Law Commission
Reforming the law

Intimate image abuse: a final report

HC 326

Law Com No 407

Law Commission
Reforming the law

Law Com No 407

Intimate image abuse: a final report

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965 Ordered by the House of Commons to be printed on 06 July 2022

HC 326

This publication is available at www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at Enquiries@lawcommission.gov.uk.

978-1-5286-3473-1

E02760788 07/22

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of the Controller of Her Majesty's Stationery Office

The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Green, Chair

Professor Nick Hopkins

Nicholas Paines QC

Professor Sarah Green

Professor Penney Lewis

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this report were agreed on 25 May 2022.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

Contents

Chapter 1: Introduction

1.1 This report is the result of the Law Commission's review of the criminal law as it relates to the taking, making and sharing of intimate images without consent. In this report we make our final recommendations for law reform, which are designed to deliver an offence regime that proportionately and clearly addresses the criminal wrongs of intimate image abuse and provides consistent and effective protection for victims. This report follows the publication of our consultation paper in 2021.[1] In that paper we made a series of provisional proposals for reform of the law relating to the taking, making and sharing of intimate images. We conducted a public consultation seeking views on our proposals. That process informed the recommendations that we make in this report, and we are very grateful to those who met with us or responded to our consultation.

INTIMATE IMAGE ABUSE

1.2 Though we may think it is a recent phenomenon, nude and sexual images have been taken and shared since photography was invented. People have taken and shared intimate images as art, for socialisation, sexual education and exploration, and body positivity. A key feature of intimate image use in such contexts is consent. Where intimate images are taken or shared without consent, they can cause significant harm to individuals and wider society.

1.3 Although the practice has been around as long as photography itself, taking and sharing intimate images has become infinitely easier, and therefore much more prevalent, with technological developments. Most of us use devices that can take and share images with the press of a button daily. Images can be shared across long distances and to huge audiences instantaneously. We socialise, work, learn, explore, date, and record our lives on smart phones, computers, smart home appliances and even watches. It has never been easier to take and share images. This has been a massive social benefit when we were prevented from socialising and sharing our lives physically with our friends, family and partners during the COVID-19 pandemic. It also means it has never been easier to take or share intimate images without consent.

1.4 The rapid developments in technology have also created new ways of offending. The use of deepfake pornography and nudification software is increasingly common.[2] Simply put, deepfake pornography is the digital creation of sexual photographs or videos where the facial or bodily features of person A are mapped on to the face or body of person B resulting in an image that is of person B but appears to be of person A. This can be used to "swap" the face of a porn actor with the face of someone else. Deepfake technology can also be used to "strip" an image of clothing. Nudification

---

1 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253.

2 See for example, Jesselyn Cooke, "A Powerful New Deepfake Tool Has Digitally Undressed Thousands Of Women" (11 August 2021) *Huffpost*, https://www.huffingtonpost.co.uk/entry/deepfake-tool-nudify-women_n_6112d765e4b005ed49053822.

software essentially alters a clothed image of someone so it appears realistically nude.

1.5 The pandemic itself gave rise to both an increase in online abuse, and new ways to take and share intimate images. The Revenge Porn Helpline, the Government-funded service for adults experiencing intimate image abuse, reported in 2020 an 87% increase in cases from 2019.[3] In our consultation paper we described how the pandemic led more people to conduct their romantic and sex lives online, increasing the use of "sexting" (sharing intimate pictures as part of a sexual conversation) and individuals appearing nude or engaging in sexual acts during videocalls. With this came people recording such encounters, or taking "screenshots", downloading or saving the sexual images without the consent, or sometimes knowledge, of the other person.

1.6 This is not to say that intimate image abuse only occurs online. People still have the ability, and motivation, to take images using film cameras, to share hard copies of images, to send them by post, to publish them in the media or display them publicly. However it occurs, the non-consensual taking and sharing of intimate images can have a significant and long-lasting impact on victims. Victims can experience a wide range of harms that are serious and significant. Such harms can include psychological harm such as anxiety, depression and post-traumatic stress disorder (PTSD), impact on physical health, financial harm either through losing work or time off work, and paying to remove images, withdrawal from public life including online spaces leading to isolation and reduced opportunities to advance and network. In some cases, there have been reports of attempted suicide and self-harm.

1.7 People who take and share intimate images without consent do so for a range of reasons. In the consultation paper we identified motivations including sexual gratification, exerting power and control, to humiliate, alarm or distress, to bond with a group, to increase social standing, for a joke, and to make money or other gain. In some cases, there is no identifiable motivation at all. Intimate image abuse has been described as a gendered phenomenon. Women are more likely to be victims than men; 75% of the calls to The Revenge Porn Helpline in 2021 were from female victims,[4] and the perpetrators predominantly male.[5] It is often linked to misogyny; a sense of male entitlement to women's bodies is a prevalent motivation for the non-consensual taking and sharing of intimate images[6] and operates to reinforce female subordination and the objectification of women in society.[7] We have explored these

---

3 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 1.21.

4 Revenge Porn Helpline, "Cases and Trends of 2021" available at https://revengepornhelpline.org.uk/resources/helpline-research-and-reports/revenge-porn-helpline-cases-and-trends-of-2021/.

5 Zara Ward, "Intimate image abuse, an evolving landscape" (2020) p 18 available athttps://revengepornhelpline.org.uk/assets/documents/intimate-image-abuse-an-evolving-landscape.pdf?_=1639471939.

6 Clare McGlynn, Erika Rackley, Kelly Johnson and others "Shattering Lives and Myths: A Report on Image-Based Sexual Abuse" (July 2019) Durham University and University of Kent, https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf.

7 Charlotte Bishop, "Assessing culpability where intimate images are shared without consent 'for a laugh' or as a form of 'harmless' banter", forthcoming.

themes throughout the project, including the links between intimate image abuse and other forms of violence against women and girls such as online abuse[8] and street harassment.[9]

1.8 In the context of increasing reliance on technology to communicate and express ourselves, it can be difficult to comprehend the scale of digital imagery. Research suggests that in every minute in 2021, 240,000 photos were shared on Facebook and two million photos were shared on Snapchat.[10] These are just two of many ways in which images can be taken or shared. Given the ease and scale of image taking and sharing, we acknowledge that there is potential for non-consensual image taking and sharing to be prolific. It is not difficult to imagine, given this potential scale, that police and prosecutors could be overwhelmed by incidents. The criminal justice system is just one part of the solution to the harms of intimate image abuse. Alternative or complementary remedies including civil action and platform liability also have a role to play. We discuss these further in Chapter 13 of this report. Education, training and other cultural drivers are also necessary to address the behaviours and harms we explored in our consultation paper. In this report we focus on the role of the criminal justice system. Clear, well-defined, proportionate criminal offences that effectively target culpable and harmful behaviours will ensure that this part of the solution is as robust as possible.

The legal framework

1.9 Currently, there is no single criminal offence in England and Wales that covers the taking and sharing of intimate images without consent. Instead, a patchwork of offences has developed over time, usually in response to a particular type of behaviour becoming more well known. There are four offences that specifically address some forms of intimate image abuse; we refer to these as the current intimate image offences. We set these out fully in Chapter 2 of this report, but briefly they are:

(1) disclosing, or threatening to disclose, private sexual photographs and films, under section 33 of the Criminal Justice and Courts Act ("CJCA") 2015 (we refer to the disclosure element of section 33 as the "disclosure offence");

(2) recording an image of a person doing a private act, under section 67 of the Sexual Offences Act ("SOA") 2003 (the "voyeurism offence");

(3) recording an image of genitals and buttocks, underneath clothing, under section 67A of the SOA 2003 (the "upskirting offence"); and

---

8 See for example, Dr Madeleine Storry and Dr Sarah Poppleton, "The Impact of Online Abuse: Hearing the Victim's Voice" (1 June 2022), The Office of the Victims Commissioner, available at https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/6/2022/05/Hearing-the-Victims-Voice.pdf.

9 See for example, The College of Policing, "Violence against women and girls toolkit", available at https://www.college.police.uk/guidance/violence-against-women-and-girls-toolkit.

10 DOMO, "Data Never Sleeps 9.0" (2021), available at https://www.domo.com/learn/infographic/data-never-sleeps-9.

(4) recording an image of someone breastfeeding without consent (the "breastfeeding voyeurism offence").

1.10 Despite best attempts,[11] the law has been unable to keep up with developments in technology and sexual offending. Some of the offences currently used to address intimate image abuse were introduced before the rise of the internet and smartphones. Each offence has different definitions and fault requirements, leading to undesirable gaps and limitations and inconsistent application. We summarise the gaps and limitations in the current law in Chapter 2, but briefly they include:

(1) The types of images that are protected varies. The disclosure offence applies to images that are both private and sexual, whereas the voyeurism offence includes images of someone doing a private act.

(2) Altered images, such as deepfakes, are excluded from the disclosure offence.

(3) The fault requirements are too limited; they do not include a range of harmful and culpable behaviour where someone acts, or claims to act, for purposes other than obtaining sexual gratification or causing the victim distress. This also means that where a specific intent cannot be evidenced, prosecutions will be unsuccessful.

(4) Ancillary orders such as automatic anonymity for complainants are inconsistently available.

1.11 Law makers remain alive to the need for further reform to keep up with the developing scope of intimate image abuse. Since we published the consultation paper, two relevant offences have been enacted following impressive public campaigns to address specific gaps. First, the disclosure offence was amended to include threatening to disclose a private sexual image without consent, with intent to distress the person depicted.[12] Secondly, the upskirting offence was amended to include the breastfeeding voyeurism offence.[13] As these offences are based on the existing offences, they inherit many of the same limitations.

Terminology

1.12 We are aware that the term "image-based sexual abuse" is accepted terminology used to describe the sort of conduct with which this report is concerned, particularly in academic circles.[14] Much intimate image abuse has a sexual element; it can involve sexual images, have a sexual motive, and victims report experiencing the abuse as sexual abuse. Some forms, however, are not sexual: an image of a teacher using a toilet shared amongst a class is not sexual, but it is intimate. We therefore chose to

---

11 For example, the upskirting offence was introduced to address the fact that the voyeurism offence did not capture "upskirting", a behaviour that has only relatively recently come to the attention of the public, Government and Parliament.

12 CJCA 2015, s 33 as amended by the Domestic Abuse Act 2021, s 69.

13 SOA 2003, s 67A as amended by the Police, Crime, Sentencing and Courts Act 2022, s 48.

14 Clare McGlynn, Erika Rackley, Kelly Johnson and others "Shattering Lives and Myths: A Report on Image-Based Sexual Abuse" (July 2019) Durham University and University of Kent, https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf.

use the term “intimate image abuse” in the consultation paper to reflect the range of behaviours and harms, and continue to do so in this report. It is the term also used by the Revenge Porn Helpline,[15] and we note that news articles referring to the behaviour also use the term intimate image abuse.[16] We believe it is conceptually clear and well understood, while reflecting the scope of behaviours and harms.

1.13 In the consultation paper we considered the range of terminology used in this context:

> The terminology used to describe this behaviour is a critical issue and not merely of academic interest. The eye-catching, headline grabbing terms used to label and describe this behaviour have been criticised by academics, policy makers and those who work in this field. Several commentators have argued that the label of “upskirting”, popularised by the media, downplays the serious nature of the behaviour.[17] Although we accept the criticisms of this term, we use it pragmatically in this paper in relation to the offence under section 67A of the Sexual Offences Act 2003 in order to distinguish it from the voyeurism offence in section 67 of the Sexual Offences Act 2003. Likewise, the term “downblousing” can be criticised for diminishing the seriousness of the conduct to which it refers but we adopt it for the same reasons.[18]

1.14 We also acknowledged the significant criticism of the term “revenge porn”, which trivialises a malicious behaviour, inaccurately suggests there is a similarity with consensual commercial pornography, and fails accurately to reflect the range of motivations people have for sharing intimate images without consent. So-called revenge porn is the harm that was targeted by the offence of disclosing private sexual images under section 33 of the CJCA 2015. We choose to refer to that offence as the “disclosure offence” and to our recommended offence as the “sharing offence” to avoid unnecessary focus on one particular type of intimate image abuse. However, we also acknowledge the term is well known; for example, the organisation that offers advice and support to victims of intimate image abuse is called the Revenge Porn Helpline. We do therefore use the term “revenge porn” occasionally in this report when describing that particular phenomenon.

LAW COMMISSION REVIEW

1.15 This project originated from the Abusive and Offensive Online Communications Scoping Report, published in November 2018.[19] In that report we identified

---

15 See Revenge Porn Helpline, “About Image Abuse”, https://revengepornhelpline.org.uk/information-and-advice/about-intimate-image-abuse/.

16 See for example, Jemma Cullum, “Maria Miller calls for an end to intimate image abuse” (26 October 2021) *Basingstoke Gazette*, https://www.basingstokegazette.co.uk/news/19673569.maria-miller-calls-end-intimate-image-abuse/.

17 See for instance, Clare McGlynn, Erika Rackley and Ruth Houghton, “Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse” (2017) 25 *Feminist Legal Studies* 25, 32 and N Henry, A Powell and A Flynn, *Not Just ‘Revenge Pornography’: Australians' Experiences of Image-Based Abuse: A Summary Report* (2017) p 3, https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf.

18 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 1.13.

19 Abusive and Offensive Online Communications: A Scoping Report (2018) Law Com No 381.

considerable scope for reform to improve the way the current law achieves parity of treatment between online and offline offending. We identified three branches of this work: the non-consensual taking and sharing of intimate images; hate crime; and communications offences.

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

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

In particular:

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

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

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

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

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

- The review will not make recommendations about the existing law on the creation and dissemination of indecent images of children.

- Government is conducting active policy work on “platform liability”, predominantly in the Online Safety Bill. This review will therefore remain focused on the liability of individual offenders.

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

1.18 The reviews of hate crime and the communications offences have now been completed and the reports published. In Modernising Communications Offences: A final report,[20] the Law Commission recommended new communications offences which have some relevance to intimate image abuse. We explore the ways communications offences interact with the intimate image offences further in this report. The relevant offences are:

(1) a new "harm-based" communications offence to replace the offences within section 127(1) of the Communications Act 2003 ("CA 2003") and the Malicious Communications Act 1988 ("MCA 1988");

(2) new offences of sending knowingly false, persistent or threatening communications, to replace section 127(2) of the CA 2003; and

(3) a new offence of cyberflashing.

1.19 Cyberflashing generally involves a person sending an unsolicited image of genitalia to another. This is distinct from the conduct we consider in this report. In intimate image abuse, the victim is the person depicted in the image, and they are victimised by having an intimate image of them taken or shared without their consent. With cyberflashing the victim is the recipient of the image; they are victimised by receiving an unsolicited image of genitalia.

Consultation

1.20 We published Intimate Image Abuse: a consultation paper on 26 February 2021.[21] In it we identified the range of behaviours, motivations and harms we considered relevant to intimate image abuse. We evaluated the current offences that apply in cases of intimate image abuse and concluded that there were gaps and limitations that impeded effective prosecution of criminally culpable behaviour and left victims without sufficient protection. We then proposed a new framework of four intimate image abuse offences that would replace the current intimate image abuse offences:

(1) a base offence of intentionally taking or sharing an intimate image without consent and without reasonable belief in consent;

(2) a more serious "specific intent" offence of taking or sharing an intimate image without consent and with the intention of humiliating, alarming or distressing the person depicted;

(3) a more serious "specific intent" offence of taking or sharing an intimate image without consent and without reasonable belief in consent and with the intention that someone will look at the image for the purpose of obtaining sexual gratification;

---

20 Modernising Communications Offences: A final report (2021) Law Com No 399.

21 Intimate Image Abuse: a consultation paper (2021) Law Commission Consultation Paper No 253.

(4) an offence of threatening to share an intimate image of another person, with the intention to cause the victim to fear the threat will be carried out, or being reckless as to whether the victim will fear the threat is carried out.

1.21 We also made provisional proposals in relation to the definition of "intimate image", the acts that would be covered, a reasonable excuse defence, the definition of consent, elements that would carve out less culpable behaviour where there is a public element to either the taking or sharing, and ancillary orders including automatic anonymity for all victims of intimate image abuse. In total we asked 47 consultation questions in the consultation paper.

1.22 At the same time, we also published a summary consultation paper which distilled the main points and asked 17 questions which aimed to capture the key issues on which we wanted to gather views. This was a more digestible format for consultees who were interested in the area but could not read the full consultation paper.

1.23 A three-month consultation period followed publication. During this time, we held seven consultation events for different groups of stakeholders including victim support groups, academics, parliamentarians, and legal professionals. We also held a roundtable event focussing on children and young people, which was attended by a range of stakeholders including law enforcement, online safety professionals, lawyers who work with children, organisations that work with children, and with teachers.

1.24 In addition, we had a number of one-to-one meetings with individuals and organisations to discuss issues most relevant to them.

1.25 In total we received 354 written responses to the consultation.[22] These came from a mixture of individuals submitting personal responses, individuals submitting responses in a professional capacity, and organisational responses. Responses came from members of the public, law enforcement, legal professionals, judiciary, parliamentarians, academics, medical bodies, educational bodies, organisations that work with victims, and organisations that work with potential perpetrators of intimate image abuse. We are extremely grateful to everyone who took the time to share their views.

1.26 We acknowledge that the topics raised in the consultation paper can be sensitive and private. A number of those who responded shared their own experiences of intimate image abuse. The insight gained from these responses has been instrumental in informing our recommendations. As is standard practice for Law Commission consultations, consultees were asked if they wished for their consultation responses to be anonymous. In light of the potential sensitivities and the nature of this project, we have granted anonymity to all who requested it.

---

[22] Consultees could respond either to the summary consultation document (which had 17 consultation questions), the full consultation paper (which had 47 consultation questions), or they could submit a response that did not directly respond to any specific question. We received 288 written responses to the summary consultation document and 48 written responses to the full consultation paper. However they chose to respond, consultees could respond to any or all of the questions. The total response numbers will therefore differ for each individual question set out in this report.

1.27 In general, there was substantial support for an improved framework of intimate image offences. The majority of our proposals were supported, but there were a number of issues and concerns raised by consultees which we explore fully in this report. The main issues raised by consultees included:

(1) The tiered structure of the proposed offences. There was concern that it would create a hierarchy of victims, and that it risked overcomplicating the law. Some consultees who took this view objected to the introduction of any specific intent offences.

(2) Downblousing. There was concern that our proposals did not satisfactorily define what behaviour should be criminalised.

(3) Public element tests. There was concern that the public element tests were not sufficiently clear about when an image would be considered taken, or previously shared, in public as opposed to private.

(4) Possession and retention. Some consultees submitted that there should be offences of possession and retention of intimate images without consent, where there had been a request to delete the image. We did not propose such an offence.

(5) Scope of the offences. Some consultees argued for a more subjective interpretation of "intimate" that would widen the scope of the offences. Others were concerned that the base offence was too broad in scope and would risk overcriminalisation.

(6) Children and young people. Consultees, predominantly those who work with children and young people, raised concerns about how the offences would apply to children and young people as both victims and perpetrators.

This report

1.28 In this report we describe and analyse the consultation responses received on each issue. We have not included every comment received for each question in this report, but we have read and considered each one when arriving at our conclusions.

1.29 In reaching our recommendations we have taken into consideration: the discussions in the consultation paper; consultation responses; input from stakeholders; developments in the law since consultation; and media reporting of other instances of intimate image abuse.

Key recommendations

1.30 As noted above, in general, most of our proposals received substantial support. Consultees want to see improved intimate image offences that are clear, that address the gaps in the current law, that can be consistently and effectively applied and understood by police and prosecutors, and that properly respond to victims' experiences. Consultees also want to see a regime that reduces offending and improves understanding amongst society of the issues presented. We absolutely agree. This cannot be achieved by criminal offences alone. We have heard repeatedly

during consultation that any new offences will only have the desired impact if they are implemented alongside well-resourced education and training.

1.31 Intimate image abuse can feel pervasive in our culture. The discussions in the media over the course of the last year have placed intimate image abuse within the context of widespread misogyny and violence against women and girls.[23] It is in this context that a number of consultees felt that the offences proposed could go further in offering protection to victims of harmful sexual behaviour. For example, consultees argued for a definition of "intimate image" that would include images taken of women clothed in public where the image is "zoomed in" on breasts or the buttocks; a behaviour we have heard occurs in gyms, leading women to feel they cannot exercise in the clothes they would like to wear for fear of men taking photos of them. Consultees also argued that "semen images"[24] should be included within the scope of the offences. This is an unpleasant and violating behaviour that involves images where semen is depicted on top of a hardcopy of a non-intimate image of another person, and is then shared with the person in the image to suggest that the person who took the semen image has masturbated to the victim's image.

1.32 We understand the desire to improve the criminal justice response to a wider range of harmful behaviours that can make simply existing in public as a woman or girl feel unsafe. However, we have had to restrict the scope of these offences to those that can properly be described as intimate image abuse. We do not seek to sell short the harm that can be caused by the behaviours we conclude fall outside the scope of this project. Instead we need to ensure that the offences we recommend address the particular violations associated with non-consensual taking and sharing of images that are nude, partially nude, sexual or show toileting. Intimate image offences should only apply where the act is criminal because the image itself is sufficiently intimate. Non- or less intimate images that are taken to intimidate or sexualise someone (such as in a gym or public park) could be better understood as public sexual harassment. Non- or less intimate images that are shared to sexualise someone or to share something about their behaviour or sexuality are better understood as communications offences, because it is what is being communicated that causes the harm, rather than the intimate nature of the image. Where this behaviour does include images that are intimate within our definition, they will of course be included in the scope of these offences. For example, sharing a semen image where the underlying photo was partially nude will be an offence within this regime.

1.33 We recommend five offences to address intimate image abuse:

(1) A base offence: it should be an offence intentionally to take or share an intimate image without consent, and without reasonable belief in consent.

---

[23] See for example, Stephanie Balloo, "Here and Now: The mum tackling harmful misogyny that starts with schoolboys" (29 April 2022) *Birmingham Mail*, https://www.birminghammail.co.uk/news/midlands-news/here-now-mum-tackling-harmful-23779018.

[24] This conduct is also referred to as "tributing". We have chosen not to use this word as it incorrectly suggests the behaviour is in some way positive, or should be taken as such. As with the term "revenge porn", it trivialises a serious and harmful behaviour.

(2) A more serious offence: it should be an offence intentionally to take or share an intimate image without consent, with the intention of humiliating, alarming or distressing the person depicted.

(3) A more serious offence: it should be an offence intentionally to take or share an intimate image without consent, and without reasonable belief in consent, with the intention that the image will be looked at for the purpose of obtaining sexual gratification.

(4) A threat offence: it should be an offence to threaten to share an intimate image with the intention of causing the victim to fear that the threat will be carried out or being reckless as to whether the victim will fear that the threat will be carried out.

(5) An installing offence: it should be an offence to install equipment with the intention of enabling someone to commit the offence of taking an intimate image without consent.

1.34 These offences would replace current intimate image offences. The offences that we recommend necessitate a tiered structure. First is the base offence. We recommend that this should be a summary only offence, triable only in magistrates' courts. Next, the more serious specific intent offences and the threat offence. We recommend that these should be triable either way (in either magistrates' courts or the Crown Court) with a higher maximum sentence. Finally, the installing equipment offence can apply to the taking in the base offence, or the specific intent offences if there is evidence that the equipment was installed to take an image with the relevant intent.

1.35 In Chapter 16 we set out the full framework detailing all the recommended offences including all relevant elements, definitions, and sentencing. This provides an easy reference guide to the recommended framework, demonstrating the full scope of the offences and how all the elements work together.

Structure of the report

1.36 We describe the scope of the current law as it relates to intimate image abuse in **Chapter 2**. We set out the voyeurism, upskirting and disclosure offences. We also describe the amendments to the law that have been made since the consultation paper that criminalise threatening to disclose a private sexual image and taking images of someone breastfeeding. We also set out a number of other offences that can apply in some instances of intimate image abuse. Finally, we describe the gaps and limitations in the individual offences, and in the overall coverage provided, as they apply to instances of intimate image abuse.

1.37 In **Chapter 3** we define what should be included in the term "intimate image". We explain that "image" should be limited to videos and photographs. We then recommend that "intimate" images should be defined as "sexual, nude, partially-nude and toileting" images. We conclude that to include images that are sexual only because of the context in which they are shared, or comments that are made on or with the image, would extend the scope of intimate image offences too far.

1.38 Finally, we explain that the definition of intimate refers to what is seen in the image and not necessarily the way the person presented when the image was taken. In this way we intend the definition of an intimate image to capture upskirting and downblousing.

1.39 We then consider the responses to our provisional proposals regarding the acts that should be criminalised. In **Chapter 4** we recommend that only the acts of taking and sharing should form the basis of intimate image offences. We set out the forms of taking and sharing that should be criminalised, broadly understood in order to cover all means by which a photo or video can be taken or shared. We conclude that there is not sufficient justification for criminalising simple making, where the image is not then shared or threatened to be shared. We recommend that made, or altered, images are included in the sharing offences to address what we understand to be the more harmful behaviour concerning altered images such as deepfakes, or nudified images, namely sharing them without the consent of the person depicted.

1.40 We consider at length the arguments for criminalising possession of an intimate image without consent, before concluding that it is not sufficiently culpable to be criminal.

1.41 The final issue in this chapter is the act of installing equipment in order to take an intimate image. We conclude that the behaviour is sufficiently culpable and should be criminalised.

1.42 In **Chapter 5** we consider the fault elements of our recommended offences. We recommend that taking or sharing must be intentional for it to be criminal; accidental or non-intentional taking or sharing would not be within the scope of the offences. We consider the different levels of knowledge that we could require of the defendant as to lack of consent. We conclude that, in line with sexual offences, it is appropriate to criminalise in circumstances where there was no consent and the defendant did not reasonably believe there was consent.

1.43 In **Chapter 6** we set out our recommendations for a base offence and two, more serious, specific intent offences. First, we explain our rationale for recommending a base offence that criminalises taking or sharing an intimate image without consent, regardless of the motivation for doing so. We then consider specific motivations that can make a defendant's actions more culpable and should be reflected in a more serious offence with a higher maximum sentence. We conclude that there should be two additional, more serious offences where an image was taken or shared without consent and the defendant acted with a specific intent: either an intention to cause humiliation, alarm or distress to the person depicted; or an intention to obtain sexual gratification. We also consider intent to make a gain, or to control or coerce, but conclude that separate offences for these specific intents are not justified.

1.44 We explain in **Chapter 7** that the need for the offences we recommend dictates a tiered structure. The specific intent offences reflect higher culpability, rather than creating distinctions between victims. All intimate image abuse is serious and should be taken seriously by professionals, police, prosecutors, and society. We reflect this when we come to consider the sentencing range that should be available for the recommended offences at the end of this chapter.

1.45 The key feature of intimate image abuse is that it is acting without consent. People may take or share intimate images with consent as part of relationships, for artistic purposes, for education and development. If done without consent, it is harmful, wrongful and in most cases, criminal. In **Chapter 8** we recommend that the consent provisions that apply to sexual offences should also apply to intimate image offences. We recognise the concerns with the way these provisions currently operate but consider that the benefits of consistency outweigh those concerns.

1.46 Consultees supported our provisional proposal that the offences should not require proof of actual harm, that is, proof that the non-consensual taking or sharing caused harm to the person depicted. In **Chapter 9** we set out the responses and our recommendation that intimate image offences should not include a proof of harm element.

1.47 One of the more complex areas of intimate image abuse is how to carve out less culpable behaviour, or behaviour that is not culpable at all, because there is a public element to it; for example, taking an image of a streaker at a football match, or resharing an image posted on a commercial porn website. In **Chapter 10** we set out the response to our proposed public element tests that aimed to carve out such behaviour, while including some examples that we considered sufficiently criminal. We recommend two "public element" tests:

(1) For an offence of taking or sharing an intimate image without consent, where the image was originally taken in public the prosecution must prove that the person depicted had a reasonable expectation of privacy in relation to the taking of the image.

(2) It should not be an offence to share an intimate image without consent if that image has previously been shared in public with the consent of the person depicted, unless the defendant knew that the person depicted withdrew their consent to the image being available publicly.

1.48 In **Chapter 11** we recommend a defence of reasonable excuse that would apply to the base offence. We identify a non-exhaustive list of categories of conduct that may amount to a reasonable excuse and should not be criminalised by our offences. We also recommend two specific exclusions from the base offence where the conduct is not wrongful, culpable or harmful: taking or sharing an intimate image of a young child that is of a kind ordinarily taken or shared by family and friends; and taking or sharing an intimate image of a child for their medical care or treatment, where they do not have capacity to consent but there is valid parental consent.

1.49 Since our consultation paper was published, parliamentarians and campaigners have acted to improve protection for victims of threats involving intimate images. The disclosure offence was amended to include threatening to disclose private sexual images without consent with the intention to cause distress to the person depicted. In **Chapter 12** we explain why further reform is required to address the limitations in the current threat offence. We recommend an offence of threatening to share an intimate image with the intention of causing the victim to fear that the threat will be carried out or being reckless as to whether the victim will fear that the threat will be carried out. We recommend that such an offence should include threats made to a third party.

1.50 We had significant support for our proposals for ancillary orders which sought to provide the necessary support for victims, and appropriate powers for courts to implement measures designed to manage sexually harmful offending. In **Chapter 13** we recommend that complainants in intimate image abuse cases benefit from: automatic lifetime anonymity; automatic eligibility for special measures at trial; and restrictions on cross examination of witnesses. We also recommend Sexual Harm Prevention Orders and notification requirements be available in cases of intimate image abuse where there is relevant sexual conduct of sufficient seriousness.

1.51 We explore the issues relating to children and young people and intimate image abuse in **Chapter 14**. Although this is a very difficult area in which to reach firm conclusions, we explain in this chapter that there is sufficient evidence of harmful behaviour conducted by children towards other children, and towards adults, that would make it inappropriate to exclude them from the offences. We discuss ways of minimising the risk of overcriminalising children for less culpable conduct, a concern that is not unique to intimate image abuse.

1.52 Like many offences, intimate image abuse can involve acts that span multiple countries. In **Chapter 15** we consider the jurisdictional challenges this presents and invite the Government to consider whether the approach to jurisdiction in current, similar, offences, would be appropriate for intimate image offences.

1.53 We bring all elements of the offences together in **Chapter 16**.

ACKNOWLEDGMENTS

1.54 We are most grateful to all 354 people and organisations that responded to our consultation and to all those who gave their time to meet with us to discuss the issues further. Their considered contributions and insight have been invaluable.

1.55 In particular we would like to extend our thanks to Dr Charlotte Bishop, Professor Clare McGlynn QC Hons, Professor Erika Rackley, Dr Kelly Johnson, Professor Alisdair Gillespie, Professor Andy Phippen, Professor Tsachi Keren-Paz, Professor Thomas Crofts, Julia Slupska, the Centre for Information Rights, Henry Ajder, the Crown Prosecution Service, the Law Society, the Bar Council, Garden Court Chambers Criminal Law Team, Kingsley Napley LLP, Ann Olivarius, Honza Cervenka, Youth Practitioners Association, Corker Binning, Slateford Law, Queen Mary Legal Advice Centre, Just for Kids Law, Senior District Judge (Chief Magistrate) Goldspring, The Magistrates Association, HM Council of District Judges (Magistrates' Court) Legal Committee, Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society), Dame Maria Miller MP, Stella Creasy MP, Jeff Smith MP, Paul Blomfield MP, Sarah Champion MP, Liz Saville Roberts MP, the Rt Hon Baroness Morgan of Cotes, Robert Buckland MP's constituency office, My Image My Choice, South West Grid for Learning, Stonewall, the NSPCC, The Lucy Faithfull Foundation, the Suzy Lamplugh Trust, Karma Nirvana, Resolution, Victims of Image Crime, Refuge, Centre for Women's Justice, #NotYourPorn, Muslim Women's Network UK, The Angelou Centre, Imkaan, Women's Aid, End Violence Against Women Coalition, Faith and VAWG Coalition, Equality Now, The Howard League for Penal Reform, Welsh Women's Aid, ManKind, Support Through Court, Centre of Expertise on Child Sexual Abuse, News Media Association, B5 Consultancy, Leigh Nicol, Emily Hunt, Office of the Police and Crime Commissioner for Northumbria,

North Yorkshire Police, Fire and Crime Commissioner, North Yorkshire Police, British Transport Police, London Mayor's Office for Policing and Crime, the National Police Chiefs' Council, Bumble, the Royal College of Anaesthetists, the Royal College of Pathologists, the General Medical Council, the British Medical Association, the Medical and Dental Defence Union of Scotland, the Medical Protection Society, the Health Research Authority, NHS Safeguarding, the University of Liverpool, Imperial College London Research Governance and Integrity Team, the Research Strategy Office at the University of Cambridge, the Information Commissioner's Office.

THE PROJECT TEAM

1.56 Commissioners would like to thank the following members of the Law Commission who worked on this report: Roseanna Peck, Lawrence McNamara and Martin Wimpole (lawyers), Yasmin Ilhan (research assistant), and David Connolly (head of criminal law team).

Chapter 2: The current law

INTRODUCTION

2.1 In the consultation paper we set out the current law in England and Wales as it applies to intimate image abuse and other relevant offences that can be used to address this conduct, including any gaps in the law and limitations.[1]

2.2 In this chapter we will give a brief overview of the current law to provide background for our recommendations that follow in this report. Each of the existing intimate image abuse offences and other applicable offences will be outlined, as well as any relevant developments in the law since the publication of the consultation paper.

2.3 The analysis below illustrates that the existing intimate image abuse offences are not fit for purpose. While other offences may fill some of these gaps in legal protection, they do not provide a comprehensive regime to deal with this behaviour.

SPECIFIC OFFENCES

2.4 Under the current law, there are three separate offences that may apply to some behaviours related to taking, making, or sharing intimate images without consent; none cover all three types of conduct. These offences are:

(1) disclosing private sexual photographs and films, under section 33 of the Criminal Justice and Courts Act ("CJCA") 2015 (the "disclosure offence");

(2) recording an image of a person doing a private act, under section 67 of the Sexual Offences Act ("SOA") 2003 (the "voyeurism offence"); and

(3) recording an image of genitals and buttocks, underneath clothing, under section 67A of the SOA 2003 (the "upskirting offence").[2]

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

2.5 As enacted (and at the time of publishing the consultation paper), the disclosure offence targeted the sharing of private sexual images without the consent of the person depicted and with the intent to cause them distress. It has since been amended by section 69 of the Domestic Abuse Act 2021 to include threats to disclose such images.

2.6 As amended, section 33 of the CJCA 2015 provides that:

(1) A person commits an offence if—

---

1 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, Chapter 3.

2 As amended by Voyeurism (Offences) Act 2019, s 1(2).

(a) the person discloses, or threatens to disclose, a private sexual photograph or film in which another individual ("the relevant individual") appears,

(b) by so doing, the person intends to cause distress to that individual, and

(c) the disclosure is, or would be, made without the consent of that individual.

2.7 Section 35 defines a "private sexual" photograph or film for the purpose of section 33:

(2) A photograph or film is "private" if it shows something that is not of a kind ordinarily seen in public.

(3) A photograph or film is "sexual" if—

(a) it shows all or part of an individual's exposed genitals or pubic area,

(b) it shows something that a reasonable person would consider to be sexual because of its nature, or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

2.8 The disclosure offence is triable either way, which means that it can be heard in either a magistrates' court ("summarily"), or at the Crown Court with a jury ("on indictment"). This offence has a maximum sentence of imprisonment for two years and/or a fine on conviction on indictment, or 12 months' imprisonment and/or a fine on summary conviction.[3]

Amendment to include threatening to disclose

2.9 At the time of publishing the consultation paper, there was significant support among stakeholders for extending the disclosure offence to include threatening to share private sexual images.[4] The need for such reform was generally framed in the context of domestic abuse as threats to share such images can be used as a form of control. This was largely influenced by Refuge's campaign 'The Naked Threat', which urged the government to use the Domestic Abuse Bill to criminalise threats to share intimate images, based on its domestic abuse support work.[5] Parliamentarians ultimately

---

3 CJCA 2015, s 33(9). The maximum term of imprisonment on summary conviction is six months for an offence committed before para 24(2) of sch 22 to the Sentencing Act 2020 (formerly s 154 of the Criminal Justice Act 2003) came into force on 2 May 2022 (para 24(2) of sch 22 was brought into force by S.I. 2022/500). When section 13 of the Judicial Review and Courts Act 2022 comes into force, the maximum sentence available for either way offences tried summarily can be changed by regulations to either six or 12 months.

4 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 12.68 to 12.81.

5 Refuge, *The Naked Threat* (2020) https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf.

proposed amendments to the Bill in both the House of Commons and House of Lords, seeking to make this change.

2.10 These proposed amendments were discussed in detail in the consultation paper.[6] The Commons amendment would have extended the offence to include threats to disclose where the offender was personally connected to the person depicted and the threat was made to the person depicted or someone who was intended to tell that person.[7] The Lords amendment neither required a personal connection, nor that the threat be made to the person depicted or to someone who was intended to tell them.[8]

2.11 Eventually, a version of the Lords amendment was passed that criminalises the act of threatening to disclose private sexual images by expanding section 33(1) of the CJCA 2015.[9] The fault element and available defences for the original disclosure offence were extended to the offence of threatening to disclose. Significantly, the amendment provided that for the purpose of this threat offence, the prosecution does not need to prove that the image in question exists or, if it does, that it is in fact a private sexual image.[10] This recognises that harm can be caused even where an image does not exist.

Limitations

2.12 In the consultation paper we identified the failure to capture threats as a limitation of the disclosure offence.[11] The amendment to the disclosure offence sought to address this limitation. While this change improved the effectiveness of section 33, the amended provision inherited many of the issues inherent in the original offence. This can be attributed to the fact that the offence of threatening to disclose was simply incorporated into section 33, using the same definitions and fault requirements.

2.13 Firstly, some images are excluded from the scope of this offence. For the purposes of section 33, "photograph or film" is defined as follows under section 35:

> (4) "Photograph or film" means a still or moving image in any form that—
>
> (a) appears to consist of or include one or more photographed or filmed images, and
>
> (b) in fact consists of or includes one or more photographed or filmed images.

---

6 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 12.69 to 12.81.

7 *Hansard* (HC), 6 July 2020, vol 678, col 695.

8 Amendment 162. See *Hansard* (HC), 8 February 2021, vol 810, col 144.

9 Note that this amendment was drafted differently from the earlier Lords amendment described in the consultation paper.

10 CJCA 2015, s 33(2A).

11 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 3.71 to 3.79.

(5) The reference in subsection (4)(b) to photographed or filmed images includes photographed or filmed images that have been altered in any way.

(6) "Photographed or filmed image" means a still or moving image that—

(a) was originally captured by photography or filming, or

(b) is part of an image originally captured by photography or filming.

(7) "Filming" means making a recording, on any medium, from which a moving image may be produced by any means.

2.14 By virtue of subsection (4), the disclosure offence excludes images that look like photos but in fact do not contain a photo. The Explanatory Notes for the CJCA 2015 describes as an example that would not be covered by this definition an entirely computer-generated image.[12] Additionally, the offence explicitly states that certain altered material is not "private and sexual".[13] This includes material that is only private or sexual by virtue of being altered or combined,[14] such as deepfake pornography.[15] Furthermore, as this offence is limited to images that are both private and sexual,[16] it excludes images that do not satisfy these criteria but sharing them without consent or threatening to share them may be harmful nevertheless.

2.15 Several concerns arise in respect of the fault requirement – that the defendant intended to cause distress to the person depicted in the image. The fact that the offence is restricted to cases where the perpetrator intended to cause distress (as opposed to, for example, sharing out of anger or to humiliate the victim) means it only applies in a narrow range of circumstances. Further, the threat offence requires the prosecution to prove both that a threat was made and that the threat was made with intent to cause distress to the person depicted. Inherent in a threat is an intent to cause the person a level of upset, otherwise it would be a statement of intent to share, and not a threat. Requiring an additional element to prove intent to cause distress is therefore unnecessary and could be a barrier to successful prosecution for some threats to share.[17]

2.16 While secondary distribution (re-sharing or forwarding photographs or films) is within the scope of the disclosure offence, it can be difficult to prove intent to cause distress in such cases, given the potential distance or remoteness between the re-sharer and the person depicted.

---

12 CJCA 2015, Explanatory Notes [359].

13 CJCA 2015, s 35(5).

14 As defined under CJCA 2015, s 35(4).

15 Note that an amendment to the Policing and Crime Bill 2016 was proposed but rejected in 2016 to repeal the provisions that exempt altered images in sections 33 to 35 of the CJCA 2015: *Hansard* (HL), 16 November 2016, vol 776, col 1443. See discussion of this in Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 3.14 to 3.17.

16 CJCA 2015, ss 33(1) and 35(2).

17 See further discussion of threats to share in Chapter 12.

2.17 Section 33 does not define consent beyond stating that "'consent' to a disclosure includes general consent covering the disclosure, as well as consent to the particular disclosure."[18] It is also not an offence to disclose, or threaten to disclose, a photograph or film to the person depicted in the image.[19]

Voyeurism: section 67 of the Sexual Offences Act 2003

2.18 Section 67 of the SOA 2003 contains four offences of voyeurism. These deal with observing, recording, and operating or installing equipment to observe or record another person doing a private act.

2.19 The observing offence under section 67(1) is less relevant for our purposes but is related to the installing equipment offence under section 67(4):

> (1) A person commits an offence if—
>
> (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
>
> (b) he knows that the other person does not consent to being observed for his sexual gratification.

2.20 The voyeurism offences that are most relevant to intimate image abuse are set out in section 67(2) to (4):

> (2) A person commits an offence if—
>
> (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
>
> (b) he knows that B does not consent to his operating equipment with that intention.
>
> (3) A person commits an offence if—
>
> (a) he records another person (B) doing a private act,
>
> (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
>
> (c) he knows that B does not consent to his recording the act with that intention.

---

18 CJCA 2015, s 33(7)(a).

19 Above, s 33(2). However, the offence could be committed if the image were sent to a person depicted with the intent to cause distress to another person who also appeared in the image: D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), para B18.33.

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

2.21 Section 68(1) of the SOA 2003 defines an act as "private" where a person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—

(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,

(b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

2.22 These offences are all triable either way. The maximum penalty is 12 months' imprisonment and/or a fine on summary conviction, and two years' imprisonment on conviction on indictment.[20]

2.23 Several ancillary measures are also available in respect of these offences. By virtue of the inclusion of section 67 in Schedule 3 to the SOA 2003, notification requirements may be triggered in certain circumstances[21] and the court may make a sexual harm prevention order against the offender.[22] Additionally, complainants are granted automatic lifetime anonymity.[23] This contrasts with the disclosure offence, for which these measures are not automatically available.

Limitations

2.24 In the consultation paper, we recognised that it can be difficult to interpret the requirement that the victim is observed or recorded doing a "private act".[24] On the one hand, the court in *Richards*[25] held that voyeurism could be committed by a participant in the private act; on the other, the Crown Prosecution Service ("CPS") decided not to prosecute a person who filmed the victim while they were both in the same room on the basis that this meant the victim could not have reasonably expected privacy.[26] These difficulties risk inconsistent application of the law. Furthermore, the restriction of this offence only to circumstances where the victim themselves must be engaged in a private act has the effect that some intimate images, such as upskirting, are excluded

---

20 SOA 2003, s 67(5). For an offence committed before section 282 of the Criminal Justice Act ("CJA") 2003 came into force on 2 May 2022, the maximum term of imprisonment on summary conviction is six months. Section 282 of the CJA 2003 was brought into force by S.I. 2022/500.

21 SOA 2003, Part 2, s 80.

22 Above, Part 2, s 103A.

23 Sexual Offences (Amendment) Act 1992, ss 1 and 2(1)(da).

24 SOA 2003, s 68(1). Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 3.97 to 3.105.

25 [2020] EWCA Crim 95, [2020] 1 WLUK 499.

26 The victim, Emily Hunt, applied for a judicial review of the CPS's decision not to prosecute. Following the decision in *Richards*, the CPS conceded the judicial review in this case. The perpetrator was convicted of voyeurism. See Michael Buchanan, "Voyeur sentenced after woman's five-year campaign" (4 September 2020) *BBC*, https://www.bbc.co.uk/news/uk-england-london-54027088.

from its scope.[27] As discussed at paragraph 2.27 below, such issues led to the introduction of a new offence of upskirting to fill the gaps in the law.

2.25 Moreover, section 67 requires proof that the perpetrator's purpose was to obtain sexual gratification (for themselves or others); it does not include cases where the perpetrator acted for the purpose of humiliating the victim, for example. This behaviour can be similarly harmful whether or not the purpose is to obtain sexual gratification.[28]

2.26 Furthermore, section 67 focuses on taking – not sharing – such images. Consequently, the acts of taking and sharing an image must be dealt with separately under section 67 of the SOA 2003 and section 33 of the CJCA 2015. As these offences do not cover the same types of images and have different fault elements, difficulties may arise: the taking of some images may be criminal, while their disclosure may not (and vice versa).[29]

Upskirting: section 67A of the Sexual Offences Act 2003

2.27 The offences under section 67 of the SOA 2003 exclude from scope images where the victim is not engaged in a private act. This includes upskirting, which is the taking or recording of images up clothing such as skirts or kilts without consent. Gina Martin's campaign to fill this gap in legal protection led to the introduction of section 67A into the SOA 2003 via section 1 of the Voyeurism (Offences) Act 2019.

2.28 Section 67A criminalises upskirting as a form of voyeurism. It provides that:

> (1) A person (A) commits an offence if—
>
> (a) A operates equipment beneath the clothing of another person (B),
>
> (b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in subsection (3), to observe—
>
> (i) B's genitals or buttocks (whether exposed or covered with underwear), or
>
> (ii) the underwear covering B's genitals or buttocks,
>
> in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and
>
> (c) A does so—

---

27 *R v Henderson* [2006] EWCA Crim 3264. See also Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 3.107.

28 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 3.109.

29 For example, images taken of a sexual assault in a public place are not covered by the voyeurism offence, but it would be an offence under section 33 of the CJCA 2015 to share such an image with the intent to cause distress to the person depicted. (Although taken in a public place, such an image would meet the definition of "private" set out at para 2.7, above, because "it shows something that is not of a kind ordinarily seen in public".)

(i) without B's consent, and

(ii) without reasonably believing that B consents.

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

(a) A records an image beneath the clothing of another person (B),

(b) the image is of—

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

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

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

(c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and

(d) A does so—

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(3) The purposes referred to in subsections (1) and (2) are—

(a) obtaining sexual gratification (whether for A or C);

(b) humiliating, alarming or distressing B.

2.29 This offence is triable either way. The maximum penalty is 12 months' imprisonment[30] and/or a fine on summary conviction, and two years' imprisonment on conviction on indictment.[31]

2.30 As with section 67 of the SOA 2003, a number of ancillary measures are available for this offence. In certain circumstances the court must make a notification order or may make a sexual harm prevention order in respect of a person convicted under section 67A, given that this offence is contained in Schedule 3 to the SOA 2003.[32] However, this is limited to cases where the offender's purpose was to obtain sexual gratification. Complainants of this offence are entitled to automatic lifetime anonymity.[33]

---

30 SOA 2003, s 67A(5). For an offence committed before para 24(2) of sch 22 to the Sentencing Act 2020 came into force on 2 May 2022, the maximum term of imprisonment on summary conviction is six months.

31 SOA 2003, s 67A(4).

32 SOA 2003, sch 3, para 34A.

33 Sexual Offences (Amendment) Act 1992, ss 1 and 2(1)(da).

Limitations

2.31 Section 67A was designed to respond to a specific issue: taking upskirting images. The effect of such a targeted offence is that some images that are not captured by section 67 are similarly excluded from scope here.[34] Furthermore, the upskirting offence only deals with the act of taking, thus the disclosure offence must be used to target the sharing of these images. However, this may not always be possible as they cover different images and have different fault requirements,[35] although the fault element for upskirting is broader than the fault element for voyeurism). This means that taking upskirting images is criminalised but sharing such images will not always amount to an offence.[36]

2.32 Moreover, the upskirting offence requires that the perpetrator intended that the image be viewed by themselves or another for the purpose of either obtaining sexual gratification, or to humiliate, alarm, or distress the victim. The voyeurism offence is restricted to the purpose of obtaining sexual gratification only. This means that it is an offence to take an upskirting image for the purpose of humiliating the victim, but is not an offence where the image is of another body part (under either section 67 or 67A) taken for the same purpose. While the upskirting offence has a wider fault element than voyeurism, it is nevertheless limited as it excludes from scope the same behaviour committed for a different purpose (such as a joke or for financial gain). It is also unclear whether a person can intend to humiliate the victim if they never meant for the victim to be aware of the image's existence.

Amendment to include breastfeeding voyeurism

2.33 The restriction of voyeurism offences to images of a person doing a private act, defined at paragraph 2.21 above, not only has the effect of excluding upskirting images from their scope, but also images of a person breastfeeding in public. Generally speaking, a person who is photographed without consent while breastfeeding will often not have their breasts exposed or covered only with underwear. Further, if they are breastfeeding somewhere like a park or café, they will not be in a place which would reasonably be expected to provide privacy. Consequently, an offence under section 67 will not apply. The upskirting offence will also not apply, given its restriction to images beneath clothing, and to images of buttocks or genitals but not breasts.[37]

2.34 These difficulties were faced by Julia Cooper, who was told by police in 2021 that her experience of being photographed without consent while breastfeeding in a park was not a criminal offence. Her campaign to fill this gap in the law[38] gained support from

---

34 For example, while it would be an offence to take an upskirting image with an intent to cause distress, it is not an offence under sections 67 or 67A to take an otherwise sexual image without consent for the same purpose.

35 As discussed in respect of voyeurism at para 2.26 above.

36 For example, it is an offence to take an upskirting image for the purpose of obtaining sexual gratification; however, it would not be an offence under section 33 of the CJCA 2015 if that image were subsequently shared with the same intent.

37 SOA 2003, s 67A(1)(a) and (2)(a).

38 Alex Forsyth and Jennifer Scott, 'Taking pictures of breastfeeding mothers in public to be made illegal in England and Wales' (4 January 2022) *BBC*, https://www.bbc.co.uk/news/uk-politics-59871075.

victim support groups and parliamentarians.[39] This led to the introduction of an offence of breastfeeding voyeurism, inserted into section 67A of the SOA 2003 by the Police, Crime, Sentencing and Courts ("PCSC") Act 2022.

2.35 An amendment to criminalise this behaviour was originally tabled by MPs Stella Creasy and Jeff Smith. In the House of Commons, Alex Cunningham MP recognised that "there is a massive void in the rights and protections of breastfeeding women in public spaces."[40] Justice Minister Victoria Atkins MP welcomed the opportunity to debate this "unacceptable, creepy and disgusting behaviour,"[41] recognising that while "[t]here might well be offences that could cover this behaviour… those offences are not clear … either to the public or the police."[42] She highlighted that this project, reviewing the law concerning intimate image abuse, includes consideration of taking and sharing images of breastfeeding without consent, and recommended awaiting our final recommendations before amending the current offences.[43] The amendment was ultimately rejected in the Commons.

2.36 However, a second amendment proposed by then Justice Minister Lord Wolfson this year was supported. He considered that an earlier amendment proposed by Lady Hayman was "too broadly drawn and would capture conduct that ought not to be criminalised."[44] Justice and Home Office Minister Kit Malthouse MP noted the government's earlier commitment to awaiting our final recommendations but considered that this amendment would provide protection to victims in the meantime.[45]

2.37 Section 48 of the PCSC Act 2022, which came into force on 28 June 2022,[46] inserted the following into section 67A of the SOA 2003:

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

(a) A operates equipment,

(b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in subsection (3), to observe another (B) while B is breast-feeding a child, and

(c) A does so—

---

39 National Childbirth Trust, Pregnant Then Screwed, the Breastfeeding Support Network, and Mumsnet: see *Hansard* (HC), 24 June 2021 vol 697, col 748. See also Molly Blackall ''Stop the Breast Pest': MP's 'horror' at being photographed while breastfeeding' (1 May 2021) *The Guardian*, https://www.theguardian.com/lifeandstyle/2021/may/01/labour-mp-stella-creasy-horror-photographed-while-breastfeeding-prompts-campaign.

40 *Hansard* (HC), 24 June 2021 vol 697, col 747.

41 Above, col 748.

42 Above, col 748.

43 Above, cols 748 to 749.

44 Above, col 1176.

45 Above, col 753.

46 The Police, Crime, Sentencing and Courts Act 2022 (Commencement No. 1 and Transitional Provision) Regulations 2022 (S.I 2022/520), s 5(e).

(i) without B's consent, and

(ii) without reasonably believing that B consents.

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

(d) A records an image of another (B) while B is breast-feeding a child,

(e) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and

(f) A does so—

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(3A) In this section a reference to B breast-feeding a child includes B re-arranging B's clothing—

(a) in the course of preparing to breast-feed the child, or

(b) having just finished breast-feeding the child.

(3B) It is irrelevant for the purposes of subsections (2A) and (2B)—

(a) whether or not B is in a public place while B is breast-feeding the child,

(b) whether or not B's breasts are exposed while B is breast-feeding the child, and

(c) what part of B's body—

(i) is, or is intended by A to be, visible in the recorded image, or

(ii) is intended by A to be observed.[47]

2.38 The penalties set out in section 67A(4) apply to breastfeeding voyeurism: a maximum sentence of 12 months' imprisonment and/or a fine on summary conviction,[48] and two years' imprisonment on conviction on indictment.[49] Further, the ancillary measures available in respect of the existing voyeurism and upskirting offences also apply to this offence.

2.39 This new offence essentially extends the voyeurism offence to cover breastfeeding images in the same way that section 67A extended the law to capture upskirting images. Both the upskirting offence and the breastfeeding voyeurism offence include

---

47 PCSC Act 2022, s 48.

48 SOA 2003, s 67A(4). For an offence committed before the commencement of para 24(2) of Schedule 22 to the Sentencing Act 2020 on 2 May 2022, the maximum term of imprisonment on summary conviction is six months: SOA, s 67A(5).

.

offences of operating equipment and recording images and include the same consent and purpose requirements.[50] This provides protection and support to a new category of victims. By not restricting the offence to images of a person doing a private act, the breastfeeding voyeurism offence contributes to creating a more comprehensive regime of intimate image abuse offences.

Limitations

2.40 As this new offence mirrors the upskirting offence, it inherits many of its weaknesses. It also raises several additional issues.

2.41 As is the case with the upskirting offence, the intent elements of the breastfeeding voyeurism offence focus on the observation of the image after the taking – rather than the act of taking itself – and applies only where the perpetrator has acted for one of two purposes. This will exclude from the scope of the offence the same behaviour conducted for a different purpose.

2.42 Just as the upskirting offence was designed to target a specific type of image, the breastfeeding voyeurism offence is limited to images of a person breastfeeding a child. This means that others, such as downblousing images, continue to be excluded from the scope of offences that target the non-consensual taking of intimate images. However, while the new offence is narrow in some ways, it is extremely broad in others. It does not define the term "breast-feeding" but clarifies that it captures cases where the person depicted is re-arranging their clothing either in preparation for, or having just finished, breastfeeding.

2.43 Further, it is irrelevant whether the victim's breasts are exposed, which part of their body is visible, or is intended to be visible or observed. These elements of the offence extend its scope very broadly, beyond images that would be deemed intimate. For example, it would include taking an image of someone re-arranging their clothes to begin breastfeeding, even where their breasts are not yet exposed; or where the perpetrator intended to look at the image to obtain sexual gratification by observing an area of the body that is not necessarily intimate. Such an offence risks capturing conduct that may not be harmful, or at least insufficiently so to warrant criminalisation.

OTHER OFFENCES

2.44 As noted in the consultation paper, a number of other offences may apply to some behaviours relating to the taking or sharing of intimate images without consent.[51] This subsection will provide an overview of the following relevant offences:

(1) Harassment and stalking;

(2) Controlling or coercive behaviour;

(3) Blackmail;

---

50 Above, s 67A(1) to (3).

51 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 3.130 to 3.201.

(4) Communications offences;

(5) Outraging public decency;

(6) Possession of extreme pornography.

Harassment and stalking

Harassment

2.45 The offence of harassment is contained in the Protection from Harassment Act ("PHA") 1997. It is committed where a person behaves in a way that harasses or alarms another or that causes that person distress, on at least two occasions which, taken together, amount to a course of conduct. The fault element requires that the defendant knew or ought to have known that the behaviour amounted to the harassment of another.[52]

2.46 Harassment is a summary only offence with a maximum penalty of six months' imprisonment and/or a fine.[53] Section 4(1) of the PHA 1997 contains a more serious offence of harassment where the victim fears violence. This is an either way offence with a maximum sentence of ten years' imprisonment on conviction on indictment, and 12 months' imprisonment on summary conviction.[54] The court can also impose a restraining order on the offender upon conviction in order to protect the victim from conduct amounting to harassment or that will cause fear of violence.[55]

Stalking

2.47 Stalking is criminalised under the PHA 1997. This covers cases where a person's course of conduct amounts to harassment of another, the acts or omissions involved are ones associated with stalking, and the person whose course of conduct it is knows or ought to know that it amounts to harassment of the other person.[56]

2.48 Stalking under section 2A is a summary only offence with a maximum penalty of six months' imprisonment and/or a fine. Section 4A(1) provides for a more serious offence of stalking where the course of conduct caused the victim to fear violence, or caused serious alarm or distress which has a substantial adverse effect on the victim's usual day-to-day activities. This either way offence has a maximum penalty of 12 months' imprisonment and/or a fine on summary conviction, and ten years' imprisonment and/or a fine on conviction on indictment.[57]

---

52 PHA 1997, ss 1 and 2.

53 Above, s 2(2).

54 Above, s 4(4). The maximum term of imprisonment on summary conviction of an offence committed before the commencement of s 282 of the CJA 2003 on 2 May 2022 is six months.

55 Above, s 5.

56 PHA 1997, s 2A(2).

57 Above, s 4A(5). The maximum term of imprisonment on summary conviction of an offence committed before commencement of paragraph 24(2) of sch 22 to the Sentencing Act 2020 is six months: PHA 1997, s 4A(6).

Application to intimate image abuse

2.49 Section 2A provides examples of acts or omissions which, in particular circumstances, are associated with stalking, some of which may overlap with intimate image abuse. For example, these acts include publishing any statement or other material relating or purporting to relate to a person or purporting to originate from a person;[58] and watching or spying on a person.[59] Intimate image abuse may thus form one or some of the acts that amount to a course of conduct.

2.50 However, as the offences of harassment and stalking were not designed to address intimate image abuse, their application to such behaviour is limited in some ways. First, they require the defendant to have engaged in a course of conduct. Secondly, both require the prosecution to prove harm to the victim: in varying forms, they require the defendant to have acted in a way that harasses, alarms, or distresses the victim or makes the victim fear violence.[60] The conduct in question must also meet a minimum threshold of causing alarm or distress to amount to harassment;[61] and the conduct must be oppressive.[62] These elements of the offences may prevent them from covering some forms of intimate image abuse.

2.51 The requirement to show a course of conduct has the effect of excluding isolated cases of intimate image abuse or multiple incidents that do not have a sufficient nexus between them.[63] Further, these offences focus on cases where the victim is alarmed or distressed, which means that cases involving harm of a different nature may not be covered. Therefore, harassment and stalking offences are not able to deal with the full range of intimate image abuse.

Controlling or coercive behaviour

2.52 Section 76(1) of the Serious Crime Act 2015 criminalises controlling or coercive behaviour in an intimate or family relationship. The offence aims to protect victims who have experienced non-physical domestic abuse, the meaning of which was recently expanded by the Domestic Abuse Act 2021 to include, for example, economic and emotional abuse.[64]

2.53 This offence applies where a person engages in repeated or continuous behaviour towards the victim, with whom they are personally connected, that is controlling or coercive. This behaviour must have a serious effect on the victim, which means it either: causes them to fear, on at least two occasions, that violence will be used against them; or causes serious alarm or distress which has a substantial adverse effect on the victim's usual day-to-day activities. The fault element of this offence

---

58 PHA 1997 s 2A(3)(c).

59 Above, s 2A(3)(g).

60 *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935.

61 *DPP v Ramsdale* [2001] EWHC Admin 106.

62 *R v N* [2016] EWCA Crim 92; [2016] 2 Cr App R 10 at [32].

63 *R v Patel* [2005] 1 Cr App R 440 at [40]; *James v CPS* [2009] EWHC 2925 (Admin).

64 Domestic Abuse Act 2021, s 1(3).

requires that the defendant knew or ought to have known that the behaviour would have a serious effect on the victim.

2.54 This is an either way offence with a maximum penalty of 12 months' imprisonment and/or a fine on summary conviction, and five years' imprisonment and/or a fine on conviction on indictment.[65]

Application to intimate image abuse

2.55 The behaviour targeted by this offence may include intimate image abuse. For example, threatening to share a person's intimate images may amount to psychological or emotional abuse. Further, this offence does not require the defendant to have a particular purpose, which means that it can apply more widely than the existing intimate image abuse offences in this respect.

2.56 However, as the behaviour must be repeated or continuous to satisfy this offence, it does not apply to isolated cases of intimate image abuse. Moreover, the victim and perpetrator must be personally connected. In the consultation paper we explained that they must be in an intimate relationship (or family members) at the time of the behaviour, and we considered this a major barrier to relying on this offence. Section 68 of the Domestic Abuse Act 2021 has since amended the meaning of "personally connected" in section 76 of the Serious Crime Act 2015 to include previous intimate personal relationships.[66] Section 68 is expected to be brought into force in 2022,[67] at which point it will no longer be a requirement that the victim and perpetrator are in a relationship when the conduct is carried out. While this broadens the scope of the offence, its application to intimate image abuse remains limited as it still only applies where such a relationship once existed.

Blackmail

2.57 It is an offence for a person to make any unwarranted demand with menaces, with a view to gain for themselves or another or with intent to cause loss to another. A demand with menaces is unwarranted unless the person making it does so in the belief that he has reasonable grounds for making the demand and that the use of the menaces is a proper means of reinforcing the demand.[68]

2.58 This offence covers both express and implied demands, including those made in writing, by speech, or through conduct. "Menace" is not defined in the legislation but includes threats of any action that is detrimental to or unpleasant to the person being threatened.[69] It is not required that the perpetrator intended to carry out the threat. The gain must consist of property, including money.[70]

---

65 Serious Crime Act 2015, s 76(11).

66 Domestic Abuse Act 2021, s 68(4).

67 Home Office, *Guidance: Domestic Abuse Act 2021 commencement schedule* (25 April 2022), https://www.gov.uk/government/publications/domestic-abuse-act-2021-commencement-schedule/domestic-abuse-act-2021-commencement-schedule.

68 Theft Act 1968, s 21(1).

69 *Thorne v Motor Trade Association* [1937] AC 797.

70 *R v Bevans (Ronald George Henry)* [1988] 87 Cr App R 64.

2.59 An offence of blackmail is triable only on indictment to the Crown Court, with a maximum penalty of 14 years' imprisonment.[71]

Application to intimate image abuse

2.60 Making threats to disclose intimate images without consent may constitute blackmail, for example where the perpetrator threatens to share the victim's intimate images unless the victim sends them more images or money.

2.61 The requirement that the perpetrator must act with a view to make a gain, which must consist of property, means the blackmail offence would not cover cases where the perpetrator threatens to share the victim's intimate image to humiliate them or coerce them to remain in the relationship. In this way, the blackmail offence does not reflect the variety of contexts in which intimate image abuse occurs.

Communications offences

2.62 Section 1 of the Malicious Communications Act ("MCA") 1988 and section 127(1) of the Communications Act ("CA") 2003 contain offences that target grossly offensive, indecent, false, and threatening communications. These offences have filled some gaps in the law relating to intimate image abuse. For example, communications offences have been used to deal with threats to disclose that do not come within scope of the disclosure offence.

Application to intimate image abuse

2.63 We reviewed the existing communications offences in our report on Modernising Communications Offences[72] published in July 2021 and concluded that they raise a number of concerns. The requirement that the communication must be indecent or grossly offensive means that, on the one hand, these offences capture a wide range of communications, but on the other, they only apply to some types of intimate images. Furthermore, the section 127 offence is limited to distribution of a communication via a public electronic communications network, which excludes sharing material over a private network. Additionally, section 127 is a summary only offence and therefore may not appropriately reflect the harm caused to victims of intimate image abuse.

2.64 We recommended several new offences to replace the existing communications offences. In February 2022 the Government announced it would be taking forward a number of these recommendations in the Online Safety Bill.[73] The most relevant recommended offences in the intimate image abuse context are the harmful

---

71 Theft Act 1968, s 21(3).

72 Modernising Communications Offences: A final report (2021) Law Com No 399.

73 Department for Digital, Culture, Media and Sport and Home Office, *Online safety law to be strengthened to stamp out illegal content*, (4 February 2022), https://www.gov.uk/government/news/online-safety-law-to-be-strengthened-to-stamp-out-illegal-content. At the time of writing, the Online Safety Bill is at Committee stage in the House of Commons. See for more information Department for Digital, Culture, Media and Sport, *Online Safety Bill: communications offences factsheet* (19 April 2022), https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-communications-offences-factsheet.

communications offence and the false communications offence.[74] These offences remove some of the barriers imposed by the existing law: they apply to all types of communication regardless of how they are sent; and they adopt a harm-based model, rather than relying on subjective concepts such as gross offensiveness. Consequently, these recommended offences would capture a wider category of intimate images than under the current law. For example, it is possible that the false communications offence could cover the sharing of deepfake pornography that was sent or posted, as a deepfake is obviously a false communication.

2.65 While we welcome the implementation of these new offences, we note that they will not always apply to the intimate image abuse context as they are designed to address a different type of offending. As communications offences, these offences are limited to circumstances where the perpetrator sent a communication intending to cause harm to those who were likely to encounter it. Therefore, if the perpetrator shared a person's intimate image without consent and intended to cause them harm, that victim would also need to be likely to encounter it in order for the conduct to fall within the offence. A large category of behaviour is thus (necessarily) excluded from the scope of these communications offences – for example, often intimate images are shared on sites that the person depicted is never intended to see.

2.66 Furthermore, for the harmful communications offence, harm is defined as psychological harm amounting to at least serious distress. This means the offence will only apply where this threshold is met, which may not always be the case in the intimate image abuse context where psychological harm may be significant, but not amount to serious distress, or where the harm is physical.[75]

2.67 The new communications offences will also have a more limited range of sentencing options and ancillary orders than is appropriate for intimate image abuse offences. Given the nature of this abuse, it is more appropriate that the behaviour be prosecuted as an intimate image offence (which also has the benefit of more appropriate labelling).

Outraging public decency

2.68 This is a common law offence, committed where a person's act is "lewd, obscene or disgusting" and "of such a nature as to outrage minimum standards of public decency as judged by a jury in contemporary society".[76] This is a strict liability offence, which means that the defendant need not have intended to outrage public decency in carrying out the relevant act.[77]

---

74 Modernising Communications Offences: A final report (2021) Law Com No 399, paras 2.257 and 3.71.

75 In Chapter 5 of the consultation paper we described the full range of harms that may be experienced by victims of intimate image abuse. This included more physical harms such as physical abuse as a result of an image being shared, self-harm, and loss of a job.

76 *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435.

77 *R v Gibson* [1990] 2 QB 619. The Law Commission made recommendations for reform of the offence of outraging public decency in its report on Simplification of Criminal Law: public nuisance and outraging public decency (2015) Law Com No 358. The Commission recommended, among other things, that the offence should cover acts that are obscene or disgusting (omitting "lewd" acts) and should include a fault requirement: see Chapter 3 of that report. These recommendations have not been implemented.

2.69 The offence is triable either way with a maximum penalty of 12 months' imprisonment and/or a fine on summary conviction,[78] or imprisonment and/or fine at large on conviction on indictment.[79]

Application to intimate image abuse

2.70 While this offence has been used in the past to deal with the non-consensual taking of intimate images in public places,[80] it does not cover the various types of intimate image abuse.

2.71 The courts have defined an act as "public" for the purposes of this offence where more than one person is present and could have seen the act.[81] This means that the offence is restricted to cases where the image is taken in public with at least two bystanders capable of witnessing the act. Consequently, most instances of intimate image abuse will not be covered by this offence.

2.72 It is also not yet clear whether an online space can constitute a public place for these purposes. This further limits the application of this offence to the intimate image abuse context.

Possession of extreme pornographic images

2.73 Under section 63 of the Criminal Justice and Immigration Act ("CJIA") 2008, it is an offence to possess extreme pornographic images. An "extreme" image is defined as an image of an act listed under subsections (7) or (7A) which is "grossly offensive, disgusting or otherwise of an obscene character".[82] It is sufficient to satisfy the offence that the image was "produced… for the purpose of sexual arousal of anyone who comes to have it"; the circumstances in which it is received or the person by whom it is produced are irrelevant.[83]

2.74 Subsection (7) covers images that portray any of the following in "an explicit and realistic way":

(a) an act which threatens a person's life,

---

78 Magistrates' Courts Act 1980, s 32(1) and para 1A of Sch 1. For an offence committed before the commencement of s 282 of the CJA 2003 on 2 May 2022, the maximum term of imprisonment on summary conviction is six months: CJA 2003, s 282(1).

79 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), para B3.354.

80 See for example, Rebecca Shepherd and Dominic Smithers, "The public school pervert who spent years secretly filming up women's skirts in one of Britain's wealthiest villages" (29 March 2018) *Manchester Evening News*, https://www.manchestereveningnews.co.uk/news/greater-manchester-news/alderley-edge-upskirt-film-pervert-14470375; Bradley Jolly, "Upskirt pervert who took 9,000 secret photos in just five weeks avoids jail" (28 January 2015) *Mirror* https://www.mirror.co.uk/news/uk-news/upskirt-pervert-who-took-9000-5058048.

81 *R v May* (1989) 91 Cr App R 157. In Chapter 3 of its report on Simplification of Criminal Law: public nuisance and outraging public decency (2015) Law Com No 358, the Commission recommended that a new offence of outraging public decency should not require that two people are present at the place of the act.

82 CJIA 2008, s 63(5A).

83 *DB* [2016] EWCA Crim 474, [2016] 1 WLR 4157.

(b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,

(c) an act which involves sexual interference with a human corpse, or

(d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive),

and a reasonable person looking at the image would think that any such person or animal was real.

2.75 Subsection (7A) covers images that depict either: an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis; or an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else. As with subsection (7), the image must portray the act in an explicit and realistic way, and a reasonable person looking at the image must think that the persons were real.

2.76 This is an either way offence. Where the image portrays an act listed in section 63(7)(a) or (b), or (7A) the maximum penalty is 12 months' imprisonment and/or a fine on summary conviction, and three years' imprisonment and/or a fine on conviction on indictment.[84] Where the image does not portray one of these acts, the same maximum penalty applies on summary conviction, but on conviction on indictment the maximum penalty is two years' imprisonment and/or a fine.[85]

Application to intimate image abuse

2.77 The offence of possessing extreme pornography may apply to the intimate image abuse context. The inclusion of images "produced by any means"[86] within the scope of this offence means that it can capture altered images in addition to unaltered images. For example, the offence may cover images depicting the sexual assault of a person incapacitated by drugs, as well as altered images or deepfakes of such behaviours. The non-consensual activity depicted need not be real, as long as it is portrayed in an "explicit and realistic way".[87]

2.78 However, this offence only applies where the image has been produced for the purpose of sexual arousal. This means that taking relevant images for any other purpose would be excluded from its scope, for example to cause humiliation or to extort money from the victim. Secondly, the offence applies to a very narrow range of images that are considered sexually harmful. Thirdly, it applies only to possession, not taking or sharing. For these reasons, this offence is not appropriate as a means of dealing with intimate image abuse.

---

84 CJIA 2008, s 67(2) and (4)(a). For an offence committed before the commencement of para 24(2) of Schedule 22 to the Sentencing Act 2020 on 2 May 2022, the maximum term of imprisonment on summary conviction is to be read as six months: CJIA 2008, sch 27, para 23.

85 CJIA 2008, s 67(3).

86 Above, s 63(8)(a).

87 Above, s 63(7) and (7A).

CONCLUSION

2.79 This chapter has illustrated that the current legal framework comprises a patchwork of offences and does not appropriately or effectively deal with intimate image abuse. On the one hand, the existing offences fail to provide comprehensive protection to victims as certain types of images and behaviours are excluded from their scope. On the other hand, in some circumstances, they are too far-reaching and may criminalise conduct that is not sufficiently wrongful or harmful in the context of intimate image abuse. Moreover, the sentences, ancillary orders, and labels, attached to other relevant offences discussed in this chapter will often fail accurately to reflect the nature of intimate image abuse. While legislative reform has made some improvements and other applicable offences can fill some gaps in legal protection, the analysis above has shown that several gaps and inconsistencies remain.

Chapter 3: Definition of intimate image

INTRODUCTION

3.1 In this chapter, we explain how "intimate image" should be defined for the purposes of all intimate image offences. Consultees engaged with this section of the consultation paper in large numbers and provided detailed, considered views. Throughout this chapter we first consider what we proposed in the consultation paper, consultees' responses, our analysis of the responses, and our conclusions.

3.2 The chapter starts by defining "images" as videos and photographs. It also explains why audio recordings will not be included in the recommendations of this project.

3.3 It then turns to consider the definition of "intimate", concluding that intimate should include only "sexual, nude, partially-nude and toileting" images. Each of these categories is then explored in depth and we recommend a definition of each as follows:

(1) Sexual: an image which shows something that a reasonable person would consider to be sexual because of its nature; or taken as a whole, is such that a reasonable person would consider it to be sexual.

(2) Nude and partially nude: an image of all or part of a person's genitals, buttocks or breasts, whether exposed, covered with underwear or anything being worn as underwear, or where the victim is similarly or more exposed than if they were wearing underwear.

(3) Toileting: an image of a person in the act of defecation or urination, or an image of personal care associated with genital or anal discharge, defecation or urination.

3.4 Within the consideration of nude and partially-nude images, we explore what should be counted as "underwear". We also recommend a purposive interpretation of "breasts" to ensure comprehensive protection for the female chest area. We conclude that downblousing can be appropriately captured by the recommended definition of intimate and does not require additional, specific wording. We explain why we recommend including images that leave the victim similarly or more exposed than if they were wearing underwear.

3.5 We discuss images of "private" acts such as changing, showering, and bathing and conclude that those images which are sufficiently intimate will be captured by our definition of nude and partially nude.

3.6 We then consider whether there are any other types of images that should be protected by intimate image offences. First, within the definition of sexual we discuss semen images (where semen is depicted on top of a non-intimate image of the victim) and clothed images where a body part is "zoomed in". Later, we discuss images that may be considered intimate by certain religious groups but are not sexual, nude,

partially nude or toileting, and images that are not intimate but convey private information about the person depicted such as their sexuality. We ultimately conclude that these images should not be included in the scope of these offences. Although they can cause harm when taken or shared without consent, where there is sufficient culpability the conduct is better addressed by different offences. We have concluded that it is necessary and proportionate to limit the scope of the intimate image offences to images that show the victim, the person depicted, intimately. We explain why we do not recommend a subjective element of the definition of "intimate".

3.7 The chapter then explores whether there are images that do fall under our definition of sexual, nude, partially nude or toileting that nonetheless should be excluded from intimate image offences. This includes images of kissing and the chest area of males and prepubertal children. We recommend a test that excludes from the offences images that show only something that is "ordinarily seen on a public street". However, we explain that the offences should include intimate images depicting breastfeeding, even if this is ordinarily seen on a public street.

3.8 Finally, we conclude that images where the person depicted is not readily identifiable should not be excluded from intimate image offences.

DEFINITION OF IMAGE

3.9 The first thing to consider is what counts as an image, whether intimate or not. The three current intimate image offences in England and Wales vary slightly in their definition of "image".

3.10 The voyeurism and "upskirting" offences do not define what is meant by an image but rely on the relevant act of "recording". The Explanatory Note to the voyeurism offence found in section 67 of the Sexual Offences Act 2003 (the "SOA 2003") confirms that recording includes "filming". An image therefore is anything that results from recording or filming.

3.11 The disclosure offence defines an image as a "photograph or film" which is a still or moving image that includes one or more photographed or filmed images, originally captured by photography or filming.[1] This definition of image includes altered images where part of a photograph or film in its original state is part of the resultant image.[2] A composite image made of a number of original photographs would qualify as an image under this definition. Filming is described as making a recording, on any medium, from which a moving image may be produced by any means.[3]

3.12 In the consultation paper we concluded that the current offences all broadly capture photographs and videos and therefore they should be captured by any proposed new offences. We then asked whether there was anything in addition to photographs and videos that should be considered an "image" for these purposes. There are other visual representations that could depict someone intimately, such as paintings or sculptures. We decided not to include these as they do not involve a real image of the

---

1 Criminal Justice and Courts Act 2015, ss 34 (4) and (6).

2 Criminal Justice and Courts Act 2015, s 34 (5).

3 Criminal Justice and Courts Act 2015, s 34 (7).

person depicted. Further, such pieces constitute artistic expression which may only be curtailed where necessary and proportionate.[4] We did not hear from stakeholders that use of intimate drawings, painting, or sculpture etc was a significant form of intimate image abuse. We therefore provisionally proposed that an image for the purposes of any new intimate image offence should include photographs and videos, and not any other form of visual representation.

Consultation

Drawings, paintings and sculpture

3.13 In his consultation response, lawyer Honza Cervenka submitted that "paintings" should be included in the definition of an image. Gregory Gomberg, personal response, also disagreed that the definition should be limited to videos and photographs and suggested instead including "any representation whose subject may reasonably be taken to be the alleged victim".

3.14 Ann Olivarius, of law firm McAllister Olivarius, submitted:

> Certain genres or types of "artwork" should also perhaps be included: those created to represent, without consent, identifiable persons in intimate or private acts which are then put on public display. Note that some artworks are scarcely indistinguishable from photography. But I have in mind any artwork that obviously was intended to show an identifiable person. My aim is not to restrict artistic expression. It is to prevent the creation of public artistic works of 'intimacy' that intend to harm, or are reckless towards this possibility, recognizable individuals without their consent.

3.15 We did not hear further evidence from consultees that intimate images that are not, or do not include, photos or videos, cause serious harm or are prevalent instances of intimate image abuse. We are not aware of instances where non-photographic art has been used in this way, causing harm to the person depicted. We are also of the view that to include forms of artistic expression would be extremely broad and open to interpretation. It is imperative that criminal offences are clearly and precisely defined, as vague offences may be incompatible with the European Convention on Human Rights. In particular, Article 10, the right to freedom of expression, can only be interfered with where that interference is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society.[5] The Law Commission analysed how this relates to vaguely drawn offences in the consultation paper on modernising the communications offences:[6]

> In deciding whether a criminal provision formulated using vague terms … is compatible with Article 10, the relevant stage of the analysis is … whether the interference was prescribed by law. The Grand Chamber has made clear that Article 10 "not only requires that the impugned measure should have a legal basis in

---

4 We discuss the protections afforded to artistic expression under Article 10 of the European Convention on Human Rights at para 3.15.

5 *Karácsony v Hungary* (2016) App No 42461/13 (Grand Chamber Decision).

6 Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248, para 3.117.

domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects".[7] The Court "must ascertain whether [the provision] is sufficiently clear to enable a person to regulate his/her conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[8]

Any intimate image offence must therefore be sufficiently clear so people can identify both the images and the conduct covered by the offence.

3.16 Our position therefore remains that visual representations of individuals other than photos or videos should not be included in the definition of "image" for the purposes of intimate image offences. Images that are altered or created in any way will be included if they appear to be a photograph or film of a person (see paragraph 3.18 below).

3.17 Gregory Gomberg also raised non-photography methods of taking realistic images of someone.[9] In this chapter we are concerned with the resultant image rather than the method by which it is taken. It is important however to clarify that defining an image to include photographs and videos does not require they be taken by a camera. We consider the ways in which an image can be "taken" in Chapter 4. This gives rise to two relevant issues.

Altered images

3.18 Photos and videos can be in their original form, or altered in some way. This can be done digitally or manually. In the consultation paper we described the recent rise of digitally altered sexual, nude and semi-nude images.[10] Terms such as "deepfakes" and "nudification" have been used in Parliament recently to describe the growing behaviour of altering images to make them sexual. The resultant altered images are often photographs or videos. Images that are made sexual as a result of such altering are explicitly excluded from the disclosure offence,[11] although the definition of "image" includes some altered images, as we note at paragraph 3.11 above. (We consider further which acts could and should include altered images when we discuss the act of sharing in chapter 4). For this chapter it is sufficient to conclude that altered images should not be excluded from the definition of an "intimate image" if the resulting image is or includes a photograph or video.

Audio recordings

3.19 During the pre-consultation period, the Muslim Women's Network UK advised us that audio-only recordings are sometimes made of a victim engaging in a sexual act. These recordings are then used to coerce the victim to pay money or to engage in

---

7 *Karácsony v Hungary* (2016) 64 EHRR 10 (App No 42461/13) at [123].

8 *Akçam v Turkey* (2011) (App No 27520/07) at [91]; similarly, *Grigoriades v Greece* (1999) 27 EHRR 464 (App No 24348/94) at [37].

9 Gregory Gomberg, Consultation Response.

10 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 2.34 to 2.54.

11 Criminal Justice and Courts Act 2015, s 35 (5).

further sexual acts to prevent the recordings being shared.[12] Audio is also a feature of some "deepfakes". For example, audio can be added or altered so an image features audio that makes it sound sexual. We acknowledge the significant harm such behaviour can cause. However, the terms of reference for this project limit our consideration to intimate *images*. Some consultees commented on this issue in their consultation responses.

3.20 Gregory Gomberg, personal response, suggested that audio "can be sexually suggestive and harmful in much the same way as a visual image [and] I don't see what is to be gained by restricting the law to just one sense".

3.21 Ann Olivarius suggested that methods of "taking" that would capture audio recordings should be included in the offences.

3.22 Centre for Women's Justice, while noting they did not have evidence of prevalence, are aware of a case involving a man who "illicitly audio-recorded sexual encounters without consent, and then incorporated those recordings into a number of songs that he had written, which he went on to release/publish". They recognised that while not in scope of our project, and potentially therefore not in scope of an intimate *image* offence:

> If it is criminal to take and share a visual record of someone in a sexual context without their consent, it logically must also be criminal to share an audio record of someone in a sexual context without their consent. It is essentially the same type of abuse and no less harmful.

3.23 We agree that recording sexual audio-recordings without consent or sharing or threatening to share a sexual audio-recording (whether real or "deepfaked") can be a similar behaviour, and give rise to similar harm as intimate image abuse. The offences that we recommend are necessarily focussed on definitions, motivations and fault elements that are relevant to behaviours involving images. If, in the future, it is deemed necessary and appropriate to criminalise taking, sharing or threatening to share sexual audio-recordings without consent, it is possible that any such offences could be based on our recommended intimate image offences.

DEFINITION OF INTIMATE

3.24 The second part of this chapter asks what type of images should be captured by intimate image offences. The three current intimate image offences differ in the types of image they capture. The disclosure offence covers "private and sexual" images. Images must be both private *and* sexual. Section 34 of the Criminal Justice and Courts Act 2015 defines "private" as "something that is not of a kind ordinarily seen in public". An image is sexual when:

> (a) it shows all or part of an individual's exposed genitals or pubic area,

[12] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.114.

(b) it shows something that a reasonable person would consider to be sexual because of its nature, or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

An image showing an individual's exposed genitals or pubic area was separated out as it was considered to be "so intimate that an image showing it should automatically be regarded as sexual".[13] Images of female breasts therefore would only be covered if the image was sexual by nature or the content was sexual as a whole.

3.25 The "reasonable person" concept is found throughout the law of England and Wales, most commonly in tort law,[14] to introduce a universal objective standard by which to measure the relevant behaviour, knowledge or concept.

3.26 The voyeurism offence covers images taken of someone "doing a private act".[15] This is defined in subsection 68(1) of the Sexual Offences Act 2003:

> A person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—
>
> (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
>
> (b) the person is using a lavatory, or
>
> (c) the person is doing a sexual act that is not of a kind ordinarily done in public.

The focus of the voyeurism offence is the circumstances in which the image was taken. This is because the voyeurism offence was intended to address "peeping Tom" type behaviour where the victim's physical privacy was violated, rather than the type of image the behaviour resulted in. It is broader than the disclosure offence in the type of images covered (for example exposed breasts that are not otherwise sexual) and toileting images. It is also narrower because the victim has to be in a place where they have a reasonable expectation of privacy.

3.27 The "upskirting offence" criminalises the recording of images taken "beneath the clothing of another person (B),"[16] where:

> The image is of—

---

13 Crown Prosecution Service, Revenge Pornography - Guidelines on prosecuting the offence of disclosing private sexual photographs and films (24 January 2017) https://www.cps.gov.uk/legal-guidance/revenge-pornography-guidelines-prosecuting-offence-disclosing-private-sexual.

14 See for example, J Gardner, "The many faces of the reasonable person" (2015) 131 Law Quarterly Review 563 to 584.

15 Sexual Offences Act 2003, s 67(1)(a).

16 Sexual Offences Act 2003, s 67A(2)(a).

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

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

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.[17]

3.28 This offence is limited to images of genitals or buttocks taken underneath clothing and therefore would not cover images of breasts or where the victim was not clothed.

3.29 In the consultation paper we considered other jurisdictions and the nature of images covered by their intimate image offences. The offences in Scotland,[18] Australia,[19] New Zealand[20] and Canada[21] vary but broadly cover similar types of images as England and Wales. We identified four categories of images that are currently covered, and should continue to be covered, by intimate image offences in this jurisdiction: sexual; nude; semi-nude; and private images. In the consultation paper we explored what should be included within each of these categories and how they should be defined. Next, for each category we will set out what was said in the consultation paper, what the consultation responses said, our analysis and our final recommendations.

Sexual

3.30 The taking and sharing of sexual images without consent violates the sexual autonomy and bodily privacy of victims and can cause serious harm. Much of the evidence we have heard about intimate image abuse involves images that could be considered sexual. It is clear that any definition of an intimate image should include "sexual" images. In the consultation paper we explained how the disclosure and voyeurism offences capture sexual images. We considered the definition used by the disclosure offence (at paragraph 3.24 above), focussing on "something that a reasonable person would consider to be sexual because of its nature, or its content, taken as a whole, is such that a reasonable person would consider it to be sexual".[22] We identified that such a definition would include images of sexual acts (sexual by nature), or "provocative" images such as someone posing in a sexual manner in

---

17 Sexual Offences Act 2003, s 67A(2)(b).

18 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2.

19 New South Wales Crimes Act 1900, s 91P, s 91Q and s 91R, Queensland Criminal Code 1899, s 223, s 227A, s 227B and s 229A, South Australia Summary Offences Act 1953, s 26C, s 26D and s 26DA, Victoria Summary Offences Act 1966, s 41DA and s 41DB, Western Australia Criminal Code Act Compilation Act 1913, s 221BD, s 338A, s 338B and s 338C, Northern Territory Criminal Code Act 1983, s 208AB and s 208AC, Australian Capital Territory Crimes Act 1900, s 61B, s 72C and s 72E.

20 Crimes Act 1961, s 216G and Harmful Digital Communications Act 2015, s 4.

21 Criminal Code, RSC 1985, c C-46, s 162.

22 The definition in the Criminal Justice and Courts Act 2015, s 34 also includes images of "person's genitals, buttocks or breasts … exposed or covered only with underwear". As these would be covered by the category of nude or partially nude they will not be further considered under "sexual".

underwear (sexual when taken as a whole).[23] We agreed that such images should continue to be captured by intimate image offences.

3.31 We then asked whether the definition of sexual should be broadened to include a subjective element. Some stakeholders had suggested that different people, or groups, consider images to be sexual that a "reasonable person" may not. We provisionally concluded that this would be unworkably broad. Given the range of things that individuals may find sexual, it would have the potential to cover images of everything.

3.32 We also considered whether the context in which an image is shared could make the image sexual. For example: a non-sexual image uploaded to a website advertising sex work. We provisionally concluded that while this may be harmful (when done without consent of the person depicted), intimate image offences are not the right way to criminalise that behaviour. They should be concerned only with the nature of the image itself and not the context. We identified that other offences may apply in such circumstances, for example the communications offences.[24]

3.33 In Consultation Question 1 and Summary Consultation Question 5 we asked:

> 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?

Consultation responses

3.34 The majority of consultees who responded to these questions agreed with our proposed definition of sexual (276 out of 301). Comments in support noted that sexual images are inherently intimate, and that an objective test provides certainty, is understood by courts, is sufficiently flexible, for example, it could accommodate changes over time of societal views of what is "sexual".

3.35 The Centre for Information Rights submitted that the definition "allows for changes i[n] societal mores/attitudes over time".[25] The joint response from the North Yorkshire Police, Fire and Crime Commissioner and North Yorkshire Police stated: "the test of the reasonable person is used in many other aspects of law and this should be no different for a picture to be deemed sexual".

---

23 Explanatory Note to Criminal Justice and Courts Act 2015, s 35(3)(c).

24 Communications Act 2003, s 127, Malicious Communications Act 1988, s 1, or the new communications offences currently contained in the Online Safety Bill.

25 They also suggested that a third limb should allow for images that "show something that is otherwise clearly considered intimate by the person depicted".

3.36 Law firm Corker Binning noted:

> It allows the courts flexibility to adhere to the modes of today without creating too broad a definition. We note that the definition as proposed is consistent with current definitions within the Sexual Offences Act 2003.

3.37 The Crown Prosecution Service ("CPS") observed:

> This definition is consistent with the definition of 'sexual' for the purpose of the offence of disclosing private sexual photographs and films with intent to cause distress under the Criminal Justice and Courts Act 2015. Therefore, this concept is already well understood by practitioners.

3.38 The objective nature of the test was mentioned by consultees. Professor Alisdair Gillespie submitted that "the test should be objective, as what each person considers to be 'sexual' is far too subjective for these offences".

3.39 Generally, legal consultees considered an objective test to be most appropriate. The CPS "consider[ed] that an objective test is more appropriate than a subjective test" and that "a subjective definition of what is sexual could lead to substantial legal uncertainty". HM Council of District Judges (Magistrates' Courts) Legal Committee also stated that "what counts as sexual can differ from individual to individual, so it should not be [a] subjective test, which could make the definition too broad".

3.40 The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society):

> We agree that defining "sexual" according to the individual idiosyncrasy of the subject would easily result in injustice, where an apparently innocuous image, not perceived as sexual by the defendant, was taken without consent and perceived as sexual by the proposed victim. Apart from being unjust, it would present difficulties in identifying the correct sentence.

3.41 Slateford Law observed:

> The standard for the offence should be an objective one – not for the purposes of moralising particular sexual acts, but for clarity and, most importantly to remove barriers for the victim. If the emphasis of the offence relies on the intent and definition of "sexual" of the sender or distributor, the focus on the victim is reduced.

3.42 Conversely, some consultees (who agreed, disagreed, or responded neutrally to the proposed definition) argued that a subjective element was appropriate. For some consultees, the test should focus on the victim's view of what is sexual. Equality Now submitted:

> 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.

3.43 Consultees considered the "reasonable person" test and queried whether it sufficiently addresses the diversity of those who live in England and Wales. In a joint response, The Angelou Centre and Imkaan submitted:

> Specific consideration must be given when establishing the test for a 'reasonable person', considering intersecting social identities, including gender, race, ethnicity, religion or sexuality may impact on an individual's perspective of what is deemed sexual.

3.44 Jacky Smith, personal response, submitted: "of course, we need a non-culturally-biased definition of 'reasonable'. … judges are still not a representative sample of the population". Equality Now argued that "the reasonable person standard also dissembles biases and reinforces social disadvantages".

3.45 Some consultees argued that the definition should focus on the knowledge of the person who takes or shares an image without consent, in addition to the view of the person depicted. Honza Cervenka of McAllister Olivarius proposed "expanding the standard to include 'shows something that the perpetrator knew the victim would consider to be sexual or was reckless as to the same'".

3.46 Professor Tsachi Keren-Paz observed:

> Image based abuse is a gendered phenomenon. A feminist critique of law has long observed the biased way in which … 'reasonable' [was] interpreted in courts. It would be good to think how the use of 'reasonable person' in a definition of a gendered offence in terms of both perpetration and victimhood would avoid this pitfall.

3.47 Kingsley Napley LLP were the only organisation to disagree with our proposed definition. They raised concerns that the definition is not sufficiently clear and relies on an objective test which could pose difficulties for prosecutors:

> The complexity lies in the fact that the definition encompasses an objective test (i.e. the 'reasonable person' test). For example, taking a photograph of a foot. It is unlikely that a reasonable person would categorise the photograph as sexual, but if a foot fetishist took the photograph, it might be. It is not clear what the prosecution would have to prove in this scenario.

3.48 Relatedly, a number of consultees submitted that the definition should include images that are considered "sexual" among certain religious groups or communities. This will be fully considered from paragraph 3.219 below.

3.49 Consultees also discussed our provisional conclusion that the image itself must be intimate, and that the context in which it is shared cannot make an image "sexual" for the purposes of an intimate image offence (paragraph 3.32 above). HM Council of District Judges (Magistrates' Courts) Legal Committee questioned this conclusion. Advocacy organisation #NotYourPorn provided examples where images "of women in normal everyday life situations" are shared on websites that sexualise the images with captions and comments. They stated that "the accounts were clearly intended for sexual gratification, even if not overtly pornographic" and argued that "this also inflicts psychological harm on the victim". Consultees also raised this issue in response to

later consultation questions. For example, in response to a question asking for examples of other "private" images that could be included, Slateford Law described the experience of a client who had images shared that "would not be deemed as 'sexual' in nature, but [were] made sexual in the context" of the websites to which they were posted. Consultees suggested this is a particular issue with sportswomen. Greg Gomberg, personal response, raised the case of athlete Allison Stokke. In 2007, when Allison was 17, an image was taken of her while preparing to pole vault at a track event. She was wearing usual athletic wear. It was uploaded to a sports website with a predominantly male audience with the title ""Pole Vaulting is Sexy, Barely Legal". This image and article brought significant attention to Allison for her appearance, overshadowing her successful athletic career.

3.50 South West Grid for Learning[26] and (in a joint response) Professors Clare McGlynn and Erika Rackley supported the specific inclusion of images of "tributing"[27] or "semen images". Professors McGlynn and Rackley suggested an Explanatory Note should include direct reference to such images. In the consultation paper we described such images:

> The perpetrator will find what is often a non-intimate image of the victim, masturbate onto it, take a picture and put it online, often on websites dedicated to these types of images. Often the victim will be told that her image has been "tributed", because the aim is to make her aware of how her pictures are being used.[28]

3.51 Consultees including the Angelou Centre and Imkaan, and Slateford Law suggested that guidance could assist with ensuring that the test is applied in the most appropriate way. Slateford Law note that the "term 'sexual' is a fluid concept and such a term may be difficult for the courts to qualify" therefore guidance might be required.

3.52 The Bar Council and Professor Gillespie suggested the wording of section 78 of the SOA 2003 could be used instead. That section provides:

> For the purposes of this Part, penetration, touching or any other activity is sexual if a reasonable person would consider that—
>
> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
>
> (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

Analysis

3.53 An overwhelming number of consultees were in support of including sexual images, and the proposed definition of sexual. We are convinced by the response from the

---

26 Incorporating the Revenge Porn Helpline, Report Harmful Content and the Professionals Online Safety Helpline.

27 "Tributing" is a term sometimes used to describe the behaviour we choose to refer to as "semen images". See Chapter 1 for our rationale.

28 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.73.

legal community that the test offers certainty and is well-known by those who will have the responsibility to implement it.

3.54 We understand the arguments for including a level of subjectivity in the test, however we do not think that it is possible to introduce subjectivity in a way that ensures sufficient clarity, certainty, and culpability. There was no consensus amongst consultees as to whether a subjective element should include an understanding of sexual from the victim, the perpetrator, or combination of both. If it were to rely only on what the victim considered sexual, many people could commit an offence without realising and without the appropriate culpability. This could be mitigated by requiring that the perpetrator have knowledge that the victim considered the image to be sexual. However, this would be very difficult to evidence as it relies on the individual's assessment of sexual; the perpetrator would have to have engaged with the person depicted, ascertained their views on what is considered sexual and then acted.

3.55 Alternatively, the person depicted would be expected to raise their views on what they consider sexual with any person who may take or share an image of them they deem sexual. This becomes unworkable when we consider that images can be taken of multiple people, by multiple people at once, they can be shared multiple times by people who are unknown to the person depicted. The result is that most perpetrators will have no knowledge that the person depicted considers the image sexual, and there will be no reasonable expectation that they should know because it is not what a "reasonable person" would deem sexual. Therefore, the test would rarely apply. We consider later at paragraph 3.219 where there is a more collective understanding of sexual (such as within certain religious communities), that may be outside the common collective threshold of a "reasonable person".

3.56 Where the subjective element only considers the perpetrator's interpretation of sexual, it cannot always be said that there is significant, or even any, harm caused to the victim or society. There is less of a violation of someone's bodily privacy and sexual autonomy if they do not find an image of them sexual. It may be unpleasant to think someone else considers an image of you sexual that you do not, but it is not the same level of violation. There may also be insufficient culpability. For example: Martin has a fetish and finds images of long nails sexual. As part of his administrative duties at work he has been asked to take close up photos of everyone working together at a corporate training day. Some of the attendees have long nails; Martin takes photos of everyone as requested, including those with long nails. Martin may consider the images sexual but that was not his purpose in taking them. If there was a subjective element that considered Martin's view that images of long nails are sexual, he would have committed an intimate image offence even though he did not take the photos because he finds them sexual, and the people in the images would not think they were sexual. There is nothing in this example that warrants criminalisation.

3.57 This is also the position in respect of the definition of "sexual" in section 78 of the SOA 2003 for offences of sexual touching and penetration. In section 78,

> penetration, touching or any other activity is sexual if a reasonable person would consider that—
>
> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

3.58 The Court of Appeal in the case of *H*[29] determined that for something to be sexual under part (b), there is a two-stage test: first, the act has to be something that *could* be sexual because of its nature; and second, that because of the circumstances or purpose it was in fact sexual.[30] The two questions should be considered separately.[31] Someone's purpose cannot make an act sexual if it was not objectively capable of being sexual.

3.59 The Explanatory Notes to section 78 confirm that where an activity (such as touching) was not objectively sexual, it will not be considered sexual for the purposes of the offence even if the person carrying it out derives sexual gratification from it. They specify that "the effect of this is that obscure fetishes do not fall within the definition of sexual activity".[32]

3.60 We understand the concerns that a "reasonable person" standard can reinforce bias and prejudice. Similar concerns were raised by consultees in respect of the "reasonable belief in consent" test, also utilised in sexual offences.[33] This is a problem that is wider than intimate image abuse and therefore is not a sufficient reason to depart from a well-known test that works well in many cases.

3.61 In the consultation paper we concluded that the context in which an image is taken or shared cannot make a non-sexual image sexual. Having considered the responses on this issue, we consider it is important to maintain this distinction. We understand that the sexualisation of non-intimate images can be used to subjugate women in public spaces and minimise their contributions to society. However, intimate image offences are best focussed on images that show the victim intimately, and not images that are only intimate because of the sexual behaviour of the taker or sharer. The link between the image and the victim is important. Does it show them as nude or partially nude, does it show them using a toilet, does it show them engaging in a sexual act or in a sexual pose? Contexts such as websites that advertise sex work, comments that sexualise the person depicted, or the presence of semen on an image, are external to the person depicted. We agree that these contexts can cause serious harm and sharing images in this way without consent is deplorable behaviour. However, they represent a different type of violation of the victim's bodily privacy and sexual autonomy. They would also broaden the purpose of intimate image offences too far. We consider that a focus on how the victim is depicted in the actual image, rather than the sexualisation of any image is the best way of addressing intimate image abuse.

3.62 This does not mean that such behaviours should never be criminal. We explained in the consultation paper that posting a non-intimate image of someone who is not a sex

---

29 [2005] EWCA Crim 732, [2005] 1 WLR 2005.

30 HHJ P Rook and R Ward, *Rook and Ward on Sexual Offences*, 6th Edn, (2021) para 2.67.

31 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), para B3.59.

32 Explanatory Notes to Sexual Offences Act 2003, s 78, para 147.

33 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 10.36 to 10.38.

worker on a sex worker website may fall under the existing communications offences of sending a knowingly false communication using a public electronic communications network to cause annoyance, inconvenience or needless anxiety[34] or sending a communication which conveys false information in order to cause distress or anxiety.[35] The new knowingly false communications offence recommended in the Law Commission's Modernising Communications Offences final report and recently introduced in Parliament in the Online Safety Bill[36] may also cover this behaviour. Semen images sent to the person depicted may also be covered by the communications offences, both the current offences and the new offences in the Online Safety Bill that would give effect to the Law Commission recommendations, or harassment offences. This, we submit, is more appropriate as such images are part of a communication by the perpetrator either about the victim or about themselves.

3.63 While considering this important distinction, we discussed the role of the second limb of the provisionally proposed test: "taken as a whole, is such that a reasonable person would consider it to be sexual". Professors McGlynn and Rackley and South West Grid for Learning suggested that semen images could be expressly included in this definition. For the reasons explained above we do not agree that semen images should be included in intimate image offences. To reflect our position in paragraph 3.61 above, we recommend that the test does not include semen images and that the test be interpreted as focussing on the person depicted.

3.64 We considered using the wording of section 78 of the SOA 2003 as suggested by the Bar Council and Professor Gillespie. That definition includes a more subjective element by including the purpose of any person in relation to the act. This is appropriate in the context of section 78 which related to offences that involve contact such as penetration or sexual touching. In the Explanatory Notes to section 78, an example of vaginal penetration is used. The purpose of the person acting is important; penetration could be sexual if in the context of sexual activity, or not sexual in the context of a medically necessary vaginal examination. A doctor could also act under the guise of medical care but with a sexual purpose. The wording of section 78 means that criminal behaviour is appropriately caught. This does not work as well in relation to imagery and non-contact offending. With contact offences, the invasion of bodily privacy, bodily integrity and sexual autonomy is always physical. In such cases the persons related to the act will always be the same ones involved at the time the act was deemed sexual. For imagery there can be a distance between the victim and the person taking the image, or between the taking and the subsequent sharing of an image. While sharing or taking may be done for a particular purpose, this cannot change the nature of the image. In the example above, the purpose of the doctor does change the nature of the penetration from therapeutic to sexual. For the reasons explained above, we do not consider it appropriate to include a subjective element in the definition of sexual for intimate image offences, therefore we do not recommend the use of the wording of section 78. The purpose of the perpetrator should not form part of the definition of sexual; however, it is appropriate to consider their purpose with

---

34 Communications Act 2003, ss 127(2)(a).

35 Malicious Communications Act 1988, s 1(1)(a)(iii).

36 Online Safety Bill, cl 152.

respect to their culpability. We consider in Chapter 6, the taking or sharing of an image without consent for the purpose of obtaining sexual gratification.

3.65 In the consultation paper we explained that kissing might be deemed a sexual act for the purpose of the disclosure offence, but as it was a sexual act of a kind ordinarily seen in public, it was excluded from the offence.[37] We similarly want to exclude images of kissing from the definition of sexual as such images are not sufficiently intimate to justify criminal sanctions for non-consensual taking or sharing. We explain from paragraph 3.266 below how our recommendations will achieve this by using a test that excludes from the scope of the offences images that show only something that is ordinarily seen on a public street, such as kissing.

Conclusion

3.66 Intimate image offences must include sexual images of the victim. An image which is not itself sexual, but the context in which the image is taken or shared sexualises the image (including semen images) should not fall within the definition of an intimate image; such images are better addressed by other criminal offences where appropriate, in particular the communications offences.

Recommendation 1.

3.67 We recommend 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 in the definition of an intimate image. The definition of sexual should be applied only to the person depicted in the image itself, without considering external factors such as where or how the image was shared.

Nude and semi-nude

3.68 The current disclosure, voyeurism, and upskirting offences include images where certain body parts are exposed or covered by underwear. In the voyeurism offence, images where the person's genitals, buttocks or breasts are exposed or covered only with underwear are included.[38] The upskirting offence includes images of genitals or buttocks (whether exposed or covered with underwear), or the underwear covering genitals or buttocks.[39] For the disclosure offence, images of all or part of an

---

37 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.126.

38 Sexual Offences Act, s 68(1).

39 Sexual Offences Act, s 67A(2)(b).

individual's exposed genitals or pubic area are part of the definition of sexual.[40] However, nude and semi-nude images are not always sexual, and we do not think that intimate image offences should only protect sexual images. If we consider an image of someone showering nude, it would be an intimate or private image because of the nudity; it is not an image of something sexual. In the consultation paper we therefore concluded that nude and semi-nude images should be a separate category of intimate image.

3.69 There is inconsistency between the types of nude and semi-nude images covered by the current offences. The upskirting offence does not include images of breasts (understandably given its purpose); the disclosure offence does not explicitly include images of breasts, buttocks or genitals if covered by underwear;[41] and the voyeurism offence does not include images of genitals, buttocks or breasts if they are taken underneath clothing. It is undesirable for certain images to be covered only by a taking offence but not a sharing offence, and vice versa. We concluded in the consultation paper that a single definition of nude and semi-nude should apply to images for all intimate image offences.[42]

3.70 The definition in the voyeurism offence is the broadest; it includes genitals, buttocks and breasts. It also captures underwear images, which we heard during pre-consultation can cause serious harm when taken or shared without consent. We heard specifically that younger people may take and share "lower level", "suggestive" images that are then shared without their consent.[43] "Provocative" images, where someone is posing in underwear, are often used in intimate image abuse. In the consultation paper we described a case that the Revenge Porn Helpline helped with where 150 provocative images of one victim were shared over a six-year period, causing her significant harm.[44]

3.71 The nude and semi-nude images caught by the current voyeurism definition are limited by the requirement that the person depicted be in a private place, and that the genitals, buttocks or breasts are covered *only* by underwear. This means that "upskirting" or "downblousing" images would not be caught as they are often taken in public, and the person depicted is clothed so their private body parts are not only covered by underwear. In the consultation paper we provisionally concluded that departing from the voyeurism definition in two ways would help incorporate these images and provide a comprehensive definition for including relevant nude and semi-nude images:

> First, "upskirting" images could be covered if the focus were moved from the depicted person to the image. That is, from enquiring whether the depicted person had their genitals or buttocks exposed or covered only with underwear, to enquiring

---

40 Criminal Justice and Courts Act 2015, s 35(3).

41 If such images were deemed sexual they may be included, but non-sexual images of breasts or genitals covered by underwear are not included.

42 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.57.

43 Marilyn Selwood (ManKind) and Carmel Glassbrook, (Professionals Online Safety Helpline (POSH)). See above, para 6.54.

44 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.83.

whether the image shows their genitals or buttocks, either exposed or covered with underwear. Secondly, "downblousing" images could be caught if the definition were widened to include images of partially exposed breasts, whether covered by underwear or not, taken down the depicted person's top (it could not simply include partially exposed breasts, because this would include an image of someone who is wearing a low-cut top and as a result their cleavage is visible).[45]

3.72 In Consultation Question 2 we asked:

> 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?

3.73 In Summary Consultation Question 6 we asked:

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

Consultation responses

3.74 The majority of consultees who responded to this question supported the proposed definition (290 out of 316). Slateford Law suggested the definition is "helpful and clarificatory" and would remove "some early potential barriers for the victim". Lawyer Ann Olivarius wrote that this more expansive definition will assist victims. Stonewall supported the gender neutrality of the definition. Refuge submitted that the proposed "comprehensive definition would simplify the law around intimate image abuse".

3.75 HM Council of District Judges (Magistrates' Courts) Legal Committee noted the definition "would ensure that images currently captured by voyeurism offence would also apply to a sharing or disclosing offence".

3.76 Anon 75, personal response, suggested only images not covered by underwear should be caught. Professor Gillespie noted that including breasts covered with underwear would "significantly widen" the offence but acknowledges that while the harm may be different from nude images, "the harm may be comparable" for some victims.

3.77 There was support for including semi-nude images although some consultees raised potential confusion as to what is meant by the term. Dr Charlotte Bishop agreed with the inclusion of "sexualised images that don't show a fully nude person as the harm from making/taking/sharing these is as great". Brian Grove, personal response, suggested that partially-exposed images "can be as embarrassing and humiliating (or more) as naked images". Ruby Compton-Davies, personal response, stated that such images were "just as invasive as a 'full nude'". Campaigning organisation My Image My Choice submitted that an image of "partial nudity is a huge invasion of privacy and

---

[45] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.56.

undoubtedly causes stress/distress to the person depicted in the image". Conversely, Kingsley Napley LLP stated that they agree with including "nude" images but raised concerns with "semi-nude". They submitted that a semi-nude image "does not have the same level of embarrassment attached to it as a naked photograph".

3.78 During a consultation event, academics suggested the use of the term "partially nude" instead of "semi-nude". It was argued that semi-nude was unclear and there was concern it would be restrictively interpreted as meaning "half nude" (for example fully dressed from the waist up but nude from the waist down).

3.79 In their consultation response, the NSPCC argued that evidence suggests that semi-nude images are a "real concern for children".[46] They submitted that many images that would be classified as "semi-nude" do not reach the threshold for Category C images in the indecent images of children ("IIOC") criminal law regime. They therefore represent a gap in the current law as they have a "significant potential to cause harm or distress for the child subject".

3.80 Anon 90, personal response, suggested including "partially exposed" buttocks or genitalia. Similarly, West London Magistrates' Bench suggested that all relevant body parts could be exposed or partially exposed; they "agree[d] with the caveats that the body parts could be either completely exposed or partly exposed or covered with anything worn as underwear".

3.81 Some consultees suggested that intimate should not be limited to nude or semi-nude and that some clothed images should be considered equally intimate. For example, Anon 84, personal response, suggested that images of fully clothed buttocks could be as intimate as semi-nude images. Welsh Women's Aid suggested that images of other body parts isolated in an image should be included where the intent is for sexual gratification or to cause humiliation. We will consider this category of images at paragraph 3.92 below.

3.82 Gregory Gomberg, personal response, submitted that it would be beneficial to give examples of images that would not be included to add clarity to the scope of the definition.

3.83 The Angelou Centre and Imkaan advised that the definition should take care not to draw distinctions based on choice of clothing:

> We would be concerned with any type of definition that interfered with the rights of women to wear any attire that they should chose to wear or for any implication or 'blame' to be placed on a woman should they experience image based abuse in relation to their attire.

3.84 The Royal College of Anaesthetists in their consultation response sought clarification that internal images such as "endoscopic / laparoscopic photos, X-rays / MRI scans" would not be caught by this definition.

---

[46] In this regard, the NSPCC referenced the work of Childline and their counselling work with children and young people.

3.85 A number of consultees provided comments in respect of the part of the definition relevant to downblousing. We will consider this separately below.

Analysis

3.86 We agree that "partially nude" may better describe the images we intend to include that are not fully nude. This category includes images where the person depicted is wearing clothes, or some clothes, but in the image one or more of their genitals, buttocks or breasts are seen either exposed or covered with underwear. It also includes images of someone who wearing only underwear and no clothes. We will therefore use partially nude instead of semi-nude. "Partially nude" is not a determined level of nudity; it is not half nude for example. If an image shows all or part of the person depicted's genitals, buttocks or breasts, whether exposed or covered by anything worn as underwear, it is a partially-nude image. Images that show exposed body parts that are ordinarily seen on a public street would not be included. We explain this test in more detail below, but it would operate to exclude, for example, images of breasts where only cleavage is exposed.

3.87 There was significant support for including nude and partially-nude images in the definition of intimate, and for the definition we proposed. We acknowledge that nude and partially-nude images describe a range of images and levels of exposure. There may also be a range of harms experienced. Some people may find partially-nude images less intimate than fully nude images, although consultation responses suggest this is not always the case. Regardless, the responses support our provisional conclusion that all nude and partially-nude images have the potential to cause enough harm for it to be appropriate to include them in intimate image offences. Further, if we were to exclude partially-nude images, this would exclude a range of images that currently are included in intimate image offences, such as upskirting images.

3.88 We considered the responses that suggested that some clothed images should be included in the definition of intimate (for example at paragraph 3.81 above). In response to a later question,[47] the Magistrates Association suggested including "other transparent, non-underwear garments", noting that a wet t-shirt would not currently be covered by the definition as it is not being worn as underwear. Some clothed images would show someone as exposed as if they were nude or partially nude; for example, a man wearing white trousers that are wet and therefore see-through. Without underwear, or where the underwear is also see-through, this would be a very exposing and intimate image; his genitals would be visible in the image. An image which shows this type of wet, see-through garment partially exposing genitals, buttocks or breasts should therefore be considered partially nude. It will be a matter for the courts in individual cases to determine whether the level of exposure in the image is sufficient to deem it nude or partially nude. An image of someone fully clothed in tight clothing does not have the same level of exposure and would not be considered nude or partially nude. It is the visible genitals in the image of the example above that make it worthy of protection in an intimate image offence. We consider below from paragraph 3.189, examples of images where someone is nude but their genitals, buttocks or breasts are not visible, for example when showering behind a frosted glass door. If any such images are considered appropriate to include in

[47] Consultation Question 4.

intimate image offences, it would be better to do so as a separate category or under "private" rather than extend the definition of (partially) nude. The proposed definition of nude and partially nude benefits from a focus on clearly understood and defined body parts that distinguish intimate images from other types of images.

3.89 We considered the inclusion of images where the buttocks, breasts or genitals are partially exposed. We provisionally included partially-exposed breasts to capture "downblousing" images and we discuss this further below from paragraph 3.93. We did not explicitly include in our definition partially-exposed genitals or buttocks, though we do not intend to exclude images where genitals or buttocks are only partly exposed. For example, if someone is "upskirted" and only part of their genitals is seen in the image, this should not be excluded merely because the full genital area was not captured. Partially exposed must mean that an image shows some or all of the relevant body parts, whether exposed, covered by underwear, or somewhere in between. It does not refer to the way someone has chosen to dress. This is a departure from the way we proposed including "downblousing" images in the consultation paper, where "partially exposed" referred only to breasts that were clothed but exposed to some degree.

3.90 As this discussion of partially exposed exemplifies, it is important that the definition of nude or partially nude focuses on the image and not the state of dress of the person depicted in the image. In the consultation paper we noted that this focus is important to capture "upskirting" images (as the person depicted may be fully clothed but the image shows exposed or partially-exposed genitals). We will also consider how this focus on what is shown in the image can still capture "downblousing" images below.

3.91 With regards to the concern raised by the Royal College of Anaesthetists, such images do not fall within the definition of an "intimate image". The images that result from internal medical examinations do not in fact show genitals, buttocks or breasts themselves but the tissue that lies underneath. Therefore such images would not, and should not, fall within the scope of intimate image offences. Where images that would be classified as nude or partially nude are taken for genuine medical purposes, they would be excluded from these offences. The mechanism by which they will be excluded will depend on the circumstances and whether the person depicted had capacity; either section 5 of the Mental Capacity Act 2005, the exemption for images taken or shared of children for medical purposes where there is parental consent, or the reasonable excuse defence would apply to exclude this conduct. For more on this, see Chapter 11.

Clothed images

3.92 In response to the range of questions about the definition of intimate, consultees suggested that some images taken of someone clothed in public should be included in intimate image offences. Specifically, concerns were raised about what are sometimes called "creepshots", images taken (usually of women) in public for the purpose of obtaining sexual gratification. They are often taken discretely and often "zoomed in" on the buttocks, breasts, legs, or pubic area. They are often taken when women are wearing sportswear, leggings, or tight tops so that much of the outline of the body part is visible. This often occurs in gyms. The Centre for Information Rights stated that: "images taken without permission in gym environments (e.g. 'crotch shots', buttock images during squatting exercises/yoga poses, etc) are similarly to be treated as

intimate images".[48] This phenomenon has received media attention; there are website forums where people can upload, share and comment on "creepshots", and share tips on how to take them. Similar to upskirting and downblousing, this is very intrusive behaviour that impinges on women's security and autonomy while they are simply existing in public. Forums dedicated to sharing "creepshots" demonstrate a sense of entitlement to women's bodies. In one example reported in the media, a "creepshot" Reddit forum stated: "we kindly ask women to respect our right to admire your bodies and stop complaining".[49] The existence of "creepshot" communities has been described as posing "significant risks to the dignity and respect women are afforded in the community".[50] Professor Mary Anne Franks has suggested that creepshots are a "product of rage and entitlement".[51] The behaviour is reprehensible and harmful. However the images that result from the behaviour do not satisfactorily distinguish the behaviour from less culpable image-taking such as street photography. The images themselves are not nude or partially nude and not of a sexual or private act. If one zoomed in after a "normal" image was taken, that would be indistinguishable from a creepshot. Including such images would broaden the intimate image offences so far they would risk becoming unmanageable and ineffective. We note again the need for offences to be suitably clear and defined to be compatible with the European Convention on Human Rights (discussed at paragraph 3.15 above). Therefore we suggest that the focus should be on the behaviour exhibited with "creepshotting". We consider this further at paragraph 3.119 below.

Downblousing

3.93 Downblousing is the act of taking an image without consent of a woman's breasts, usually from above so that the photo is angled down and underneath the clothing of the victim. Downblousing is not covered by any of the current intimate image offences. The upskirting offence was deliberately restricted to images of genitals and buttocks to target the specific behaviour that gave rise to the offence being introduced.[52] The voyeurism offence is restricted to images taken in a private place and where the breasts are exposed or covered only by underwear. Therefore downblousing images, usually taken in public and where the victim is wearing clothes, are not included. The disclosure offence only includes images that are private and sexual; an image of breasts would only be included if the image is deemed sexual.[53] In the consultation paper we described the prevalence of downblousing. For example, a study by the Australian eSafety Commission found images of cleavage were the most common

---

48 See their response to SCQ 7.

49 Ryan Chan, "Creepshots – A Persistent Difficulty in the Australian Privacy Landscape" (2020) 39 *University of Tasmania Law Review* 83, 84. The forum was eventually forced to close.

50 Above, p 87.

51 Kira Cochrane, "Creepshots and revenge porn: how paparazzi culture affects women" (22 September 2012) *The Guardian*, https://www.theguardian.com/culture/2012/sep/22/creepshots-revenge-porn-paparazzi-women.

52 See Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, from para 3.116 and from para 7.35.

53 See para 3.124 above for discussion on the definition of sexual in the current disclosure offence.

form of intimate image abuse for women aged 18 and over (20%).[54] Downblousing images are often associated with upskirting images on online forums that host such material.[55] We also explained that the fact that downblousing is not currently criminalised has attracted criticism.[56] In chapter 7 of the consultation paper we explored some of the arguments for including downblousing images in intimate image offences and provisionally concluded that they should be included. We noted:

> Those working in the field of image-based abuse have long argued that "downblousing" causes the same kinds of harms, and is just as much a violation of privacy, as "upskirting". For example, in 2015 Professor Clare McGlynn QC (Hon) wrote:
>
> > Upskirting and downblousing are gross invasions of privacy and a form of street harassment that leaves women feeling vulnerable in public spaces, impacting on their quality of life, access to public space and feelings of security.[57]

3.94 We also note that observation of breasts is included in the voyeurism offence, in recognition of the fact that breasts can be intimate and that a woman should be able to choose who observes them. Intimate image offences in the Australian Capital Territory[58] and New South Wales[59] have provisions that criminalise downblousing alongside upskirting. Northern Ireland is currently considering the Justice (Sexual Offences and Trafficking Victims) Bill that would criminalise both upskirting and downblousing.[60]

3.95 We asked, in Consultation Question 17:

---

54 Office of the eSafety Commissioner, Image-Based Abuse – National Survey: Summary Report (October 2017), https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf.

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

56 See Alisdair Gillespie, "Tackling Voyeurism: Is The Voyeurism (Offences) Act 2019 A Wasted Opportunity?" (2019) 82 *Modern Law Review* 1107, 1125.

57 Clare McGlynn, "We Need A New Law to Combat 'Upskirting' and 'Downblousing'" (15 April 2015) Inherently Human, https://inherentlyhuman.wordpress.com/2015/04/15/we-need-a-new-law-to-combat-upskirting-and-downblousing/. Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.39.

58 Crimes Act 1900, s 61B(5).

59 Crimes Act 1900, s 91L and s 91N.

60 Justice (Sexual Offences and Trafficking Victims) Bill, Bill No 29/17-22, available at http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/justice-sexual-offences-and-trafficking-victims-bill/. See also, Department of Justice, "New sexual offences legislation extends protections to victims" (15 March 2022), https://www.justice-ni.gov.uk/news/new-sexual-offences-legislation-extends-protections-victims#:~:text=The%20Justice%20(Sexual%20Offences%20and%20Trafficking%20Victims)%20Bill%20has%20two,sexual%20offences%20against%20children%3B%20and.

> 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?

3.96 In Summary Consultation Question 6 we asked:

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

3.97 In the consultation paper we considered that downblousing images could be included in intimate image offences by specifically incorporating them in the definition of intimate:

> Secondly, "downblousing" images could be caught if the definition were widened to include images of partially exposed breasts, whether covered by underwear or not, taken down the depicted person's top (it could not simply include partially exposed breasts, because this would include an image of someone who is wearing a low-cut top and as a result their cleavage is visible).[61]

3.98 As explored above at paragraph 3.72, we asked consultees at Consultation Question 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?

3.99 We will first consider whether we should recommend that downblousing be a criminal offence. Having concluded that we should, we will look again at our proposed definition of intimate to ensure it best captures the downblousing images we agree should be criminalised.

Consultation responses

3.100 As Consultation Question 2 and Summary Consultation Question 6 asked about more than just downblousing, we have identified responses that specifically mentioned downblousing and will consider them alongside the responses to Consultation Question 17.

3.101 In response to Consultation Question 17, the majority of consultees who responded agreed that downblousing images should be included in intimate image offences (32 out of 39). Dr Bishop submitted that the behaviour was harmful and a "gross violation of female privacy".

3.102 Some consultees noted the similarities with upskirting which is already recognised as an offence. Slateford Law agreed "wholeheartedly", and suggested it is an extension

---

61 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.56.

of the principles of upskirting. The Bar Council submitted that "there would not appear to be any distinction in principle between the two types of conduct, or the harm caused".

3.103 The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) supported the criminalisation of downblousing if given as an example of a generic taking offence rather than a bespoke offence. They suggested that focussing on the specific act of taking required to capture such an image is not future proof. Honza Cervenka considered the "down" a person's top element too limiting. Ann Olivarius suggested that the focus should be on the attempt to take an image beneath the clothes, not the angle that was used. Marthe Goudsmit alternatively suggested that the offence should focus on the areas of the body rather than the garment. Professor Gillespie submitted that the "true" wrongful behaviour is the use of devices to capture what would "not ordinarily be seen" and suggested, instead of a standalone offence, amendment to the voyeurism offences of operating or installing equipment.

3.104 The CPS agreed with the concerns expressed about the behaviour but noted potential difficulties with implementing such an offence. They submitted that upskirting images necessitate more deliberate acts, for example equipment may need to be altered to access the pubic area as it would not otherwise be visible, and deliberate positioning of taking equipment is normally required.

3.105 There was concern from a significant number of consultees that while some downblousing behaviour should be criminalised, there is a risk an offence would also capture less culpable behaviour and lead to inappropriate distinctions based on choice of clothing or the angle at which an image was taken. Professor Gillespie has "consistently called for its criminalisation", however he expressed concern with how downblousing could be legislatively described, noting that it is harder to distinguish the criminal behaviour than with upskirting. Dame Maria Miller MP considered that "the threshold for an image to be considered 'downblousing' is highly subjective and open to individual interpretation". Garden Court Chambers Criminal Law team were concerned about the "lack of certainty in relation to the phrase 'down the depicted person's top'" as it does not "clearly or sufficiently delineate the bounds of criminality".

3.106 In their joint response, Professors McGlynn and Rackley agreed with including some, but not all downblousing images. They identified three categories:

(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 have 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 (for example, 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.

3.107 They submitted: that category (a) and (b) images are unwelcome but should not be criminalised; that category (c) images should be criminalised; that our provisional

proposal would criminalise category (b) and (c); and that only category (c) images would be captured by the definition of nude and partially nude without needing a specific offence or wording. They argued that category (c) images are most akin to upskirting and involuntary exposure in public. They suggested that the only practical difference between category (a) and (b) images is the angle at which the image is taken. The Angelou Centre and Imkaan and the joint response from the End Violence Against Women Coalition and Faith and VAWG Coalition provided support for this position.

3.108 In their joint response the Angelou Centre and Imkaan also cautioned against including images of women who have "autonomously" decided to wear clothing that exposes their breasts which may lead to "policing" of women's clothing choices, victim blaming, and stigmatisation.

3.109 Kingsley Napley LLP disagreed with including downblousing in a criminal offence, suggesting there is too much subjectivity and that some images of women wearing revealing clothing may be caught by the offence. They also considered that upskirting and downblousing are different behaviours with different levels of privacy invasion.

Analysis

3.110 There is sufficient evidence that taking images of breasts underneath clothing is a harmful violation of privacy that should be included in intimate image offences. However, the consultation responses raise real concerns that our provisional proposal did not adequately or clearly distinguish the behaviours that should be criminalised from those that should not.

3.111 First, we agree with concerns that relying on the direction of "down the person's top" is not sufficiently clear. It could exclude images taken from other angles which is undesirable. Even though "downblousing" is currently the most commonly understood type of behaviour, we cannot exclude the possibility that some images may be taken from underneath or below clothing.

3.112 Secondly, further consideration is required of the type of images we want to ensure are included in an offence. Consultees raised concerns that an offence of downblousing could capture less culpable behaviours that depend on the clothing of the person depicted, or the relative position of the image taker. We considered the three categories suggested by Professors McGlynn and Rackley. We agree that our provisional proposal did not criminalise category (a) images; we did not intend to do so. We did intend to criminalise category (c) images; they are highly culpable, have the most potential for harm, and are most similar to the behaviours that gave rise to the current upskirting and voyeurism offences.

3.113 There is some cross over between category (b) and (c) images as defined by Professors McGlynn and Rackley. If someone stands above a woman on a balcony, zooms in with a camera and captures an image of her breasts below the line of her top, the image shows her breasts in a manner not of her choosing. How one would be viewed from a balcony is unlikely to have been part of the woman's consideration when choosing what top to wear and how much of her breasts would be visible. The lines between categories (a), (b) and (c) are not sufficiently clear to enable people to know if they are committing an offence or not. This would raise the concern that the

offence would be too vague and therefore not compatible with the European Convention on Human Rights (see paragraph 3.15 above).

3.114 There is something invasive, degrading, and harmful about this behaviour. However, the consultation responses and our analysis demonstrate just how challenging it would be to define the act of downblousing in an offence.

3.115 That is not to say that no downblousing behaviour should be criminalised. The fact that a woman chooses to wear an exposing outfit in category (a) is not what makes an image of her breasts taken or shared without her consent not worthy of criminalisation; it is the fact that the *image* only shows what she chose to expose.

3.116 We provisionally concluded that including "partially-exposed" breasts was necessary to capture downblousing images. Consultation responses have demonstrated that this is too broad if it could include breasts partially covered by clothes by choice. A clearer way of distinguishing criminal behaviour is by focussing on what is shown in a resulting image. If an image shows a breast, whether bare or covered by underwear, that is sufficiently intimate to be criminalised regardless of whether it was taken when a woman was fully clothed, nude or partially nude. If an image shows a breast, whether bare or covered by underwear, it does not matter whether the perpetrator was able to capture it underneath clothing or from which direction the image was taken. This would capture category (c) images and some of the more serious images that are akin to category (b). If someone were able to take a photo underneath a top by strategic placement of a spy camera and captured an image of breasts, this would be included. The victim's breasts need not have been exposed (visible to someone else) at the time the image was taken.

3.117 Images that capture breasts that were exposed in public will be subject to our public element test. Images of someone who is voluntarily nude or partially nude in public would be excluded from intimate image offences unless the person depicted had a reasonable expectation of privacy against the image being taken (for further discussion of this element see Chapter 10). If a victim's breasts were exposed in public involuntarily, images taken or shared would not be excluded from the offence. If someone voluntarily wears clothing that exposes their underwear or breasts, images taken or shared would be excluded from the offence as they were voluntarily partially nude in public. If someone is voluntarily partially nude but an image captures more than they had chosen to expose, this could be included in an offence if the person depicted retained a reasonable expectation of privacy against that image being taken.

3.118 Consider an example: Beth is an underwear designer and goes to a local park to take images of herself wearing her new bra. David is watching the photoshoot and takes a photo of Beth posing. David would not have committed an intimate image offence as Beth is voluntarily partially nude and does not have a reasonable expectation of privacy against images being taken of her; she is in fact posing for photos. Beth then changes bras; she covers herself with a towel to do so. As she takes off her bra the towel falls and her breasts are exposed briefly. David takes a photo. Beth was involuntarily exposed and the image of her without a bra on may be included in the intimate image offences. Beth puts a loose t-shirt on to walk home and takes off the bra. The t-shirt is low cut and her cleavage is visible. David has a spy camera installed on the top of his shoes. He sits at a bench and waits for Beth to walk past, as she

does he takes images of her bare breasts from underneath her t-shirt. This would be included in the intimate image offences as Beth has a reasonable expectation of privacy against that image being taken of her. It does not matter that some of Beth's cleavage was visible. David's actions are an invasion of her privacy as he sought to capture her bare breasts which she had not chosen to expose.

3.119 We have also considered whether the acts of downblousing and taking "creepshots" are akin to public sexual harassment, regardless of whether or not the resultant image would fall within our definition of intimate. We have heard about the harm caused by "downblousing" from stakeholders. We have not heard explicitly whether this harm arises from the invasion of privacy in a public space that the act itself represents, the intimate nature of the resultant image, or a combination of both. Both are likely engaged to some degree for downblousing images, as with upskirting. There will be some victims who experience downblousing as street harassment or sexual assault, and others who experience it as intimate image abuse. Where an image was taken, or attempted to be taken, down or underneath clothing in public, but the image does not meet our recommended definition of intimate, the invasion of bodily and sexual privacy in public spaces may be better addressed by an offence of public sexual harassment. This could also address some of the concerns consultees raised about images such as zoomed in "creepshots". The behaviour is unpleasant and threatens victims' feeling of safety in public spaces, but in our view the images are insufficiently intimate to be included in an intimate image offence.

3.120 Similarly, some images of breastfeeding in public may not meet our (necessarily limited) definition of intimate, where for example the whole chest area is covered by a scarf or top. We further consider breastfeeding images in Chapter 10. The recent successful campaign to include breastfeeding images in the current voyeurism offence[62] demonstrates the strength of public feeling about the wrongfulness and harm associated with taking images without consent of someone breastfeeding. We have read and considered the experiences of women who have shared their stories of being photographed while breastfeeding. There is a level of harm caused that is separate from how intimate the resultant image is, or in fact how intimate the taker intended the image to be. For the same reasons described above, images taken without consent of someone breastfeeding where the taking did not and could not have resulted in an intimate image may be better considered as part of a public sexual harassment offence. In its review of hate crime laws, the Law Commission discussed issues of public sexual harassment raised by consultees and recommended that the Government "undertake a review of the need for a specific offence of public sexual harassment, and what form any such offence should take".[63] We are aware that the Government are considering the need for such an offence. We recommend that the Government consider the behaviours of downblousing and taking "creepshots" in public as part of this work.

---

62 See Chapter 2.

63 Hate Crime Laws: final report (2021) Law Com No 402, para 5.397.

Recommendation 2.

3.121 We recommend that the Government consider the behaviours of downblousing and taking "creepshots" in public as part of any review into the need for a specific offence of public sexual harassment.

The chest area

3.122 The definition of breasts in the current voyeurism offence does not include nude male chests.[64] Female chests are thought of differently from male chests. In the consultation paper we described the difference in male and female underwear and swimwear; commonly male underwear and swimwear covers genitals and buttocks only; traditionally female underwear and swimwear also covers breasts. Male chests, and the chest areas of young children, are often exposed in public on hot days or at a pool. The male chest does not require the same level of protection as the female chest when defining the body parts within nude and partially-nude images.

3.123 In the consultation paper we considered how best to define breasts in a way that reflected this but was suitably inclusive of female chests where there is less or no breast tissue. We provisionally proposed the following:

> Any definition of nude or semi-nude should include the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue.

At Consultation Question 3 we asked consultees if they agreed and also if they thought there were additional examples that should be included in a definition of nude or semi-nude.

Consultation responses

3.124 The majority of consultees who responded to this question agreed with our proposal (33 out of 41). Equality Now suggested: "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". The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) submitted that "the absence of breast tissue does not detract from the private nature of such images".

3.125 Professor Gillespie asked whether it is necessary to set out inclusions or whether the courts would already consider these as "female breasts".

3.126 Comments mainly focussed on the chest areas of transgender people and of children.

---

64 *R v Bassett* [2008] EWCA Crim 1174, [2009] 1 WLR 1032 at [14].

(1) **The chest area of transgender people**. Lawyer Honza Cervenka considered that the current definition is too narrowly focussed on surgery and should reflect the wider transgender community, suggesting that it should include:

> Trans men, who have not undergone top surgery; any person who has undergone a mastectomy (this would include cisgender women, trans men and gender non-binary people); and any person taking hormones with the aim of developing breast tissue (this would include trans women and gender non-binary people).

Stonewall supported the protection of transgender women with the definition; they also noted that some transgender women use hormone therapy rather than surgery to grow breast tissue which should be reflected. Stonewall also suggested that transgender men can be victims of downblousing, often where there is an attempt to "out" them and should not be excluded from the offences.

(2) **The chest area of children**. Professor Gillespie suggested that explicitly including images of pre-pubescent breasts may lead to charging under intimate image offences rather than the IIOC regime. South West Grid for Learning also queried the extent to which this would overlap with the IIOC regime. Kingsley Napley LLP disagreed with the proposal and suggested that images of a girl developing breast tissue would be covered by the IIOC offences and therefore it is not necessary for such images to be included in intimate image offences. The Lucy Faithfull Foundation suggested that images of prepubescent children who have not begun developing breast tissue should be included as the IIOC regime may not always cover such images. One consultee asked, "do you really want a discussion in court about whether the victim has started puberty and whether they are or are not developing breast tissue?"[65] The CPS noted:

> Whether a girl has started puberty and is developing breast tissue will be a question of fact in any case brought on that basis. We do not foresee any difficulties with this being part of the definition. The courts are well equipped to conduct a fact-finding exercise as part of the trial process.

Analysis

3.127 It is important that we are as explicit as possible in what we intend or expect to be included in the definition of intimate. While courts may well already interpret the current law to include "female breasts", it still remains important to specify here what should be included.

3.128 We appreciate that there may be an overlap with images that are covered under the IIOC regime, but the behaviour and acts the intimate image offences address are separate. We consider this in more detail in Chapter 14. We note that the CPS do not foresee any issues with including such images in the definition of intimate for these offences. We also note that the Lucy Faithfull Foundation consider that this definition of intimate may offer greater protection of some images of children. Where the taking or sharing of an image could be prosecuted under either the intimate image offences or IIOC regime, as is the case now, it will be a decision for the prosecutor which is

---

[65] Gregory Gomberg, personal response.

more appropriate in an individual case. Therefore we do not think that images of the chest area of girls who have started puberty and are developing breast tissue should be excluded from this definition.

3.129 Consultation responses that further considered the impact of our proposals on transgender and non-binary people have demonstrated the need for a purposive interpretation of "female breast". A broad approach to defining such terms is appropriate. We note that the Law Reform Commission for the Australian state of Victoria have recently recommended that the definition of "intimate image" for their intimate image offences should be defined so that it "applies to people of diverse genders, including transgender people and intersex people".[66] We are still of the view that the male chest area does not need to be included in intimate image offences. It is commonly seen in public and it is not sexualised in the same way as female breasts; images of male chests are not intimate in the same way as images of female breasts. We recognise that female chests may or may not include breast tissue; breasts may grow naturally, or as a result of hormone treatment or be created or enhanced by surgery. The absence of female breast tissue may also be the result of hormone treatment or surgery. Cis-gendered, transgendered, and non-binary people may all have had treatment that altered their breasts and the amount of breast tissue present. A cis-gendered male chest area should not be included in the scope of intimate image offences for the reasons we discuss above at paragraph 3.122. A trans man may have some female breast tissue but, in the same way as cis-gendered men who may have breast tissue, it would not prevent them from exposing their chest in public. We consider that a test that excludes nude and partially-nude images where they are of a kind that are ordinarily seen on a public street would achieve this distinction. We further consider this test from paragraph 3.266 below but note here that it is a concept already relied upon, in a slightly different formulation, in the voyeurism offence.

Conclusion

3.130 We consider that for the purposes of intimate image offences, the definition of nude and partially nude which includes breasts should include the chest area of: trans women, whether they have breast tissue or not, and regardless of whether any breast tissue is the result of hormonal or surgical treatment; women who have undergone a mastectomy; girls who have started puberty and are developing breast tissue; non-binary people and trans men who have female breast tissue. As we explain in more detail from paragraph 3.266 below, any such images would be excluded from the scope of the offence if they only show something that is ordinarily seen on a public street.

---

66 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, (September 2021) Recommendation 52.

Recommendation 3.

3.131 We recommend that the definition of nude and partially nude should include female breasts and female breast tissue, which would include the chest area of:

(1) trans women, whether they have breast tissue or not, and regardless of whether any breast tissue is the result of hormonal or surgical treatment;

(2) women who have undergone a mastectomy;

(3) girls who have started puberty and are developing breast tissue; and

(4) non-binary people and trans men who have female breast tissue.

Underwear

3.132 Definitions of nude and partially nude necessarily include underwear images. We have discussed at paragraph 3.86 above why images where genitals, buttocks or breasts are covered by underwear should be included in a definition of intimate. We now need to address what is meant by "underwear". Clearly it means anything that is acquired as, and consistently worn as, underwear. There are also items such as swimwear, gym shorts, or crop tops that can be worn by themselves, or as underwear. In the consultation paper we discussed the case of *Police Service for Northern Ireland v MacRitchie*[67] in which the Court of Appeal of Northern Ireland decided that swimwear can sometimes be worn as underwear for the purposes of the voyeurism offence where, for example, bikini bottoms are worn instead of knickers.[68] We concluded that swimwear can be worn as underwear, even when it is also worn as swimwear. If a woman wears a skirt over bikini bottoms, planning to discard the skirt when she arrives at the beach, while she is wearing the skirt the bikini bottoms are being worn as underwear. If someone takes an upskirting picture of her before she arrives at the beach, that should be covered by an offence even if she was later planning to wear just the bikini at the beach. Further, we concluded that the presence of clothing worn over the top at the time of the image is not determinative. We described a woman who wears gym shorts and a crop top as all of her underwear is in the laundry. She plans to put clothes on over the gym shorts and crop top later, to go out to meet friends, but her partner takes a photo of her before she does so without her consent. That behaviour should be captured. She was wearing the gym shorts and crop top as underwear when the image was taken. If instead she was planning to go out just in the gym shorts and crop top, they were not being worn as underwear and such an image should not be covered.

3.133 At Consultation Question 4 we asked:

---

67 [2008] NICA 26.

68 In this case the defendant took an image of a woman in a mixed gender changing room of a public swimming pool. The woman was wearing swimwear when the photo was taken but she was in the process of changing into underwear. The court therefore said that she was not at the time wearing the swimwear as underwear as she was in fact changing into underwear.

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?

Consultation responses

3.134 The majority of consultees who responded to this question agreed with our proposal (37 out of 43). Refuge submitted it would "avoid arbitrary distinctions in the law". Dr Bishop commented that "the act/behaviour, mental state, and harm are the same and the concept [of underwear] itself is rather ambiguous".

3.135 Professor Keren-Paz suggested that the context also makes a garment akin to underwear, for example only exposing it when in a cubicle.

3.136 The West London Magistrates' Bench recommended including a list of examples intended to be covered. Ann Olivarius suggested that the underwear definition should include "intimate garments that might not ordinarily be worn or classified as underwear, such as lingerie and revealing clothing typically worn in 'boudoir photography' as well as (in certain circumstances), 'tights'". M Tunmore, personal response, commented that "underwear" should be broadened to include any clothing that was not intended to be seen.

3.137 Some consultees[69] considered whether the definition should include anything worn underneath "outerwear". Professor Gillespie added that "the type of garment is less important than the fact that [it] is 'under' something". He gave an example of upskirting where both underwear and shorts were worn underneath a skirt and neither were ordinarily visible.

3.138 The CPS submitted that the definition needs to address the fact some people choose to wear underwear in a visible way in public.

3.139 Two consultees who disagreed were concerned that the concept could be too broad. The British Transport Police suggested that "any garment" may be too broad for these offences. Kingsley Napley LLP queried whether pyjama bottoms and shorts being worn as underwear would be captured as that would present difficulties. Garden Court Chambers Criminal Law Team also suggested nightwear could pose difficulties.

3.140 During consultation, Stonewall queried whether binders (items designed specifically to bind body parts to change their appearance, most commonly chest binders for trans men and non-binary people to bind breasts and reduce their appearance) would be covered by the definition of "underwear".

Analysis

3.141 The comments in support of the proposal highlight the importance of capturing any garments worn as underwear. Items such as lingerie and nightwear could be included in this definition of "items worn as underwear". Nightwear itself cannot always be deemed "intimate". It can include items that are worn as underwear. It can also include items akin to clothing (such as pyjamas or t-shirts and shorts) which are not sufficiently intimate to include in the definition for these offences. If nightwear is simply

---

69 Gregory Gomberg, personal response; Professor Alisdair Gillespie.

being worn as clothing to sleep in, that will not be sufficient. It will be a question of fact in each case whether a particular item *was* being worn as underwear; it would not be appropriate to try and limit which garments *could* be worn as underwear. This risks the law becoming outdated and creating arbitrary distinctions. The context in which a garment is being worn can be part of this consideration. For example, someone showers in a gym then puts on gym shorts and wraps a towel around them to walk from the shower to a changing cubicle. They only remove the towel when inside the changing cubicle. It can be argued that the gym shorts were being worn as underwear as they chose to cover them with a towel while in an area with other people.

3.142 This means that a wide range of garments could be worn as underwear, but it is only when they are being worn as such that they will be included in this definition. Similarly, where an item that is commonly understood to be underwear is being worn as outer clothing (for example a bra being worn as a top) this would not be covered by the definition.

3.143 Binders[70] come in many forms; usually they are worn to cover private body parts under clothing and are not intended to be visible. Binders could be items that are worn as underwear for the purpose of these offences.

3.144 We considered whether the fact something is being worn underneath outerwear is a better definition than "anything worn as underwear". Consider, for example, wearing underwear and shorts underneath a skirt; behaviour we understand can be common amongst schoolgirls who wear a skirt as part of their uniform and want to avoid their underwear being seen. Should taking or sharing an image that captures the shorts worn underneath a skirt be criminalised? The shorts may not always be worn as underwear (indeed in this example they are worn over the underwear). Take another example of someone taking "upskirting" photos of women on a bus. One woman is wearing both shorts and underwear under her skirt; the other is just wearing underwear under her skirt. The behaviour and intent of the perpetrator is identical but only one of the photos (of the woman without shorts on) would meet our provisionally proposed definition and therefore be captured by the offences. They would both be covered if the definition was "anything worn underneath outer clothing" or similar. However, this definition poses other problems; it would not apply to the example at paragraph 3.141 above as she was not wearing any clothing over her gym shorts. The shorts were, however, being worn as underwear at the time the image was taken. It could also include items worn underneath outerwear even if they are not intimate, for example a t-shirt worn over underwear, but underneath other layers of clothing. In the example above, while the perpetrator's conduct is equally culpable in relation to both victims, that does not necessarily lead to the conclusion that the definition of an intimate image should not distinguish between them, provided that culpability is recognised elsewhere by the law. In relation to the victim who is wearing shorts over her underwear, this conduct would be better captured by an offence of attempted taking, or of operating or installing equipment in order to commit a taking offence. We consider these behaviours in Chapter 4. It is therefore unnecessary to include such images in the definition of "intimate" in order to address this particular behaviour. We

[70] See para 3.140 above.

therefore base the definition on whether the item of clothing is being worn as underwear, rather than whether it is underneath other clothing.

Recommendation 4.

3.145 We recommend that any garment which is being worn as underwear should be treated as underwear for the purpose of an intimate image offence.

Images edited to appear less nude or partially nude

3.146 We are aware that intimate images are sometimes edited before they are shared so that genitals, buttocks or breasts are less, or not, exposed. This could be done, for example, by placing black strips over the pubic region or chest area before printing a photo in a newspaper. It can also be done by the person depicted. We heard examples of teenagers who place emojis over their nipples, breasts, buttocks or genitals before sharing images of themselves.[71] In the consultation paper we considered that these images should be captured by the definition of nude or semi- (now partially) nude, although there will be examples where the editing has rendered an image no longer nude or partially nude. For example, if instead of placing black strips over just the pubic and chest area, a large black box was placed over the body so just the head and legs were visible. The original image was nude but the edited image cannot be said to show the person depicted as nude or partially nude. We provisionally concluded that where the editing (for example the black strips) covers the person depicted in a way that is similar to underwear, this should be included in the definition of nude and partially nude.

3.147 In Consultation Question 5 we asked:

> 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?

Consultation responses

3.148 The majority of consultees who responded to this question agreed with the proposal (36 out of 40). Some consultees, including Refuge and #NotYourPorn expressed "strong" agreement. Lawyer Honza Cervenka submitted that "this is an important factor in closing loopholes in the current legislation". Many consultees noted the consistency in harm caused[72] and violation of sexual autonomy that such images represent.[73]

3.149 Bumble conducted an opt-in survey in April and May 2021 of 1,011 Bumble app users:

---

71 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.54.

72 Including End Violence Against Woman Coalition and the Faith and VAWG Coalition; Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society); and Dr Charlotte Bishop.

73 Including Refuge and Professors Clare McGlynn and Erika Rackley.

Our data shows that 85% of women and 66% of men surveyed considered images that had been altered but leave the victim similarly exposed as if they were nude or semi-nude (e.g. deepfake images or photo editing/alteration) to be an intimate image.

3.150 The CPS agreed with the rationale for including such images but raised concerns as to how it would be implemented consistently in practice. They noted that "images can be altered in many different ways and the comparison with wearing underwear may not always be helpful".

3.151 Professor Thomas Crofts suggested that only images where the relevant body parts are still visible or discernible should be included. Professor Gillespie warned that our proposal may broaden the definition of an intimate image too far and queried whether an image where emojis cover the breasts and genitals is an image in which someone is as exposed as if wearing underwear.

Analysis

3.152 Most consultees supported this proposal and acknowledged the harm caused by the behaviour. If we did not include such images, it could incentivise the editing of images to escape criminal liability, leaving victims unprotected even where an image still shows them as partially nude.

3.153 Consultees queried whether images that are altered in this way can always be said to leave the victim exposed and as if wearing underwear. This was not the intention of our proposal. Our proposal aimed to include altered images if the altering leaves the victim as exposed as they would be if they were wearing underwear. We considered in the consultation paper that images of someone wearing underwear are sufficiently private and intimate to include in intimate image offences, as they are with upskirting and voyeurism offences currently. This is because images do not have to show bare breasts or genitals to be considered sufficiently intimate. Where they are covered by something other than underwear, the image could be equally private and therefore harmful to have shared without their consent. Editing tools enable images to be altered to cover some or all parts of the body. Not all editing will make someone appear like they are wearing underwear, but editing often covers the private body parts like wearing underwear does. We do not expect the comparison to underwear to be literal; it is a recognition that underwear offers a level of protection against intimate body parts being fully exposed, as some editing does. The comparison to underwear helps identify the limit to which this should apply; where editing hides more of the body than underwear would (for example bare shoulders and bare hips are hidden), this should not be captured.

3.154 The Bar Council noted a potential gap in our provisional proposals. We provisionally proposed including images that are altered but leave the victim similarly exposed as if they were wearing underwear. The Bar Council asked whether we intended to include images where the victim is similarly exposed, but as a result of something in "real life" rather than by altering; for example in a bath where foam or an arm covers the genitals. We agree that the arguments for including altered images apply equally here. Nude and partially nude should include images where the person is as exposed as if they were wearing underwear whether in the original image (such as being covered by an arm) or by altering. This would not extend to images of someone wearing clothing

or swimwear (unless worn as underwear). The comparison with underwear is not because of the layer of material over the relevant body parts, but a recognition that someone who is only wearing underwear is in a more intimate situation. Additionally, most swimwear or clothed images would be carved out of the offence by the public element test (which will exclude from intimate image offences some images of someone who is voluntarily nude or partially nude in public).

3.155 This provision will allow courts to decide on the facts of individual cases, considering the images individually, whether any editing, angle of the photo or placement of an object or body part has left the victim as exposed as if wearing underwear.

3.156 While considering this, we identified another possible gap in our provisional proposal. Images should also be covered if they are altered to leave the victim *more* exposed than if they are wearing underwear. The comparison to underwear is an upper limit to which an altered image can be considered nude or partially nude.

Recommendation 5.

3.157 We recommend that the definition of "nude or partially nude" should include images which show the victim similarly or more exposed than they would be if they were wearing underwear. This includes images that have been altered to appear similarly or more exposed.

Conclusion

3.158 In this section we have considered what should be included in a definition of nude or partially nude. The definition that we now recommend will include the relevant images resulting from downblousing, without requiring a separate definition. We also intend it to include: images where breasts, buttocks or genitals are covered by anything being worn as underwear; images where the victim is similarly or more exposed than they would be if they were wearing underwear (whether or not by alteration of the image); and images of female breasts and female breast tissue (excluding images of male chest area and the chest area of young children pre-puberty).

3.159 Nude or partially-nude images should include images which show all or part of the person's genitals, buttocks or breasts (whether exposed or covered by anything being worn as underwear or similarly or more exposed than if wearing underwear), unless what is shown in the image is ordinarily seen on a public street. This will exclude, for example, images of an adult male chest, or the cleavage of a woman who is wearing a top that shows cleavage. We explain this test in more detail from paragraphs 3.266 below.

3.160 This definition applies to the image, and not the person depicted. The image will be nude or partially nude if it shows all of or part of a person's genitals, buttocks or breasts. The person in the image does not have to be categorised as nude or partially nude.

Recommendation 6.

3.161 We recommend that the definition of an intimate image should include nude and partially-nude images, defined as images of all or part of a person's genitals, buttocks or breasts, whether exposed, covered with underwear or anything being worn as underwear, or where the victim is similarly or more exposed than if they were wearing only underwear.

Private

3.162 Both the voyeurism and disclosure offences use the term "private" when defining the relevant images. As described at paragraph 3.24 above, the disclosure offence requires an image to be both private and sexual; all the images that are currently captured by that offence would fall into our categories of sexual, nude or partially nude. The voyeurism offence captures images of someone "doing a private act". This is defined as an image of someone in a private place and their genitals, buttocks or breasts are exposed or covered only with underwear, or they are using a lavatory, or they are doing a sexual act that is not of a kind ordinarily done in public.[74] Images of genitals, buttocks or breasts would be caught by our definition of nude and partially nude. Images of a sexual act would be caught by our definition of sexual. This leaves only images of someone using a lavatory (where their genitals, buttocks or breasts are not visible). We therefore provisionally concluded in the consultation paper that "private" images would include toileting images. We also considered whether any other acts such as undressing or showering should be caught by the intimate image offences; this is discussed from paragraph 3.189 below.

3.163 At Summary Consultation Question 7 we asked:

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

Consultation responses

3.164 The majority of consultees who responded to this question agreed with our proposal (242 out of 258). Many who commented explained that toileting is an inherently or "plainly" private act[75] and that images of it are intimate.[76] Consultees expressed support for a definition of intimate that is beyond just "sexual".[77]

3.165 Consultees described the relevance of the fact that toileting usually happens in a private place, behind closed doors. Linda Mooney, personal response, suggested that

---

74 Sexual Offences Act 2003, ss 68(1)

75 Corker Binning; My Image My Choice; North Yorkshire Police Fire and Crime Commissioner and North Yorkshire Police; Anon 133; Sarah-Jane Moldenhauer; Ann Dixon; West London Magistrates Bench; Anon 121; Anon 118; Steven Gore; Nicholas Lloyd; Sophie; Anon 84; Joanne Clark; Clive Neil; Keith Allardice; Mary Robertson; Anon 53; Lauren White; Max Firth; and Jacolyn Daly.

76 North Yorkshire Police Fire and Crime Commissioner and North Yorkshire Police; Ksenia Bakina; Teresa Knox; Mr M Butler; and Anon 48.

77 Anon 136; Anon 137; Anon 44; Anon 23.

toileting is a behaviour that people would not "normally agree to other people observing". The Centre for Information Rights submitted that there is always a reasonable expectation of privacy attached to the act as it takes place in a designated area. Consultees also described the harms associated with toileting images. Ksenia Bakina suggested such images cause "substantial" harm.

3.166 Ruby Compton-Davies, personal response, suggested that the attitude to sharing toileting images, even as a joke, needs to change and that the law could assist with this, but also warned there might be a risk of overcriminalisation.

3.167 Some consultees qualified their support by suggesting that only some toileting images should be included. Victims of Image Crime ("VOIC") suggested that images that include intimate body parts or "graphic" content should be covered. Anon 78, personal response, suggested that images either of, or suggestive of, genitals or bodily fluids should be covered. Gerry Bean, personal response, disagreed with the proposal and suggested that toileting images should only be included if there is a "sexual connotation". In their joint response, The Angelou Centre and Imkaan suggested that only images that include genitals, buttocks or breasts should be covered by an offence and warn against diluting the law with too broad an interpretation of "intimate".

3.168 Consultees queried what acts would be included under "toileting". John Page, personal response, submitted that brushing teeth shouldn't be covered but urinating and defecating should.

3.169 Corker Binning noted the "limited scope for over prosecution" of toileting images especially in respect of young people who may not understand the implications of their actions. The Youth Practitioners Association noted that, in their experience, toileting images are part of the "immature humour" of boys in particular, and not seen as sexual.

Analysis

3.170 There is significant support for including toileting images in a definition of "intimate". Beyond the fact that they are currently included in the voyeurism offence, consultees considered that the act of toileting is sufficiently private to warrant protection in this way. A number of consultees raised queries about the scope of toileting images that require further consideration.

3.171 Some consultees suggested that the act of toileting is inherently private as it takes place somewhere private or in a designated area (see paragraph 3.165 above). This is not always the case. Public urination, in particular male public urination, is a relatively common sight. Intimate images that are taken in a public place may be excluded from the offences by our recommended "public element" test that we describe in Chapter 10. However, that test will only apply to images that are actually taken in a public place, and not images that may show something ordinarily seen in public but taken somewhere more private, such as a toilet cubicle.

3.172 Some consultees suggested that toileting images should only be included if the image also shows genitals, buttocks or breasts. This would be a narrower definition than the current voyeurism offence which does not require any particular body part to be visible if someone is using the lavatory. We consider that most acts of toileting are so

inherently private that any images depicting them should be included, regardless of what parts of the body are visible. If we consider a photo of a woman using a toilet taken from the side; even with her trousers pulled down, her breasts, genitals and buttocks are not visible as they are covered by her clothing. It is obvious from this image that she is using the toilet. This is the type of image that the voyeurism offence intended to capture; it is no less harmful because her buttocks are not visible as they might be if she had stood up to urinate. The violation of her privacy and potential for harm caused are sufficiently similar to taking or sharing other types of intimate images. Toileting images can be considered sexual, but not always, and the harm caused does not rely on them being considered so.

3.173 However, we do consider that some toileting images are less inherently intimate. If they do not also show any genitals, buttocks or breasts they may not be harmful enough to warrant criminalisation. If we consider an image of a man standing up to urinate; the image is taken from behind, his coat covers him down to his knees, it is clear he is standing at a urinal and is urinating. This image would be covered by our provisional proposal. However comments from consultees have caused us to reconsider whether this is sufficiently harmful, or a serious enough violation of his privacy to warrant criminalisation. This image shows a type of toileting that is seen on a public street (such as urinating against a wall or tree, or at a street urinal); it does not show any private body part. We are of the view that such images should not be covered by an intimate image offence. They are less intimate because the image shows only what is ordinarily seen on a public street. We therefore recommend that only toileting images of a kind not ordinarily seen on a public street are included in the definition of intimate. This is based on a well-understood test, similar to that used in the voyeurism offence. We therefore consider that it is an appropriate way to distinguish the type of toileting images that should be protected by intimate image offences. We have explained above at paragraph 3.129 how the test would help clarify which images of "breasts" should be included in intimate image offences. We also consider the test in more detail from paragraph 3.266 below.

3.174 It is not necessary to restrict such images on the basis of body parts visible. Where buttocks, genitals or breasts are exposed they would be caught by the definition of partially nude. Therefore if the image of the man at the urinal was taken from the side and his genitals were visible, this should be caught by an offence, and would be by virtue of the definition of partially nude.

3.175 We acknowledge that this limitation means that fewer toileting images would be included than are currently in the voyeurism offence. Recording an image of someone using the lavatory in a place in which they could reasonably expect privacy is currently included in the scope of the voyeurism offence, regardless of what is visible in the image. Our recommendation would exclude a narrow range of images currently included.[78] We think this limitation is appropriate and justified. Consultees have submitted that not all toileting images involve a privacy violation worthy of criminalisation and we accept that some toileting images are not sufficiently intimate that they should be protected by these offences. We note though that where someone

[78] Though a wider range of toileting images may be included, the voyeurism offence is narrower in scope than our recommended offences. Currently, recording someone using the lavatory is only an offence if done with the purpose of someone looking at the image with the intent of obtaining sexual gratification.

records an image of someone using the toilet, if the resultant image is not intimate for the purposes of these offences, they may still be charged with an offence of attempting to take an intimate image.

3.176 We agree with consultees that further definition of what is meant by “toileting” would be helpful. A clear definition can also help mitigate risks of overcriminalisation. Urination and defecation should obviously be included. But should they be the extent of toileting? Associated behaviours such as changing a catheter, incontinence pads, or colostomy bags are similarly private and intimate such that images of them could cause similar harm. This is also true for personal care associated with other forms of intimate discharge such as genital or anal bleeding, menstruation or discharge associated with pregnancy or childbirth. We consider that behaviours associated with genital or anal discharge such as changing sanitary products should be included. This could be described as “personal care associated with genital or anal discharge, urination and defecation”.

3.177 The current voyeurism offence includes images of someone “using a lavatory”. We intend to include all acts that would be considered “using a lavatory” but do not want to limit the definition to images taken of such acts only where they occur while the person depicted is using a lavatory. Toileting is a helpful word that succinctly captures many of these behaviours but should not be narrowly interpreted so that only behaviours that take place in a toilet are captured. For example, if a bedpan is used instead of a toilet, this should be captured. Toileting reflects the acts, not the place.

3.178 When discussing “personal care” we also considered images of medical procedures such as changing a dressing, or kidney or diabetes mechanisms. Where these include personal care associated with toileting or genital or anal discharge, they should be included, but if not, they would stretch the definition of “intimate” unduly. Where images of medical care, such as the changing of a dressing after a caesarean, or anal suppositories, show the genital or buttock area, these will be partially-nude images and fall within the scope of the offences.

3.179 We also considered images of someone who has soiled themselves. This would significantly expand the definition of intimate. If someone is in the act of toileting and that is only evidenced by soiled clothes (for example a video of someone who is urinating inside their clothes and the image shows a spreading stain), this could be included. It would be a matter for the court to determine if someone is “in the act” of toileting. An image taken or shared without consent of someone who is clothed, but in stained, soiled clothing, is reprehensible but not criminal. Arguably this is also something ordinarily seen in public. We acknowledge that it can be very harmful. We have considered an example of an image of a girl with visible menstrual blood on her clothing shared amongst her class to humiliate her. This could be very humiliating and distressing, however what is depicted in the image is not sufficiently private or intimate to be considered an intimate image. Instead, the communications offences may be better placed to address such harmful and culpable conduct.

Recommendation 7.

3.180 We recommend that the definition of an intimate image should include toileting images, defined as images of a person in the act of defecation or urination, and images of personal care associated with genital or anal discharge, defecation or urination.

Including toileting in both taking and sharing offences

3.181 Toileting images are currently only explicitly included in the voyeurism offence. The disclosure offence would only apply to toileting images if the genitals or pubic area are exposed or partially exposed. Therefore, currently it is an offence to take an image without consent of someone using the toilet, but not an offence to share it without consent. In the consultation paper we provisionally concluded that this was an undesirable inconsistency and that toileting images should be captured by both taking and sharing offences.

3.182 At Consultation Question 9 we asked:

> We provisionally propose that "private" images should be captured by a sharing offence as well as a taking offence. Do consultees agree?

Consultation responses

3.183 The majority of consultees who responded to this question agreed with our proposal (35 out of 38). No consultees disagreed (3 responded neutrally). Consultees including Refuge and #NotYourPorn submitted that this would address a gap in the current law. #NotYourPorn referred to the prevalence of "spycamming" which involves covertly taking private images, often in public toilets, and their subsequent sharing, often to large audiences. Consultees[79] also considered that sharing private images can be more harmful than taking them.

3.184 South West Grid for Learning, Professor Gillespie and Ann Olivarius considered the different nature of the behaviours of taking and sharing. They reiterated the need to clarify that consent is required for each act; that consent to taking is not consent to sharing.

Analysis

3.185 34 out of the 38 responses on the issue were in support of our proposal. There is no justification for repeating the inconsistency created by the current law. It is appropriate that private images are included in both taking and sharing offences, as all other types of intimate images will be. We agree that consent is specific to each act. Consent to taking is not and should not be considered consent to share the image. Consent is further considered in Chapter 8.

---

[79] Including Professor Keren-Paz; Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society); Dr Bishop; Professor Gillespie; Muslim Women's Network UK; The Bar Council; the CPS; and HM Council of District Judges (Magistrates' Courts) Legal Committee.

3.186 We therefore recommend that images that fall under the definition of "toileting" should be captured by a sharing offence as well as a taking offence.

Recommendation 8.

3.187 We recommend that it should be an offence to take or share, without the consent of the person depicted, an image that falls within the definition of "toileting".

3.188 We will now consider whether any other "private" acts should be included.

Undressing, showering, and bathing

3.189 Current intimate image offences include sexual, nude, partially-nude and toileting images. Other jurisdictions also include a wider range of "private" images. For example, the distribution offences in New South Wales, Western Australia and the Australian Capital Territory also include images of an individual in a state of undress, showering or bathing. In the consultation paper we discussed whether any such "private" images should be included. Where showering, bathing or undressing images show private body parts exposed or covered by underwear, they would fall under the definition of nude or partially nude and would not therefore require a separate category. In the consultation paper we considered whether images of such acts should be included, regardless of how much of the body is visible. We discussed the following examples:

> Clare is getting changed in a shared hostel dormitory. Peter is staying in the same room as Clare, and he notices her getting changed. He tries to take a picture of Clare in her underwear, but Clare notices and quickly covers herself with the t-shirt she was about to put on.
>
> Melissa is showering in a festival shower block. The shower cubicles are frosted glass, so anyone outside the cubicle can only make out the outline of Melissa's body, but the glass stops at her neck so her head is fully visible. Alessandro takes a picture of Melissa from outside the cubicle.

3.190 The images would clearly show that Clare and Melissa were undressing and showering, but without any private body parts exposed would the images be sufficiently intimate to warrant protection of an intimate image offence? We noted that Peter's behaviour could be caught by section 1 of the Criminal Attempts Act 1981, if his actions were "more than merely preparatory" to the taking of a nude or semi-nude image of Clare, although this would not necessarily capture Alessandro's behaviour. We also noted that we had not heard evidence from stakeholders about this behaviour and concluded that more information was needed to inform our view. We therefore asked, at Consultation Question 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?

3.191 We then asked for consultees' views on whether they should be included. At Consultation Question 8 and Summary Consultation Question 8 we asked:

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?

Consultation responses

Examples and harm

3.192 Consultees provided examples of images similar to those we discussed in the consultation paper relating to bathing and showering. These included images of someone wrapped in a towel exiting a shower, in a bath where breasts and genitals were covered by foam or an arm, showering behind a door that only covered the middle of the body, or showering in swimwear. Other examples described states of undress such as being nude in bed but with a duvet covering parts of the body.

3.193 #NotYourPorn explained that there are entire categories of pornography based on hidden cameras located in public bathrooms, changing rooms, swimming pools, and ponds. The cameras tend to remain in place for long periods of time thus the state of undress of those depicted will vary throughout the footage.

3.194 Some consultees raised examples that would be covered by the current definition of intimate; for example images of someone fully clothed or covered while masturbating[80] (sexual) or urinating not in a toilet (toileting).[81]

3.195 Consultees also suggested images that are "private" but are not a state of undress, bathing or showering. Examples include images of personal medical equipment being changed or cleaned;[82] images of someone's buttocks, genitals or breasts when clothed[83] (such as "creepshots" as described at paragraph 3.92 above);[84] and images taken through a bathroom window.[85]

3.196 Consultees provided insight into the harm caused by the non-consensual taking or sharing of these kinds of images. Refuge suggested that the behaviour causes "significant harm" to the person depicted. The following types of harm were raised by consultees:

---

80 Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society).

81 Dr Aislinn O'Connell; Professor Tsachi Keren-Paz.

82 Ann Olivarius.

83 Anon 21, personal response.

84 Centre for Information Rights.

85 Anon 2, personal response.

(1) humiliation or embarrassment;[86] often coupled with loss of privacy,[87] anxiety or distress;[88]

(2) damaging impact on professional or social life;[89] and

(3) emotional and psychological harm including low self-worth.[90]

3.197 Consultees argued that it would be inappropriate to distinguish between these images and other intimate images as the harm to victims is similar. Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) submitted that an intimate image "would expose the subject to the same harms… whether or not the breasts and vulva were exposed". Ann Olivarius argued that "it is not useful to associate certain types of harm exclusively with certain genres of intimate photos". Muslim Women's Network UK considered that all types of images "need to be treated with equal seriousness".

Should they be included in intimate image offences?

3.198 In response to Consultation Question 8 and Summary Consultation 8, the majority of consultees agreed with including such images (237 out of 293).

3.199 The key reasons given for supporting inclusion were:

(1) Respect for the privacy of the person depicted in the image. Consultees submitted that the acts depicted are private which should give rise to a level of protection against images being taken or shared without consent. The Centre for Women's Justice stated that showering and bathing is "by definition a very private act", thus those depicted are "likely to feel vulnerable and humiliated whether or not their private parts are visible in the image". HM Council of District Judges (Magistrates' Courts) Legal Committee stated that "a person who is showering is entitled to expect a level of privacy, even if they are not exposing their genitals etc." Lionel Harrison, personal response, stated that "[l]ike toileting, bathing is an intimate activity even if genitals, buttocks, and breasts are not exposed. Therefore, sharing such images should be considered a violation".[91] West London Magistrates' Bench argued that a distinction should not be drawn between these images and completely nude images as "there is very little difference … as regards what can be seen". Conversely, Garden Court Chambers Criminal Law team submitted that "although showering and bathing may be private acts to be protected, this will not always be the case".

---

86 Refuge; British Transport Police; Amber Daynes, personal response.

87 Dr Aislinn O'Connell.

88 British Transport Police.

89 Backed Technologies Ltd; Refuge.

90 Magistrates Association; #NotYourPorn.

91 Also Mr M Butler, personal response: "Bathing is an intimate act, therefore any image of such is an intimate image"; and Clive Neil, personal response: "I think most people would consider that bathing or showering is an intimate/private act."

(2) Absence of consent. North Yorkshire Police, Fire and Crime Commissioner and North Yorkshire Police submitted these images should be deemed intimate if taken or shared without the consent of the person depicted. Some responses suggested that any image shared without consent should come within the definition of intimate regardless of whether body parts are exposed.[92]

(3) Harm to or impact on victims. Professor Keren-Paz highlighted that "[m]any people have body image issues so would not like to be seen when not fully covered even if the image does not reveal breast[s,] buttocks or genitals" and that failing to criminalise this behaviour "gives the takers and sharers of these images power over the victims" and "adds to the feeling of humiliation" experienced by the victim. Suzy Lamplugh Trust recognised that while the type of image described in this question may not appear "as 'serious as others'" for some people, it could have a "devastating" impact for the victim and should therefore be included.

3.200 A significant number of consultees did not think that these images should be included in the definition of intimate.[93] The main concerns raised were that including these images would make the definition of "intimate" too broad, vague, or unclear; and that these images are already covered by existing offences. Professor Gillespie stated that doing so "could turn the offence into an offence of sharing a photograph without consent, which is too broad an offence for the criminal law". Professor Crofts noted his concern "that including such images within the definition would present a wide definition and the danger of overreach of the criminal law".[94] Professors McGlynn and Rackley suggested that while harmful and abhorrent behaviour, they are not sufficiently criminal. They, along with Professor Gillespie, the Angelou Centre and Imkaan, and Garden Court Chambers Criminal Law team suggested that other offences could apply including harassment offences,[95] criminal attempt,[96] or when shared, the communications offences.

3.201 Slateford Law noted that they "do not have cause to believe that such imagery has been complained of as intimate, and therefore [they] do not feel strongly that this need be within the definition of an intimate image". Garden Court Chambers Criminal Law team similarly stated that there does not seem to be evidence of these images being prevalent.

3.202 The Youth Practitioners Association and law firm Corker Binning had particular concern with the term "state of undress" suggesting it is too vague for an offence.

3.203 Senior District Judge (Chief Magistrate) Goldspring noted that "context and any expectation of privacy" are important to consider when categorising an image as

---

92 Anon 41; Anon 64; Sarah-Jane Moldenhauer, personal responses.

93 Including Professor Alisdair Gillespie; Professors Clare McGlynn and Erika Rackley; Kingsley Napley LLP; Slateford Law; Corker Binning; and Youth Practitioners Association.

94 Thomas Crofts did not oppose including such images but proposed mitigating the potential overreach with additional conduct elements, amending the fault element, or providing liability exemptions. These options are considered throughout this report.

95 Protection from Harassment Act 1997, ss 2 and s 4 (where there is a course of conduct).

96 Criminal Attempts Act 1981, s 1.

intimate: “someone who decides to change on a public beach must be considered in a different category to another who is in a locked cubicle at the public baths”. This distinction will be addressed by the public element which carves out images of someone who was voluntarily nude or partially nude in public. We discuss this in full in Chapter 10.

Analysis

3.204 There was support for including private images of the kind described in the consultation paper and in consultees’ responses. The responses referred to a wide range of images that could be considered private and their associated harms; including images that would in fact already be covered by our recommended definition of intimate (whether sexual, nude, partially-nude or toileting images). Therefore this support is not exclusively support for including images that are not already within the definition of intimate. The harms discussed in paragraph 3.199 above mirror the harms caused by images that are deemed “intimate” under our definition. However it was not always clear with which type of image the harms are associated; some consultees who gave views on harm did not provide any examples of images and some provided examples that would already be covered under our definition of intimate.

3.205 Within the responses there are additional categories of images with support for inclusion: images of someone doing a private act; images where there is no consent regardless of the nature of the act; images the victim deems intimate.

3.206 Images of a private act. This category had the most support. We agree that there is some privacy attached to acts such as showering or bathing but consider that this attaches to the nudity involved rather than the act itself. It is different from toileting in this way. People toilet while dressed and where most of the body is not visible to others. It is still intrinsically private. One could shower fully dressed, or in a swimsuit and it would be a less private act than showering nude. This is echoed by Professors McGlynn and Rackley who submitted that “the practice of toileting is a particularly intimate and private act and images taken without consent of such practices not only breach [a] person’s privacy, but also their dignity”. Similarly with sleeping images, sleeping does have a level of privacy but people sleep in states of dress and undress in public and private. The act itself is not sufficiently private to warrant the protection of the criminal law. We do note from the responses that where there is a level of nudity or partial nudity, these acts become more private. We also agree with concerns about creating too broad an offence and definition of “private”. We think therefore that such images are better considered as part of nude and partially-nude images rather than private. As we set out in paragraph 3.157 above, we recommend including images where the victim is shown as exposed as or more exposed than if they were wearing underwear. This means that images taken in a bath or shower, changing, or while sleeping could be included even if the breasts, buttocks or genitals are covered, for example, by an arm or bath foam. We consider that this more appropriately targets the most harmful and intimate images of this kind.

3.207 If an image is taken while showering, bathing or sleeping, for example, and the victim is not as exposed as if they were wearing underwear (and the image is not otherwise nude, partially nude or sexual), other offences may apply as identified by consultees at paragraph 3.200 above. We also consider an offence of installing equipment to

record an intimate image in Chapter 4. This would also capture some of the harmful behaviour identified by #NotYourPorn at paragraph 3.193 above.

3.208 Lack of consent. Our proposed offences are premised on the absence of consent. It is not appropriate, however, to criminalise the taking, making, or sharing of any type of image solely because of the absence of consent. This would create a very broad offence that would extend to images that are not in any way intimate, resulting in an oppressive offence that risks criminalising many individuals who lack sufficient culpability and whose behaviour is neither wrongful nor seriously harmful.

3.209 Images the victim deems intimate. Defining intimacy according to the victim's perceptions presents similar issues as identified in paragraph 3.200 above: it broadens the scope of the offence, which may prevent the defendant from being able to foresee whether their conduct will be criminal and risks overcriminalisation.

3.210 We therefore conclude that any "private" images that should be included in an intimate image offence will fall within the categories of "sexual, nude, partially nude (including images where the victim is similarly or more exposed than if they were wearing underwear) or toileting".

Recommendation 9.

3.211 We recommend that an intimate image be defined as an image that is sexual, nude, partially nude, or a toileting image.

Images not currently captured by the existing intimate image offences

3.212 We have now addressed the categories of images that are included in the current intimate image offences, and the appropriate definitions of sexual, nude, partially nude and toileting. There are additional groups of images that would not fall under our recommended definition of intimate, that stakeholders have suggested should be protected by intimate image offences. In the consultation paper we identified these as broadly two types: images that identify someone as LGBTQ+ and images that are considered intimate by particular religious groups. We will consider these in turn.

3.213 In the consultation paper we described two examples provided by stakeholders of images that individuals might deem "private":

(1) A gay person, whose family, friends, or community either do not know that they are gay or do not accept them, pictured kissing, hugging, or holding hands with someone of the same sex.

(2) A fully clothed picture of a trans person taken before they transitioned.

3.214 We are very conscious of the significant, and often unique, harms that LGBTQ+ victims of intimate image abuse experience, which are usually exacerbated by homophobia and transphobia. We described these harms in the consultation paper at paragraphs 5.87 to 5.97. In summary, LGBTQ+ victims may experience emotional distress, ostracisation, victim blaming, online abuse, physical harassment, loss of jobs

and homelessness. Images may be used to "out" individuals who do not publicly disclose their sexuality or the fact they are transgender. This could expose victims to people or environments that are hostile; for example outing them at work where there is rampant transphobia, or to their family who do not accept homosexuality.

3.215 Some stakeholders were supportive of including such images in intimate image offences, primarily by broadening the definition of "intimate" or introducing a subjective element. Some stakeholders disagreed; some raised concerns that subjective definitions make the offences unworkably ambiguous, others argued that the images concerned are not "intimate" in the same way. Acts of "outing" are often motivated by prejudice towards LGBTQ+ people.[97] This prejudice also impacts the harm experienced by LGBTQ+ victims of intimate image abuse. If we consider an image of two people kissing: it is generally agreed in most cases this is not deemed sufficiently sexual to be an intimate image.[98] If those two people were gay and the image was taken and shared to "out" them, the image has not become more sexual. The harm is based on what the image conveys about the people depicted and not its intimacy. The image is a vehicle for the message; the same harm could be caused, and intended, by using something other than an image; for example, sharing a voice recording of a gay couple discussing their relationship, an image of someone attending a Pride event, or sharing a document where someone used a different pronoun. In the consultation paper we concluded that this makes these images qualitatively different from the intimate images that we do think should be included, where the harm arises predominantly or exclusively from the intimacy depicted in the image.

3.216 We did not ask a specific question about this but some consultees shared their views. Dr Aislinn O'Connell stated that images of transgender people that depict them pre-transition should not be excluded where the victim deems such images intimate. She explained that images used to "out" them violate their bodily and gender privacy. Stonewall challenged the suggestion in the consultation paper that such images do not necessarily infringe sexual and bodily privacy. They argued that LGBTQ+ people feel less safe expressing their sexuality in public. Non "sexual" acts such as kissing and holding hands have sexual connotations that are "intrinsically related to violent homophobia in our society". They welcomed the Law Commission review of communications offences[99] where it improves the protection of images of LGBTQ+ intimacy, as well as of trans individuals pre-transition. They highlighted that LGBTQ+ intimacy is relevant to the issue of intimate images for religious groups in that they can both expose the victims to serious harm and social isolation. They urged the Law Commission to identify potential gaps in the current protection and consider the inclusion of these images in the legislation on intimate images, if necessary. Below from paragraph 3.257 we consider the extent to which exposing victims to serious harm in such circumstances is currently criminalised.

---

97 Dr Alex Dymock; Catherine Bewley of Galop. Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 5.89.

98 The Explanatory Notes for the current disclosure offence specify that kissing images may be sexual but are of a kind ordinarily seen in public and therefore should be excluded from the offence. See from paras 3.266 below for further discussion.

99 Modernising Communications Offences: A final report (2021) Law Com No 399.

3.217 We have not heard significant evidence that changes our provisional view. In the responses to this section, and explored throughout this chapter, we have considered responses that argue for a more subjective or broader definition of intimate which could be used to include such images. We have also explained how difficult it would be to expand the definition of intimate while still ensuring that the offences only capture criminally culpable behaviour and are sufficiently clear to enable people to know when they may be committing an offence. Ultimately we have concluded that a clear, objective definition with examples of images that would be included and excluded is the most appropriate way to address the most harmful behaviours for victims of all identities. As Stonewall noted, a law that is "centralised, fit for purpose and future-proofed" is "essential for LGBTQ+ people to be adequately protected, understand their rights and have faith in the criminal justice system". With a subjective definition, the offences could potentially include such a wide range of images that they become impossible to enforce and prosecute, undermining the regime and leaving victims of the most harmful intimate image abuse without protection. We acknowledge that this will leave some victims of harmful behaviours outside the intimate image abuse regime, but this is primarily where the harms and behaviours are of a different quality to most intimate image abuse.

3.218 The intimate image offences with our recommended definition of intimate will still capture some of this behaviour. If an image used to "out" someone is sexual, nude, partially nude or shows toileting it will be subject to our recommended offences. For example, an image of a trans man, pre-transition wearing underwear would be included, as would an image of two men engaged in sexual activity. The offence of taking or sharing an intimate image without consent for the purposes of humiliating, alarming or distressing the victim would be an appropriate charge where there was such malicious intent. The base offence also offers greater protection than the current law for victims of "outing" using intimate images. It can be used where intent could not be evidenced, or where the victim was "outed" for a "joke". Those victims whose images do not fall within our definition of intimate will not be without the protection of the criminal law. Other offences may apply including the communications offences, harassment, stalking, controlling or coercive behaviour, and blackmail.

Images that are considered intimate within certain religious groups

3.219 The current intimate image offences do not include images that are only deemed intimate within certain religious groups, but not by "Western" standards. Such images depict individuals from religious groups, who are not wearing attire that they would usually wear in public for the purpose of modesty (based on religious beliefs) and are exposing body parts that they would not usually expose in public.

3.220 While developing the consultation paper we heard examples from a number of stakeholders of such images being taken and shared without consent, causing harm to the victims. Examples included:

(1) A Muslim woman who wears a hijab when in public pictured not wearing a hijab while in an intimate setting, for instance with a man who is not her husband, hugging or kissing, or with her shoulders and upper chest exposed.

(2) A Muslim woman attending a celebration, pictured dancing, eating, and singing with her stomach exposed.

(3) A Hasidic Jewish woman pictured with the lower half of her legs or her ankles exposed.

3.221 We summarised the experiences and harms caused to these women:

> The non-consensual taking or sharing of such images is wrongful because it violates the victim's bodily privacy, personal integrity and her dignity, and in some cases, her sexual privacy, autonomy and freedom, similarly to the non-consensual taking or sharing of images already protected by the criminal law. Women victimised in these ways report feeling violated, exposed and humiliated. Where the image is shared, or the victim is threatened that the image will be shared with the victim's family, friends or community, victims report being shamed, ostracised, harassed, and sometimes physically harmed. As such, victims suffer similar levels and forms of harm to those experienced when images which are intimate by "Western" standards are taken or shared without consent.[100]

3.222 There was no discussion in Parliament about including such images in the current offences. Scotland did consult on whether to include some such images in their disclosure offence.[101] Despite public support,[102] they ultimately decided against including them, stating that the broad definition it would require "risked perpetuating the very ambiguity in the law which a specific offence is seeking to address".[103] We are not aware of any jurisdiction that includes such images in intimate image criminal offences. There is however specific provision in the Australian civil regime. Section 75 of the Online Safety Act 2021[104] prohibits "posting an intimate image", defined in section 15(4) 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.

3.223 There is an exception if the defendant did not know that the person consistently wears that attire whenever they are in public. The Australian eSafety Commission advised us

---

100 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.107.

101 The Scottish Government consulted on whether an image should fall within the definition of "intimate" if "the person featured in the image and the person sharing the image considered it to be so" which would include images which are private "because of the particular circumstances or cultural beliefs of the person featured in it".

102 79% of consultees: Scottish Parliament, Abusive Behaviour and Sexual Harm (Scotland) Bill: Policy Memorandum (2015) p 7, http://www.parliament.scot/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20(Scotland)%20Bill/SPBill81PMS042015.pdf.

103 Above.

104 Previously section 44B of the Enhancing Online Safety Act 2015, inserted by the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018.

that the Australian Government deliberately chose not to include such a provision in the criminal law, which was being reviewed at the same time this was initially introduced in the civil regime.

3.224 We described in the consultation paper the significant support from stakeholders for including such images in intimate image offences. Many referenced the harm caused to victims, as summarised above. They supported a more subjective approach to the definition of intimate, with most suggesting that these images are seen as "sexual" rather than just "private".

3.225 We also described concerns raised by stakeholders about including such images in a definition of "intimate". Stakeholders warned against widening the scope of the offences as it could be problematic. In the consultation paper we identified additional difficulties. First, it will be difficult to define "intimate" for such purposes. The harmful examples we had been told about showed a greater level of intimacy than simply being pictured without religious dress as described in the Australian civil regime. The example raised most often involved a woman who usually wears a hijab pictured without it, in an intimate setting such as kissing a man, or in bed with bare shoulders or upper chest. We had not heard evidence that an image of a woman without a hijab where only her uncovered hair was pictured, caused the same harm. The wording of the Australian civil regime, above, would not effectively distinguish these if the woman pictured in both was in her bedroom, for example.[105]

3.226 Secondly, we noted that there may not be sufficient awareness amongst the general public that such images are considered sexual or private by religious groups. This could mean: first, that there is not sufficient public condemnation of the behaviour to justify criminalisation; and second, that individuals who take and share such images might not have sufficient knowledge to be criminally culpable. We considered how an offence could ensure that only those who acted with sufficient knowledge and therefore culpability would be caught. There would need to be knowledge that the image was considered intimate by a particular religious group, and culpability by acting despite or because of that knowledge. We suggested that the intent elements of our proposed specific intent and threat offences could achieve this. Where there is an intent to cause humiliation, alarm or distress, or a threat, the defendant would know that the image was considered intimate enough to have the desired effect. Similarly we suggested that where an image is taken or shared for the purpose of obtaining sexual gratification, there is some knowledge that the image is intimate.

3.227 Having considered both the support and the significant difficulties raised by such images, we invited consultees' views on the issue at Consultation Question 10 and Summary Consultation Question 9:

> We welcome consultees' views on whether and to what extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted.

---

[105] Being in one's bedroom is a circumstance in which an ordinary reasonable person would reasonably expect to be afforded privacy, therefore both limbs of the test would be satisfied even where only the uncovered hair is shown.

Consultation responses

3.228 The majority of consultees who responded to these questions provided views that supported the inclusion of such images in intimate image offences (183 out of 219). This includes the majority of victim support groups who responded to the consultation. 19 consultees provided views that did not support including such images. 17 consultees provided views that were neutral.

3.229 Consultees in favour of the inclusion stressed the considerable level of harm that members of religious groups face if a picture considered intimate according to their religious beliefs or cultural norms is taken and shared. Muslim Women's Network UK stressed that "there is a very serious risk of domestic abuse, forced marriage, honour-based abuse, sexual abuse and mental health issues when considering the harms caused by intimate image based abuse".

3.230 Consultees also explained that the inclusion of such images was necessary to ensure the law was inclusive and not discriminatory. The Angelou Centre and Imkaan submitted that "in order to ensure that the law is accessible and non-discriminatory towards victim-survivors and Black and minoritised communities this must be included". Natalie Stone, personal response, argued "the law must be intersectional or risk failing those in cultural groups whose consideration of 'intimate' does not meet a one size fits all standard white British approach". Clive Neil, personal response added:

> The whole point about intimate images is their potential for causing the victim embarrassment, shame, disapproval, ostracisation, etc. This should not be limited by reference to one culture or race. To do so risks rendering the law blind, if not discriminatory.

3.231 The Angelou Centre and Imkaan submitted a case study highlighting the serious impact these images can have:

> A woman that the Angelou Centre was supporting through our VAWG services was subject to high levels of honour-based violence by her immediate family, extended family and wider community after her ex-husband without her consent, shared a photo taken of her with a previous boyfriend. Her boyfriend was not from the same cultural or religious community as her. The photograph showed the woman without a head scarf on, holding a glass of wine whilst having her arm around her boyfriend. There is currently no law that creates criminal accountability for the actions of the woman's ex-husband, despite the awareness that this picture would lead to her being subject to high levels of harm and further abuse which did ensue thereafter.

3.232 South West Grid for Learning shared a case study where a Pakistani woman's husband shared an image of them in bed together where her shoulders and head were uncovered. They explained that the image had gone viral and caught the attention of "Pakistani conservative media outlets in both Pakistan and England" causing significant distress to the woman. She has described the impact it has had on her: "My family won't talk to me. My husband was beaten up because of what he's done and I'm scared to leave the house in case they do the same to me".

3.233 Consultees highlighted that taking and sharing such pictures is often part of a pattern of controlling, coercive and violent behaviour. Perpetrators often exploit victims' fear of

being shamed, or bringing shame to their family, friends, and community, for a breach of what may be considered "honour" according to their beliefs or cultural norms. The joint response from the End Violence Against Women Coalition and the Faith and VAWG Coalition submitted:

> Such images can be understood as an attempt to control, subjugate and threaten victim-survivors by using, for example, (fear of) the shame associated with breaking perceived religious, cultural and faith boundaries, or by using faith and religion as a justification to pose for, send and share such images.

3.234 Consultees provided helpful examples that illustrate the challenges already faced by women from minoritised ethnic groups[106] accessing the criminal justice system and lack of understanding of so-called honour-based abuse. Muslim Women's Network UK shared the following upsetting account:

> In a case study shared in our CJS Report,[107] both social services and the police failed to identify and take action in respect of a clear risk of honour-based abuse in a matter where the potential victim in question had already once been forcibly sent abroad to Kurdistan by her parents after they had found that she had sent a sexually explicit photo to a man she had met online. After being allowed (by her parents) to return to the UK and attend college, she started a relationship with another male student – and her family threatened to kill her. Although the MWN Helpline reported the matter to social services and the police, the social worker seemed to believe that the parents were just being 'protective', despite the threats to kill and having once already sent her to Kurdistan (where she was subjected to physical and emotional abuse).

3.235 Professors McGlynn and Rackley referenced a report by the Australian eSafety Commissioner,[108] summarising their findings:

> 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.

3.236 Professors McGlynn and Rackley suggested there is a clear body of evidence demonstrating that circulation of intimate images extends beyond nude or sexual

---

106 The use of the term "minoritised ethnic groups" is suggested by the Law Society as it "recognises that individuals have been minoritised through social processes of power and domination rather than just existing in distinct statistical minorities. It also better reflects the fact that ethnic groups that are minorities in the UK are majorities in the global population. In the UK, minoritised groups includes all ethnic groups that are not White British. The Law Society, "A guide to race and ethnicity terminology and language" (10 February 2022) available at https://www.lawsociety.org.uk/en/topics/ethnic-minority-lawyers/a-guide-to-race-and-ethnicity-terminology-and-language.

107 Shaista Gohir OBE, "Muslim Women's Experiences of the Criminal Justice System" (June 2019) https://www.mwnuk.co.uk/go_files/resources/Muslim_Women_and_Criminal_Justice_FINAL.pdf.

108 eSafety Commissioner, "eSafety for Women from Culturally and Linguistically Diverse Backgrounds: Summary report" (February 2019) *Australian Government*.

photos, stressing that "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".

3.237 Most consultees stressed in their replies the importance of ensuring that the perpetrator had some knowledge of the intimate nature of the image. Muslim Women's Network UK noted that "in the cases we deal with, we generally find that the victims and perpetrators are largely of a similar cultural background or at the very least aware of the cultural factors involved". Professors McGlynn and Rackley highlighted the "expressive role of criminal law", observing that criminal legislation has often played an active role in changing society's understanding of specific behaviours (pointing to examples of stalking and coercive control legislation). End Violence Against Women Coalition and Faith and VAWG Coalition suggested "accompanying guidance with diverse examples" to strengthen the understanding of such an offence among the public and ensure it is properly enforced.

3.238 Some consultees suggested the adoption of the Australian civil law legislation for the criminal context in England and Wales (see paragraph 3.222 above). Professors McGlynn and Rackley suggested replacing "consistently" with "commonly" or "usually".

3.239 We suggested that the intent element of the specific intent offences may ensure the requisite knowledge of the perpetrator. In response, consultees[109] were concerned that only including such images in the more serious offences would mean marginalised[110] victims face additional burdens in pursuing prosecutions.

3.240 Consultees queried why only religious groups would be included and suggested that cultural groups should be too. Consultees suggested that a subjective definition of intimate would benefit in particular minoritised ethnic groups,[111] and could be extended to include other marginalised groups such as LGBTQ+ victims.[112] The End Violence Against Women Coalition and Faith and VAWG Coalition suggested the focus should be not on attire, but on the wider context of the image (for example, if a woman who does not drink because of cultural or religious norms is photographed with alcohol).

3.241 Consultees who disagreed with including such images shared concerns about the way it could work in practice. The CPS suggested that such an inclusion would require courts to make determinations as to whether that particular religious group would regard an image as intimate. There was also concern that it would be difficult to prove

---

109 Including Professors Clare McGlynn and Erika Rackley; Refuge; End Violence Against Women Coalition and Faith and VAWG Coalition; and Equality Now.

110 Groups that are outside "mainstream" society are often referred to as marginalised. A report commissioned by the Department for International Development explains "marginalised groups include ethnic minorities, women and girls, people with physical and mental disabilities, and Lesbian Gay Bisexual Transgender Queer and Intersex (LGBTQI) people", O'Driscoll, D "Policing and Marginalised Groups" (2018) *K4D Helpdesk* available at https://www.gov.uk/research-for-development-outputs/policing-and-marginalised-groups#:~:text=Marginalised%20groups%20include%20ethnic%20minorities,and%20Intersex%20(LGBTQI)%20people.

111 Including The Angelou Centre and Imkaan; Refuge; Women's Aid; Professors Clare McGlynn and Erika Rackley; My Image My Choice; and Maria Miller MP.

112 Including Suzy Lamplugh Trust; Northumbria Police and Crime Commissioner in partnership with four local organisations; and Honza Cervenka.

the defendant's awareness of specific religious and/or cultural practices.[113] HM Council of District Judges (Magistrates' Courts) Legal Committee noted that "the question of whether an image is intimate should be a question of fact divorced from the knowledge of intentions of the perpetrator". The Bar Council added that the inclusion of such images would extend the concept of intimacy beyond "a) a plain language reading of the term and b) the experience of most 'reasonable persons'".[114]

3.242 Professor Gillespie observed that, when someone is deliberately trying to humiliate or cause distress to the victim, the harmful conduct is the sharing or publishing of the image, rather than its taking. He suggested that the communications offences (particularly if reformed as the Law Commission proposed)[115] would be a way to control this behaviour, rather than expanding the concept of intimacy to include religiously-sensitive images.

3.243 Senior District Judge (Chief Magistrate) Goldspring observed that "it is not the role of the criminal law to reinforce what could be perceived as misogynistic stereotypes based on interpreted norms or expectations of a religious or cultural nature". Conversely, Ann Olivarius submitted that:

> To classify images of women without their everyday religious attire as 'intimate' is not, in my view, to defend the religious and cultural strictures that privilege men and which sustain these rules. It is to protect these women from additional forms of abuse.

3.244 We also acknowledge the criticism in some responses that the consultation paper did not sufficiently engage with the groups affected by these issues, in particular the "by-and-for" sector.[116]

Analysis

3.245 It is abundantly clear from the thoughtful, powerful, and well-informed responses to this topic, in addition to the wealth of important research on related issues beyond the scope of this project, that:

(1) Some images considered intimate by certain religious groups are experienced by victims in the same way as sexual or partially-nude images as defined above. The motivations for and harms flowing from non-consensual taking and sharing of such images can be the same or similar.

---

113 Including Justices' Legal Advisers' and Court Officers' Service; the Bar Council; and Senior District Judge (Chief Magistrate) Goldspring.

114 As explained at para 3.125 above, the reasonable person is usually required to be a universal subjective standard.

115 At the time of this response, the Law Commission had published its consultation paper with provisional proposals for reform: Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248.

116 "By and for" organisations design and deliver services with the people or groups who use the services.

(2) Image abuse involving images considered intimate by certain religious or cultural groups can expose the victim to serious harm including physical violence.

(3) Victims of intimate image abuse from marginalised groups (including but not limited to minoritised ethnic groups, migrant, and disabled women) face significant barriers to accessing the criminal justice system and receiving an appropriate response.

3.246 In this section we set out these issues in more detail and consider how we can best address them within the scope of this project. We ultimately conclude that images considered sexual by certain religious or cultural groups that would not be deemed sexual by the "reasonable person" test and are not nude, partially-nude or toileting images should not be included in the definition of intimate. We identify that more work may be needed to ensure those at risk from the most harmful examples of this behaviour are appropriately protected.

Barriers to accessing the criminal justice system

3.247 In respect of the significant barriers faced, these are echoed in the experiences of marginalised groups accessing the criminal justice system for many offences, sexual or otherwise. They also face specific issues in relation to intimate image offences. In chapters 2 and 5 of the consultation paper we described the particular harms faced by different groups of victims. We agree with consultees who argued that more work could be done to understand and respond better to the specific needs of these groups. Law reform is only a small part of the picture; education, training, and resourcing of community support groups and the by-and-for sector is also crucial to improve the experiences of marginalised groups. This would benefit from a more holistic approach than the remit of this project allows. Within this project, our task is to recommend clear, proportionate intimate image offences that enable better compliance, understanding, and responses from individuals, communities, police, prosecutors, and the judiciary.

3.248 The example provided by Muslim Women's Network UK at paragraph 3.234 above is a powerful illustration of the lack of awareness in the criminal justice system of issues such as so-called honour-based abuse. The harm caused to the victim by the primary perpetrators was unacceptably exacerbated by a poor criminal and social justice response. In this example the intimate image was sent by the person depicted, seemingly consensually. It is not clear how the family became aware of the image; its content could have been reported to them without the image itself having been shared. This demonstrates how these issues are wider than the scope of this project and deserve more holistic consideration.

Images considered intimate by certain religious groups

3.249 We recognise the significant support from a wide range of consultees for including images that would be considered intimate by certain religious groups in the definition of "intimate" for the purpose of intimate image offences. We are encouraged by the collective understanding of harm caused by such images and support for intersectional interpretations of legislative definitions.

3.250 Most who supported such inclusion did so by suggesting or supporting a subjective element to the definition of “intimate” or “sexual”. We have described above at paragraph 3.54 why a subjective definition of sexual would make an offence unworkably broad. It would ultimately mean that any image has the potential to be considered sexual and therefore fall within the scope of the offences. This risks serious overcriminalisation. If a particular image is only considered sexual by one person, or even a small group of people, there is no societal consensus that taking or sharing such an image warrants criminalisation. Further, with a subjective definition of sexual, the person taking or sharing the image may not know that the person depicted considers it sexual. If they are not aware the image is “intimate”, their behaviour will not be sufficiently culpable to warrant criminalisation. Finally, we refer again to the potential risks of creating a vague offence (where any image could be considered intimate depending on the views of the person depicted). Such a subjective definition could be incompatible with the European Convention on Human Rights (see above, at paragraph 3.15).

3.251 We considered as a minimum that the perpetrator must have knowledge that the person depicted considers the image sexual. This could be very difficult to prove. In the context of group understanding of intimate, the question becomes even harder. What must the perpetrator know? That the victim and their religious group deem it sexual? That the victim deems it sexual because of a common understanding amongst their religious community? That the victim’s community deems it intimate regardless of the personal views of the victim? Does a whole religious group need to have the same belief or a significant portion? What counts as a religious group? What level of knowledge is appropriate and who determines that? What happens where, as consultees posed, some members of a group have a particular conception of honour and sexuality that is seen as outdated and harmful by others in the same group? As the CPS raised, any of these questions could lead to a court having to determine whether a particular religious group holds a certain view. How would this be evidenced? Would this take a disproportionate amount of court time to determine? Is it appropriate to ask courts to do this? Will this allow for bias towards and judgement of certain communities to flourish in criminal proceedings? These questions demonstrate the enormous difficulties presented when trying to include such images in a way that is appropriately limited to avoid the risk of overcriminalisation.

3.252 We have considered whether an element similar to the Australian civil regime could be adopted. That regime includes a much broader range of images, as described at paragraph 3.225 above. The evidence we have heard suggests that the full range of images included in that regime would not all cause sufficient harm if taken or shared without consent to warrant criminalisation. It could include an image of a woman pictured without a hijab, fully clothed while sat alone in her bedroom. Similarly it could include an image of an Orthodox Jewish man without a head covering while changing his shirt at home. There would need to be an added element of intimacy in the image which reintroduces the difficulties of determining what that level is. At the same time it is not wide enough to capture all the harms of which we are aware. It focuses on consistently worn religious attire and not a wider understanding of modesty and sexuality within certain groups. For example, it would not include an image of a conservative Muslim woman in bed with a man who is not her husband, with her shoulders and upper chest exposed, if she does not normally wear a head covering.

3.253 There are also potential inconsistencies with including such images, or a test similar to the Australian civil regime. Consultees queried whether the views of cultural groups should be included. There is no easy definition of what is a religious group and what is a cultural group; in many circumstances the two will overlap. In the examples provided by stakeholders working with victims of so-called honour-based violence, it is noted that ethnicities and nationalities are referenced, rather than specific religions or religious groups. Further, many consultees suggested that images considered sexual by religious groups should be included because there should be a subjective element regardless of the reason for holding a particular view of intimacy. As reflected in some responses to Consultation Question 1, individual conceptions of sexual content can vary considerably. This may be because of a particular sexual preference, or because of an individual or familial conservative approach to modesty that is not based in religion. An entirely subjective element would be too broad, yet attempts to narrow it to more collective understandings of sexual create inconsistencies that cannot be reconciled.

3.254 Consultees who expressed concern about this topic highlighted the difficulties in legislating for such images. Legal stakeholders explained the importance of a precise definition of "intimate". It is important that the definition of intimate for the purposes of intimate image offences is easily understood and consistently interpreted. We believe that the definitions of sexual, nude, partially nude and toileting achieve this. There are significant risks associated with broadening the definition that could undermine the whole intimate image abuse regime. There is a real risk of uncertainty, of inconsistency in application and protection, and of overcriminalisation. On balance we conclude that images considered sexual by certain religious or cultural groups, that would not be deemed sexual by the "reasonable person" test, and are not nude, partially-nude or toileting images should not be included in the definition of intimate.

3.255 This does not mean that no criminal liability should attach to the non-consensual sharing of, or threatening to share, such images. We agree that some of the behaviour we have heard about should be criminal. As we explored in the consultation paper and in this report, harassment offences, the controlling or coercive behaviour offence, blackmail and communications offences could apply in individual cases. We also recognise that there will be cases where no offences would apply. This may be because there is insufficient harm or culpability, in which case it is appropriate that no offences apply. It may be because the operation of current offences excludes certain behaviours even where significant harm is caused. For example: Barry was in a relationship with Sarah and is aware that Sarah and her family are very religious. He knows that Sarah's religion requires that women's hair should always be covered in front of men for modesty. Allowing her hair to be exposed in front of men would be considered promiscuous and sexual. Sarah has broken up with Barry and he is upset. He sends her family a photo of Sarah at a nightclub surrounded by men and women with her hair uncovered. He does this to cause Sarah serious harm, knowing her family are likely to punish her severely. The new harm-based communications offence[117] requires that the defendant must have intended to cause harm to those likely to encounter the image. Barry does not intend Sarah to see the image so the harm-based communications offence may not apply. If it is just one occurrence, the harassment or controlling or coercive behaviour offences may not apply. Barry intends

[117] Online Safety Bill, cl 151.

to cause serious harm. He is sufficiently culpable. We explore in the next section whether such conduct could be appropriately criminalised.

3.256 Finally, consultees' responses revealed a wide range of images under consideration. It is worth reiterating that images with any element of nudity, partial nudity, toileting or showing something a reasonable person would consider sexual will be included in the recommended intimate image offences. This is not a narrow definition of intimate. Partially nude, for example, covers a range of images that could be argued are less "intimate" by traditional Western standards (such as breasts covered by underwear) but are still sufficiently intimate to warrant protection in the criminal law. What we are concerned with here are images that would not fall within this definition. Images that are partially nude may be considered sexual by certain religious groups. If an image is partially nude, it will be included in the offences.

Images which when taken or shared without consent expose the victim to a risk of serious harm

3.257 As explored in the fictional example above, some images might be taken or shared to expose someone to a risk of serious harm. The real case examples provided by consultees including Muslim Women's Network UK, the Angelou Centre and Imkaan and South West Grid for Learning clearly evidence that this behaviour does occur, and the high level of harm that victims experience and fear. The type of harm is distinct from those more widely experienced with intimate image abuse. The harm does not only arise from the intimate nature of the image itself (the violation of sexual autonomy and bodily privacy) but from what the images are suggesting about the person depicted and the response to that. Victims of this type of abuse are exposed to a risk of serious harm, including physical violence, because of what the image shows. Therefore it could be preferable to create an offence which criminalises the causing of or exposing to risk of that harm, rather than expand the definition of an intimate image which is a much blunter tool.

3.258 The relevant evidence submitted to this consultation refers primarily to so-called honour-based violence. This is understandable because of the way this question was phrased. However we are also aware that images in different contexts could expose someone to similar harms. We describe at paragraph 3.212 above, "outing" images. It is easy to envision how sharing such images could expose someone to risk of serious harm, including physical violence. For example: an image showing a trans man (who is currently in prison) before their transition sent to a violently transphobic fellow prisoner, or an image of a young man kissing another man in a gay club sent to his homophobic classmates who will violently bully him. Focussing on the risk of serious harm caused could be "culturally blind" and apply to a wide range of vulnerable victims.

3.259 We have considered the scope of existing laws to address this type of behaviour. The Government has included a harm-based communications offence in the Online Safety Bill,[118] implementing the Law Commission recommendations,[119] that could apply to some of this behaviour but it is limited in the ways explained in Chapter 2.

---

[118] Online Safety Bill, cl 151.

[119] Modernising Communications Offences: A final report (2021) Law Com No 399.

Harassment, stalking and controlling or coercive behaviour offences could also apply where there is some pattern of behaviour. We also considered offences that could apply to "doxing"[120] and "outing" including section 170 of the Data Protection Act 2018.[121] The Law Commission have previously observed that, since the penalty available under section 170 is a fine, prosecutors are likely to seek to charge a more serious offence, including a communications offence or harassment or stalking.[122]

3.260 We also considered inchoate offences, where an image was taken or shared with the purpose of encouraging an offence (such as assault) to be committed against the person depicted. Sections 44 to 46 of the Serious Crime Act 2007 provide that a person will have committed an offence if they do an act "capable of encouraging or assisting the commission" of an offence or offences.[123] The three different offences contained in these sections have different intent and belief elements. The act does not have to have actually encouraged or assisted in the commission; it is sufficient that it was capable of doing so. Whether an act was so capable is a matter of fact for the court to determine.[124] The range of acts capable of encouraging the commission of an offence are necessarily wide. One example is: "D tells E where E's enemy, V, is hiding, and is charged [under section 45] with assisting or encouraging E, believing E would murder V".[125] It is conceivable that knowingly sharing an image that provides another with "justification" needed for causing harm (for example assault, kidnap, or harassment) to the person depicted could therefore be an act capable of encouraging an offence. There are existing offences that could be used in some circumstances where an image (not deemed intimate for the purposes of intimate image offences) is taken or shared without consent in order to expose the victim to a risk of serious harm.

3.261 We acknowledge that not all instances of this harmful behaviour would be covered by an existing offence. At the same time, we note that exposing someone to such harm could also arise from actions not involving intimate images, or not involving images at all. This is demonstrated if we slightly change the facts in the examples at paragraphs 3.255 and 3.258 above: sharing a document in which the trans man is described as trans or uses a previous pronoun; sharing a screenshot of a tweet from the private account of the young man where he writes that he is gay; or calling the family of Sarah to tell them she can currently be found at a nightclub with her head uncovered in front of many men could expose the victims to the same risk of serious harm as the images. We spoke to the organisation Karma Nirvana, who run a helpline for victims of honour-based abuse. They told us they had seen cases where victims were

---

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

121 This section makes it an offence for a person knowingly or recklessly: to obtain or disclose personal data without the consent of the controller, to procure the disclosure of personal data to another person without the consent of the controller, or after obtaining personal data, to retain it without the consent of the person who was the controller in relation to the personal data when it was obtained.

122 Abusive and Offensive Online Communications: A Scoping Report (2018) Law Commission Consultation Paper No 381, para 10.27.

123 These inchoate offences were the subject of the Law Commission report, Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 3. The recommendations of that report are reflected in the Serious Crime Act 2007.

124 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), A5.6.

125 Above, para 5.37.

exposed to a risk of abuse and violence by information being shared in a range of ways such as screenshots of dating profiles or images of someone drinking alcohol. They described cases where victims were "catfished" on a dating website, the perpetrator then threatened to share the messages they had exchanged with the victim's community knowing they would be perceived as dishonourable, in order to obtain money or sexual gratification from the victim. They also raised the tragic case of Banaz Mahmod, a young woman subjected to violent abuse and ultimately killed as arranged by her father and uncle after it was discovered that she was in a relationship with a man from a different community. This was discovered by someone reporting to her family that she had been seen kissing him. If there is an argument that the act of sharing information that exposes someone to a risk of serious violence is not currently appropriately criminalised, it is wider than the remit of this project. There is no clear justification for attempting to increase the protection for people who are exposed to such a risk using images but not by other methods. This issue therefore falls outside the scope of this project. We recommend that the Government consider whether any further offences are necessary to ensure this behaviour is appropriately criminalised.

3.262 Karma Nirvana told us that honour-based abuse relies on the ongoing monitoring and reporting of people's conduct and reputation, and that technology has made this even easier to do. Technology has increased the risk to victims. They advised that a better understanding of this would help police and prosecutors recognise how the abuse can be perpetuated using technology.

3.263 We also recommend that the CPS consider including image offences in the list of offences in their guidance on so-called honour-based abuse and forced marriage. CPS guidance sets out the general principles prosecutors should follow for certain types of cases. They have produced guidance specific to forced marriage and honour-based abuse to assist prosecutors appropriately to flag cases where crimes may have been committed in this context. It includes a definition of "honour-based abuse" and a list of criminal offences that may be committed as so-called honour-based offences such as grievous bodily harm, harassment, threats to kill and murder. The evidence we have heard shows that intimate image abuse is perpetrated in the context of so-called honour-based abuse. Direct inclusion in the guidance could aid understanding and help contextualise intimate image abuse in the relevant circumstances.

Recommendation 10.

3.264 We recommend that the Government consider whether any further offences are necessary to ensure the behaviour of exposing someone to a serious risk of significant harm in the context of an abusive dynamic is appropriately criminalised.

Recommendation 11.

3.265 We recommend that the Crown Prosecution Service consider including intimate image offences in the list of offences in their guidance on so-called honour-based abuse and forced marriage.

Images that should be excluded from the definition of an intimate image

3.266 Having considered what should be included in the definition of intimate, we now turn to images that should be excluded from an intimate image offence. There are images that may be caught by the recommended definition that do not warrant the protection of an intimate image offence. While "sexual acts" are included in the current voyeurism offence, this is limited to sexual acts that are "not of a kind ordinarily done in public".[126] Similarly in the disclosure offence, the definition of private means that only private sexual images that show something "not of a kind ordinarily seen in public" are included.[127] The Explanatory Notes explain that kissing may be deemed sexual but is a kind of sexual act ordinarily seen in public and therefore should be excluded from the offence.[128]

3.267 In the consultation paper we agreed that images of kissing should be excluded from intimate image offences. Kissing is an act that is often seen in public and taking or sharing images of kissing should not give rise to criminalisation. We also identified that the chests of men and prepubertal children are commonly seen in public, are not seen as intimate and sexual as female breasts and therefore do not warrant the same level of protection in intimate image offences. We explored this further in paragraphs 3.122 above. With these examples, the consultation paper concluded that there are two ways to exclude such images from the intimate image offences: by incorporating a "not ordinarily seen in public" test; or instead providing a closed list of images that should be excluded from the offences.

A "not ordinarily seen in public" test

3.268 In the consultation paper we explained how this concept has been usefully employed in the voyeurism and disclosure offences. It could effectively exclude images of kissing and male and prepubertal chest areas. It would be flexible and allow for courts to determine individual cases on their facts. It could also be too broad; we identified that it would exclude images of breastfeeding (as this is an act ordinarily seen in public), downblousing (as partially-exposed breasts are ordinarily seen in public) and images that are deemed intimate by particular religious or cultural groups (which may include images of kissing, holding hands or being seen without particular religious attire, all of which are often seen in public).

---

126 Sexual Offences Act 2003, s 68(1)(c).

127 Criminal Justice and Courts Act 2015, s 35(2).

128 Explanatory Note to Criminal Justice and Courts Act 2015, s 35(2).

A closed list of exclusions

3.269 Such a list would enable us to specify the examples of kissing and male and prepubertal chests, meaning breastfeeding etc would not be excluded. However, a list would be inflexible and could become outdated. It would not adapt to changes in societal norms as a test would. A list would also require an exact definition of which breast images should be included and which excluded; the discussion at paragraph 3.129 demonstrates how difficult this is.

3.270 We concluded that the benefits and costs of each approach are finely balanced. We first asked consultees to share any further examples of images that should be excluded, then asked their views on which option was preferable. At Consultation Question 11 we asked:

> 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)?

3.271 A Consultation Question 12 we asked:

> 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?

Consultation responses

3.272 Two consultees provided examples of images other than kissing that should be excluded.[129] Professors McGlynn and Rackley submitted that male and children's chests should be excluded. They noted that (semi-)nude images of breastfeeding should be protected, and would be included in our definition of intimate, but proposed that such images would be better dealt with through a separate specific offence. The Bar Council suggested that images of people hugging or holding hands should be excluded, however they recognised that such images would most likely fail to meet our definition of sexual.

3.273 There was a mixed response to Consultation Question 12: 16 consultees supported a "not ordinarily seen in public" element, three consultees supported a list of images that should be excluded, and 14 consultees did not support either.

A "not ordinarily seen in public" test

3.274 The most common reason for support provided by consultees was the flexibility that this test offers, compared with the restrictive nature of a closed list of images to be excluded from the scope of intimate image offences. The CPS stated that the "not

---

[129] Nine consultees provided examples or comments about images that should be included but may not fall within the current definition of intimate. This question asked specifically about images that would fall within the current definition but should be excluded regardless, therefore these responses are considered under the more relevant questions in this chapter.

ordinarily seen in public" element: "ensures that the issue can be dealt with on a case by case basis". The Centre for Women's Justice submitted:

> In practice, there may be a lot of scope for debate around what is or is not behaviour of a kind 'ordinarily seen in public' (particularly if a range of diverse cultural and religious views are taken into account). It may therefore be better simply to include the broad caveat that the intimacy captured in the image must be of a kind not ordinarily seen in public, and leave it to prosecutors/to the courts to define this by applying it to the facts of each case.

3.275 Professor Gillespie recognised that some images may still not be captured by our offences if the "not ordinarily seen in public" element is adopted but concluded that it is a simpler approach than an exhaustive list: "it is cleaner than trying to put together a list of exceptions".

3.276 Senior District Judge (Chief Magistrate) Goldspring endorsed this option as it is readily understood.

3.277 However, some consultees also considered that such a test may be too broad. British Transport Police stated that "not all instances which are ordinarily seen in public should be readily accepted" as not requiring protection, such as a person in underwear shorts.

3.278 A number of consultees[130] argued that excluding images on the basis of what is "ordinarily seen in public" will lead to a gap in protection for people who follow certain religious or cultural norms.

3.279 Professors McGlynn and Rackley supported a separate offence to address breastfeeding images, and images considered intimate by particular religious groups and therefore took no issue with the fact such images would be excluded by this test.

3.280 Some consultees argued that this test should be based on subjective ideas of intimacy, rather than "ordinary" standards. Refuge stated that what "we define as 'sexual', 'private' or 'intimate' is highly subjective and varies from person to person." They argued that the test to determine whether an image is intimate should involve a subjective element which depends on the position of the victim, and an objective element focused on reasonableness.

A closed list of exclusions

3.281 Three consultees supported a closed list of exclusions. The Mayor's Office for Policing and Crime (London Mayor) submitted that a test is "too subjective and open to interpretation" so favoured a list of exceptions. The Law Society were concerned that the flexibility of a test may lead to the offence having too wide a reach. HM Council of District Judges (Magistrates' Courts) Legal Committee recognised that this type of test "may provide clarity and be easily understood" but took issue with the fact that it would not adequately protect images of people from certain religious groups with different standards of intimacy, of people breastfeeding, or downblousing. They proposed that

---

130 Including Refuge; South West Grid for Learning; and Muslim Women's Network UK.

such a list may include: images of kissing of a type ordinarily done (or seen) in public; images of a bare, adult male chest; and images of a bare, prepubertal child's chest.

3.282 However, a number of consultees were concerned that a list would be too limiting and lead to problematic exclusions. The CPS stated that "there is a danger that a list (even if it is non-exhaustive) will result in unintended consequences". The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) added that a "closed list always risks omissions or accidentally capturing innocuous examples". South West Grid for Learning considered that such a list "would inevitably be out-of-date almost immediately and this legislation must be future-proofed as far as possible." Similarly, the Magistrates Association stated that a definitive list of exclusions is inflexible and can become outdated.

Other options

3.283 Some consultees proposed different options. The Mayor's Office for Policing and Crime (London Mayor) suggested that a list of exclusions could include an "other" category to allow for future developments. The Magistrates Association considered that it "may be preferable to have a list which is not definitive but is used to assist prosecutors and judges/magistrates".

3.284 Professor Keren-Paz suggested using the "not ordinarily seen in public" test with a proviso that, despite the test, a prescribed list of images is included in the scope of these offences.

3.285 Charmaine Malcolm, personal response, advocated a "combination of both".

3.286 South West Grid for Learning proposed a "not ordinarily seen in public" test that takes into account "cultural sensitivities and context". Refuge suggested a similar amended test:

> Whether or not a reasonable person, taking into account the victim's personal circumstances (including but not limited to religious beliefs and cultural background) would agree that the image in question is "private and sexual".

Analysis

3.287 We have explored at paragraph 3.154 above why defining "intimate" subjectively is not appropriate for intimate image offences; such an approach would create offences that are too broad, lack the required certainty and fail to ensure defendants' culpability. The main argument provided by consultees for including a subjective element here is so that images that particular religious groups consider intimate are not excluded from the offences. Many of these images would not fall under the definition of "intimate" in the first place, therefore the fact that such a test would exclude them is less relevant. If we consider the image of Sarah from paragraph 3.255 above, dancing in a nightclub with her hair uncovered; the image is neither sexual, nude, partially nude nor of toileting. Therefore it does not matter that the image shows something that we would ordinarily see in public; it already falls outside the scope of the offences. We agree with Professors McGlynn and Rackley that a separate approach would be required to address harmful behaviours regarding images that are considered intimate by particular religious groups. We have considered such an approach above.

3.288 Consultees in response to these questions did not provide additional examples for exclusions that were not considered in the consultation paper. Responses from Professors McGlynn and Rackley and HM Council of District Judges (Magistrates' Court) Legal Committee noted that bare, adult male chests and bare, prepubertal children's chests should be excluded. We have found defining which breast images should be included difficult; the images that should be excluded are perhaps easier to define.

3.289 Further, as described in paragraphs 3.173 above, we have identified that some toileting images (such as an image taken from behind of a man standing, fully clothed, urinating) show something that is ordinarily seen in public and should be excluded from the offences. Such examples are not readily summarised as items on a list as we do not want to exclude all urination images. Therefore, we consider that the test should enable consideration on a case-by-case basis. This, along with the concerns raised by consultees about the limitations of a closed list of exclusions, lead us to conclude that a formulation of the "not ordinarily seen in public" test is most appropriate.

3.290 We noted in the consultation paper that such a test would exclude images that should be included in intimate image offences: images of downblousing; breastfeeding; and potentially images deemed intimate by particular religious groups.[131] We consider that the latter are better considered separately.

3.291 The issues raised by downblousing images require further consideration. We have now amended our definition of downblousing; we no longer rely on the wording "partially-exposed breasts" to incorporate downblousing images. As a result, downblousing images would no longer be excluded in the same way by such a test. They were previously excluded because "partially-exposed breasts" (such as the top of breasts, or cleavage) can be considered ordinarily seen in public. Images of downblousing are now included in the definition of intimate where the image itself is of a breast, whether exposed or covered by anything worn as underwear, regardless of the state of dress, or level of exposure, of the person depicted.

3.292 Exposed breasts are not ordinarily seen in public. Breasts covered by underwear are not ordinarily seen in public in most circumstances. However, breasts covered by something that could also be worn as underwear, such as swimwear, are ordinarily seen in some specific public places. Beaches and public swimming pools are public spaces where it is common to see breasts or buttocks exposed or partially exposed. This presents a challenge for an "ordinarily seen in public" test. It is not appropriate to exclude all underwear or partially-nude images from intimate image offences just because, in some circumstances, they might show something that is ordinarily seen in specific public places in limited contexts such as pools or beaches. We deliberately include images of breasts, buttocks and genitals when covered by anything worn as underwear, or similarly or more exposed than if wearing underwear, because they are sufficiently intimate to warrant protection from non-consensual taking or sharing. While "ordinarily seen" does help limit the test to sights that are considered commonplace, and not sights occasionally observed in public in odd circumstances, we think a

[131] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 6.133 to 6.135.

refinement of the "ordinarily seen in public" test is needed. Where something is only ordinarily seen in a limited public context, such as beaches or pools, it should not be excluded from the definition of intimate. This can be achieved by reformulating the test so that it only excludes sights that would ordinarily be seen *on a public street*. The intention of this refinement is to focus the test on what people do and what they expose in a generic public place – the street – excluding the more unusual contexts where nudity and partial nudity might be expected or tolerated.

3.293 This test focuses on real-life sights rather than images. Advertisements displayed in public – including on public streets – show breasts, genitals and buttocks that are covered only by underwear. They do not represent what is ordinarily seen in real life on a public street.

3.294 This reformulation still has the advantage of utilising well-understood concepts from the current offences. Courts can apply this test to the facts of each case to determine whether the image in question shows something that is no more intimate than what is ordinarily seen on a public street. It works to exclude the images we want to exclude, such as images of male adults' and prepubertal children's chests and male standing clothed urination, as discussed above. It is common to see men and young children without tops on or with an open shirt on a public street. Such behaviour is not limited to places such as parks or beaches. Breasts, whether exposed or covered by underwear, are not commonly seen in public in the same way male chests are. We discussed this at paragraph 3.122 above when concluding that female breasts require protection of the criminal law in a way that male chests do not. However, images that only show the top part of a woman's breasts, the cleavage, are not sufficiently intimate to warrant inclusion in these offences. Cleavage is something that is ordinarily seen on a public street; therefore, this test would operate effectively to exclude those less intimate images. Downblousing images would still be covered where they show more than just cleavage than would ordinarily be seen on a public street. This test also effectively excludes the less intimate examples of toileting images discussed above. It is common to see standing urination on a public street where the person appears clothed and where the genitals or buttocks are not exposed. It is not common to see on a street other types of toileting that might be more intimate such as someone stood or sat with their trousers pulled down.

3.295 This test would apply to images regardless of whether they were taken in public or private. The purpose is to exclude images that are less intimate because they only show something that is ordinarily seen on a public street. For example, images of someone kissing taken in private should still be excluded from the offences; what is depicted is less intimate because it is ordinarily *seen* in public. We consider images that are less intimate because they are *taken* in public in chapter 10.

3.296 Breastfeeding is often seen on a public street and can necessitate exposed breasts. As we identified in the consultation paper, there are strong public policy reasons to support breastfeeding in public and prohibit any unfair treatment of breastfeeding parents.[132] We do not therefore wish to exclude intimate images of breastfeeding from intimate image offences, simply because breastfeeding is ordinarily seen on a public

[132] Equality Act 2010, s 17 makes it unlawful for a trader or service provider to treat a woman "unfavourably" because she is breastfeeding.

street.[133] In the consultation paper we suggested that someone breastfeeding in public would always retain a reasonable expectation of privacy against intimate images being taken.[134] The recent successful campaign to include breastfeeding images in the voyeurism offence highlights the strength of public opinion on this.[135] There are two options for ensuring that breastfeeding images are included in intimate image offences while still maintaining the benefits of the "not ordinarily seen on a public street" test:

(1) The test could apply only to the definitions of "toileting" and "sexual". This would mean that nude and partially-nude images, including images of exposed breasts, would all be included where they meet the definition. Kissing and some urination images would therefore be excluded, but intimate breastfeeding images would not. This however leaves the problem of defining which images of breasts should be included rather than the arguably simpler alternative of relying on the test to exclude male adults' and prepubertal children's chests.

(2) The test could apply to all categories of intimate images, but with a specific exception for intimate breastfeeding images.

3.297 We consider that the second option is preferable as it provides the most clarity.

3.298 We have considered the alternative options proposed by consultees. Including an "other" category in a closed list of exclusions would necessitate some analysis in each case whether the image depicts something not ordinarily seen on a public street. Practically, therefore, the courts would be undertaking the same exercise as if the test were adopted.

3.299 We agree that some combination of list and test might add clarity while retaining flexibility. We conclude that a "not ordinarily seen on a public street" test with a non-exhaustive list of examples of the type of images that should be excluded by such a test is the most appropriate approach. The list of examples should include: standing clothed male urination where genitals and buttocks are not exposed; bare male chests; bare prepubertal children's chests;[136] and kissing.

---

133 We note here that for breastfeeding images to be included in these offences, the image must show a breast that is exposed, covered by underwear or anything worn as underwear, or be as exposed as if wearing underwear. Therefore an image where a woman has her whole chest area covered with a scarf or top would not be included. We have considered whether such images that fall outside our definition could be addressed by a possible offence of public sexual harassment.

134 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.106.

135 See Chapter 2 for further information on this campaign and resultant amendment.

136 There would not be a total exclusion of such images; if, for example, an image of a male adult's chest was otherwise sexual, or the prepubertal child depicted was also toileting, they would be included in the definition of an intimate image.

Recommendation 12.

3.300 We recommend that images that only show something ordinarily seen on a public street should be excluded from intimate image offences, with the exception of intimate images of breastfeeding.

Images where the victim is not readily identifiable

3.301 Some intimate images, by the nature of the way they are taken, may mean the victim is not readily identifiable from the image. "Upskirting" images for example will usually only capture the buttocks or genitals of the victim, whether or not covered by underwear and are commonly taken in public. They are unlikely to include easily recognisable features such as a face or location specific to the victim. Some intimate images may be altered to remove identifiable features such as blurring out backgrounds, faces, tattoos or scars. This may be done in an attempt to anonymise or protect the victim; it may also be done as an attempt to avoid criminal liability.

3.302 A national study by the Australian eSafety Commissioner found that half (50%) of the victims of intimate image abuse considered that they would be recognisable to others from the image that was shared.[137] In the consultation paper we explained that:

> Images would be classified as intimate for the purposes of an offence if the body parts visible satisfy the description we discuss in this chapter. Images can be sexual, nude, semi-nude or private regardless of whether the victim is identifiable.[138]

We recognised that there may be prosecutorial and evidential difficulties when a victim is not identifiable, but this is common to many criminal offences. We therefore provisionally proposed that images where the victim is not readily identifiable should not be excluded from the intimate image offences. In Consultation Question 6, we asked consultees if they agreed with this.

Consultation Responses

3.303 The majority of consultees who responded to this question agreed with the proposal (37 out of 42). Comments in support considered the necessity for inclusion. Refuge in their response noted that to exclude such images from the offence "would seriously limit its scope and leave many women without recourse to protection under criminal law".

3.304 Consultees also commented that the harm to the victim is the same regardless of whether they are identifiable to others or not. For example, South West Grid for Learning suggested that "the victim will know and will suffer the harm and sense of violation". Dr Charlotte Bishop added that unidentifiable images, as identifiable images do, cause wider cultural harm and harm to women in general suggesting the

---

137 Office of the eSafety Commissioner, Image-Based Abuse – National Survey: Summary Report (October2017) https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf.

138 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.76.

behaviour is “sending out wider messages about female availability, female bodies as public property”.

3.305 Muslim Women’s Network UK suggested that the victim’s knowledge should be sufficient: “having to distinguish between readily identifiable images and those that are not is unfair to victims and ultimately, the victim knows it is their picture and that should be sufficient for the purposes of proving an offence”.

3.306 Refuge agreed that visible faces are not the only way an image can be identifiable, even if it means they are not “readily identifiable”. They described a case where their client was unable to pursue a complaint to the police because it is not currently considered sufficient.

> Recently, our tech abuse team supported a client who had an intimate image of her engaging in a sexual act shared by her perpetrator with third parties. Her head was not included in the image, but she was identifiable by way of a unique tattoo. She reported the incident to the police who told her that the image could well be of someone else, or be edited to include her tattoo, and was not readily identifiable as it did not include her face. Therefore, they could not proceed with bringing charges against the perpetrator. The sharing of this image caused significant psychological harm to the victim-survivor and was deliberately used by the perpetrator to intimidate and frighten her within the context of his ongoing domestic abuse of her – both within their relationship and after it ended. If this image is covered within the new offence, she and others like her will have a better chance of pursuing a conviction against their perpetrator and would likely be encouraged to report intimate image abuse and other forms of domestic abuse to the police in future.

3.307 Consultees including Honza Cervenka and academic Aislinn O’Connell suggested that even if an image itself is not identifiable, context, captions or doxing can mean the victim is identifiable, therefore images should not be excluded on the basis of the image itself.

3.308 Professors McGlynn and Rackley submitted that excluding such images “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”.

3.309 The Bar Council suggested it could defeat the purpose of including upskirting and downblousing if images of not readily identifiable victims were excluded.

3.310 Consultees supported the suggestion that evidential issues raised by non-identifiable victims can be considered as part of the case on the individual facts. The CPS noted there may be evidential challenges where a victim cannot be identified but also that there will be circumstances where there is sufficient evidence to prove non-consent, to the required standard, even without an identifiable victim. Garden Court Chambers Criminal Law Team proposed restrictions in cases where no victim has been identified:

> Without an identified victim, the prosecution must rely solely on inference to prove that the depicted person did not consent to the image being taken or shared. There are likely to be instances of photographs and footage designed to look like voyeurism but which in fact involve willing participants. Similarly, there may be

> instances in which a person was not aware of the footage being taken at the time but afterwards consent[ed] to it being shared. There is a significant risk in such cases of a person being convicted despite the fact that no offence has taken place, particularly where the defendant is several steps removed from the original taking.

Professor Gillespie similarly suggested that "it will be challenging to evidentially prove the absence of consent from a photograph alone".

3.311 Kingsley Napley LLP disagreed with our proposal. They suggested that including non-identifiable victims could complicate the offence and that it could add a burden on resources in trying to identify the victim and evidence their non-consent.

Analysis

3.312 Consultees have provided strong views that support our provisional proposal to include intimate images where the victim is not readily identifiable. It is clear that harm can be caused to the victim even if they are the only person who can identify themselves in the image. There are a number of other ways that a victim can be identified from an image, without being readily identifiable (such as by a tattoo or accompanying text that names them). It would not be appropriate to exclude such images and leave victims without the protection of the criminal law. Creating an exclusion could also incentivise editing to remove features that readily identify a victim, while still leaving sufficient detail to cause the harms we have heard so much about.

3.313 Stakeholders including the CPS agreed that while there may be evidential issues posed by images where the victim is not readily identifiable, or even identifiable at all, it will not always prevent successful prosecution. We know of two recent cases of voyeurism where the defendants were successfully prosecuted even though their victims could not be identified.[139] The nature of upskirting images often means that victims are not readily identifiable from the image, and that offence is still capable of being prosecuted.[140] It is not satisfactory to be in a position where the police and prosecutors have to locate a victim and for that victim to engage before a successful prosecution can be brought.

3.314 We are concerned with the report from Refuge at paragraph 3.306 above. The victim's testimony that the image was of her, with the added evidence of the unique tattoo, could have been evidence submitted in court, the appropriate forum for determining the facts of the case. This report highlights the barriers victims can face when reporting behaviour to the police.[141] The responses support our provisional view that

---

139 "Sheffield nurse Paul Grayson charged with hospital sexual offences" (8 December 2021) *BBC News* https://www.bbc.co.uk/news/uk-england-south-yorkshire-59577675 and Tom Seward, "Hidden camera voyeur spied on families at Butlins, court hears" (13 October 2020) *Swindon Advertiser* https://www.swindonadvertiser.co.uk/news/18791820.hidden-camera-voyeur-spied-families-butlins-court-hears/.

140 47 males were prosecuted for 128 offences of upskirting between April 2020 and July 2021. Emily Atkinson "Upskirting prosecutions more than double in second year since act became criminal offence" (3 December 2021) *The Independent,* https://www.independent.co.uk/news/uk/crime/upskirting-prosecutions-double-criminal-offence-b1968895.html.

141 We explored victims' negative experiences of police reporting in the consultation paper: Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 1.41 to 1.46.

the process of prosecution and trial are well placed to address any evidential issues, as they do with many other criminal offences.

3.315 We have considered the suggestion from Garden Court Chambers Criminal Law Team that cases where no victim is identified (as opposed to the victim not being readily identifiable from the image) should be excluded. They argued that where there is no victim identified, it would be challenging for someone to argue that their taking or sharing was done with consent. This does not undermine the offences. It will always be for the prosecution to prove lack of consent, not the defendant. There will only be a charge brought where there is sufficient evidence to do so, including sufficient evidence as to lack of consent. In cases involving upskirting or spycamming, the fact the image had to be taken in such a way that meant the victim is not identifiable could be evidence of the fact that the perpetrator did not have their consent to take it. We accept that there may be evidential issues relating to this obligation to prove lack of consent by relying solely on the image if, for example, that image was staged to look non-consensual (for example a "rape scene" in a porn video).[142] However, where there was consent, it is likely that the person depicted will be known to the defendant in some way (at least sufficiently to have allowed them to obtain their consent). It is therefore unlikely that in cases where there was genuine consent, the person depicted will not be able to be identified at all.

3.316 We know victims are harmed by intimate image abuse even where they are not readily identifiable from the image. We also know that some highly culpable non-consensual taking behaviour often results in images where the victim is unidentifiable (such as covert intimate recordings and upskirting). As the Bar Council noted, excluding images where the victim is not readily identifiable could ultimately lead to decriminalising upskirting images. The offence under section 67A of the SOA 2003 was introduced to protect victims of upskirting, whether the victim was identifiable or not. We explain in Chapter 4 why upskirting should remain a criminal offence. It would be wrong effectively to exclude much upskirting behaviour from the offences by requiring that the victim be identifiable.

3.317 The burden of proof as to lack of consent, and the role of prosecutors, best address issues of evidence and consent where no victim is identified. It is not necessary to exclude such images from the offences. Therefore, we recommend that images where the victim is not readily identifiable are not excluded from intimate image offences.

Recommendation 13.

3.318 We recommend that images where the victim is not readily identifiable should not be excluded from intimate image offences.

[142] These facts may also constitute the offence of possession of extreme pornography under Criminal Justice and Immigration Act 2008, s 63 regardless of the consent of the person depicted.

Deceased bodies

3.319 The final category of images to consider is intimate images of deceased bodies; that is, intimate images taken after someone has died. This issue has arisen both in consultation,[143] and in recent prosecutions.[144]

3.320 Intimate image abuse violates a victim's bodily privacy and sexual autonomy. These violations are experienced personally by the victim; they impact on their life, their mental and physical health, their feeling of safety, their privacy. These violations do not apply in the same way when the victim is deceased; privacy and sexual autonomy are conceptually different upon death. The harms caused by the behaviour are distinct and somewhat lessened when the image is of someone who is deceased. We conclude therefore that the intimate image offences should not apply to images of deceased bodies, which constitute a distinct category that is conceptually different from the intimate image abuse we have considered so far. It is better addressed separately.

3.321 The non-consensual taking or sharing of such images may of course be harmful in other ways. The recent case of *R v Fuller* is particularly relevant.[145] The defendant was charged with a number of offences relating to sexual interference with corpses in a mortuary, and the recording of those sexual interferences. The sentencing remarks reveal that in respect of images depicting deceased adult victims, the defendant was charged with possession of extreme pornography.[146] In relation to images depicting deceased child victims, he was charged with taking indecent images of a child.[147] The sentencing remarks include powerful testimony of the harm caused to the families of the victims by this horrific offending.

3.322 Similar, significant, harm can be caused by other behaviours that desecrate a corpse. A general offence of desecration of a corpse does not exist in England and Wales.[148] A potential gap in legal protection was identified in 2003 when a deceased Muslim woman's body was found covered in rashers of bacon in a hospital morgue. Two morgue employees were arrested on suspicion of causing a public nuisance, but no prosecution was brought.[149] The issue of desecration has been considered in

---

143 Including the Royal College of Pathologists who warned that our proposals, if they extend to images of deceased bodies, may have "very significant implications" for post-mortem pathology practice, and Cherry Bradshaw, personal response, who suggested that images of deceased people who are unable to consent should be covered by our offences.

144 *R v Fuller* (15 December 2021) unreported. We discuss the details of the case below.

145 *R v Fuller* (15 December 201) unreported. Crown Prosecution Service "Updated with sentence: David Fuller: Hospital electrician convicted of cold-case double murder and 51 sexual offences" (15 December 2021) available at https://www.cps.gov.uk/cps/news/updated-sentence-david-fuller-hospital-electrician-convicted-cold-case-double-murder-and; R v David Fuller sentencing remarks (15 December 2021), available at https://www.judiciary.uk/wp-content/uploads/2021/12/R-v-David-Fuller-sentencing-remarks-151221.pdf.

146 Criminal Justice and Immigration Act 2008, s 63.

147 Protection of Children Act 1978, s 1.

148 Some existing offences apply where a corpse is desecrated in a particular way. For example, it is a common law offence to prevent the lawful burial of a body.

149 See L Moss 'Muslim woman's body found in hospital morgue covered with bacon' (The Independent, 18 April 2003) https://www.independent.co.uk/news/uk/crime/muslim-woman-s-body-found-in-hospital-morgue-covered-with-bacon-745706.html.

Parliament recently. Baroness Brinton proposed an amendment to the Police, Crime, Sentencing and Courts Bill that would have created a criminal offence of desecration of a corpse; however, it was ultimately withdrawn.[150] The amendment was initially introduced to address concerns where the body of a victim is desecrated to frustrate attempts to identify the body, or to assist the offender to evade liability. However, in the debate on the amendment, it was noted that such an offence could have much wider application.[151] In the recent case involving sisters Bibaa Henry and Nicole Smallman who were murdered in a London park, two serving police officers took photos of their bodies and shared them on a WhatsApp group while they were supposed to be guarding the crime scene. The officers were convicted of misconduct in public office.[152] We consider that the harm caused by intimate images of deceased bodies is more akin to the harm caused in these examples, where the dignity that should be afforded to the deceased has been violated. It is the desecration of a corpse that makes the behaviour wrongful and harmful; such desecration is not limited to cases which involve an intimate image.

3.323 There is a specific offence that addresses a particular type of desecration of a corpse where there is a sexual element. The offence of sexual penetration of a corpse under section 70 of the Sexual Offences Act 2003 is a recognition that violating a corpse for sexual gratification is a criminal harm. We can see an argument that therefore, the offence of taking or sharing an intimate image for the purpose of obtaining sexual gratification should extend to images of deceased bodies. However, the section 70 offence involves contact with the body which can be a different type of violation to image taking or sharing. Further, we think that this consideration is still better placed within a wider review of offences relating to corpses.

3.324 Whether there is a need for further criminal offences covering corpse desecration and the taking or sharing of images of corpses – including but not limited to intimate images of corpses – is not something that can be resolved within a project focused solely on intimate image abuse. Instead, intimate images of deceased bodies should form part of a holistic review of these issues. The Government has established an independent inquiry into the issues arising from the *Fuller* case,[153] and alongside this, will also be reviewing the maximum penalty available for the offence of sexual penetration of a corpse.[154] As consultees to our public consultation on the Fourteenth Programme of Law Reform[155] recognised, the Law Commission would be well placed to undertake a detailed review of the laws relating to desecration of a corpse, and

---

150 *Hansard* (HL) 24 November 2021, vol 816, col 890 (amendments 292K)

151 Above.

152 BBC News "Bibaa Henry and Nicole Smallman: Met PCs jailed for crime scene images" (6 December 2021) https://www.bbc.co.uk/news/uk-england-london-59474472.

153 Independent Inquiry into the issues raised by the David Fuller case, https://fuller.independent-inquiry.uk/.

154 UK Parliament, *Written questions, answers and statements: Sexual Offences: Question for Ministry of Justice*, (10 January 2022) UIN 98336, available at https://questions-statements.parliament.uk/written-questions/detail/2022-01-05/98336/.

155 Law Commission, *Generating ideas for the Law Commission's 14th Programme of law reform*, (March 2021), available at https://www.lawcom.gov.uk/14th-programme/.

make recommendations for reform where appropriate. Such a review could take place after, or alongside the Government review of the *Fuller* case.

CONCLUSION

3.325 The joint response from the End Violence Against Women Coalition and the Faith and VAWG Coalition succinctly submitted that "the law must also not be so wide as to include actions that while being wrong, unethical and very troubling, should not be criminalised". Throughout this chapter we have explained the need for consistency, clarity and proportionality. This has informed our recommendation for a definition of intimate that focuses on the most harmful types of images; images that show the victim intimately. These are the images that when taken or shared without consent, violate the victim's sexual autonomy and bodily privacy. The definitions we recommend in this chapter will mean the images that are caught by the current intimate image offences remain protected, but also ensure they are protected equally regardless of the intent of the perpetrator, or whether an image is taken or shared without consent. We also include some images that are not caught by the definitions in the current offences: images taken of breasts where the person depicted was clothed (but the image captures a breast bare or covered by underwear) including intimate breastfeeding images; images that are altered but leave the victim as exposed as or more exposed than if wearing underwear; and images where the person depicted is wearing any garment as underwear.

3.326 We have discussed many wrong, unethical, and troubling behaviours that involve images that would not be caught by our definition of intimate. Some are wrongful, but not sufficiently wrongful or involving sufficiently culpable behaviour, that they necessitate a criminal response. Some of these are so harmful they should be criminalised but are better criminalised by other offences. We set out below images that we conclude fall within this second category, summarise why and what alternative offences could apply.

(1) Semen images. Where non-intimate images are used to create "sexual" images. They speak to the perpetrator's sexuality, not the intimacy of the person depicted. We agree that semen images are violating and potentially harmful but are distinct from intimate images of the victim. Communications and harassment offences could be used instead. Where an intimate image of the victim is used to make a semen image, that would be included in our recommended offences.

(2) Images made sexual by context. As above, these do not depict the victim intimately; non-intimate images are sexualised by the context in which they are shared or the captions or comments made alongside the image. Again, victims could feel very violated by this behaviour. The sexualisation of women and girls in particular causes real harm in society. However, this is again a distinct harm from those which arise when the image itself is intimate. Communications and harassment offences could be used instead.

(3) Outing images. These are images used to convey a message about the person depicted, usually their sexuality or trans identity. A range of harms could result from the behaviour; from minimal to exposing the victim to a risk of serious harm including physical violence. The images are considered harmful because

of what they communicate; this may be because of intimacy pictured, or it may be a completely non-intimate image. We have concluded that where an image is only private because of the message it aims to convey about the person depicted, it should not be included in intimate image offences. Communications or Data Protection Act offences could be used instead.

(4) "Creepshots". Images taken, usually in public places of people who are clothed, "zoomed in" on an area of the body such as the buttocks, breasts or pubic area. This is unpleasant behaviour, often rooted in misogyny that can make victims feel less safe just existing in public. However, the images are not themselves so intimate that they alone justify a criminal law response. We have recommended that this behaviour be considered by the Government as it assesses the need for a public sexual harassment offence.

(5) Downblousing images that do not show a breast that is bare, covered by underwear or as exposed as if covered by underwear. We have concluded that the most intimate downblousing images would be captured by our definition of partially nude or sexual. Where an image is taken of a female chest area but does not meet the definition of intimate, it is more similar to a "creepshot" as discussed above. Similarly, we have recommended that this behaviour be considered by the Government as it assesses the need for a public sexual harassment offence.

(6) Breastfeeding images that do not show a breast that is bare, covered by underwear or as exposed as if covered by underwear. As above, some images taken without consent of someone breastfeeding will not result in an image that meets our definition of intimate. This could be where the mother is breastfeeding while covered entirely in a scarf or top so no breast is visible. The behaviour of taking an image in such circumstances may feel intrusive, unpleasant, or frightening. As with "creepshots" it can make women feel less safe simply existing in public. This, we understand, was part of the rationale for introducing the breastfeeding voyeurism offence in the broad way it is drafted. The breastfeeding voyeurism offence criminalises recording an image of someone who is breastfeeding or adjusting their clothing before or after breastfeeding. The behaviour is still caught by the offence regardless of what the resultant image shows; it would still be an offence (where there is the relevant intent) if the image did not show any breast or even any of the breast area. We conclude that our offences should only apply where the resultant image is itself intimate. The full range of images caught by the breastfeeding voyeurism offence would not all satisfy our definition of intimate; we think this is a necessary limitation for the purposes of intimate image offences. In this way, our offences operate more narrowly than the breastfeeding voyeurism offence. However, as explained in Chapter 2, the current breastfeeding voyeurism offence is also much narrower in another way; it only includes taking behaviour done for the purpose of someone looking at the image to obtain sexual gratification or to cause the person depicted humiliation, alarm or distress. The behaviour targeted by the breastfeeding voyeurism offence is what causes the harm, not the resultant image. Where an image is taken in such an intrusive way that an intimate image is caught, it will be included in intimate image offences.

(7) Images of deceased bodies. Where the image is of a deceased body, it would not fall within the intimate image offences. The violation and harms such images represent are conceptually different to those addressed by intimate image offences. Intimate images of deceased bodies should be considered as part of a review of the criminal law response to the desecration of a corpse.

Chapter 4: The acts: taking, sharing, possessing and making intimate images without consent

INTRODUCTION

4.1 This chapter considers the behaviours or actions that may form the basis for intimate image offences. We consider four categories:

- **Taking** an image without consent – for example, taking a photograph or video.
- **Sharing** an intimate image without consent – most commonly (though not exclusively) through a digital format such as a messaging or social networking service.
- **Making** an intimate image without consent – distinct from taking, making is any process that creates an altered image. This includes the use of "nudification"[1] and "deepfake" technology to create an intimate image of a person, utilising existing images of the person (which may not have been intimate, may have been obtained consensually and may even have been publicly available).
- **Possessing** an intimate image without consent – for example, where the person depicted has previously shared their intimate image with consent to another and then withdrawn consent to that person's continued possession, or where an intimate image was sent to a third party without the consent of the person depicted and is then kept by that third party.

4.2 The final act we consider is threats involving intimate images. Threats are considered separately in Chapter 12.

4.3 As we outlined in our consultation paper, the first two categories – taking[2] and sharing[3] – form the basis for the current intimate image offences in England and Wales. Possessing and making intimate images of adults without consent do not currently constitute criminal offences.[4]

4.4 In this chapter we consider reforms to the scope of the taking and sharing offences. We do not recommend a specific definition of these terms, which is a matter for

---

1 Nudification software is technology that modifies existing, non-intimate images, and "strips" them of their clothes, resulting in an image that makes the subject appear naked. Some such technology only works on images of women. See, for example, Fiona Ward "'Nudifying' AI tools which 'undress' women in photos are gaining traction, but what is being done to stop it, and how can we protect our images online?" *Glamour* (7 December 2021) https://www.glamourmagazine.co.uk/article/nudification-intimate-image-abuse

2 See Chapter 2 for a description of the offences of voyeurism and upskirting in ss 67(3) and 67A(2) of the Sexual Offences Act 2003.

3 Criminal Justice and Courts Act 2015, s 33.

4 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.157.

legislative drafting. Instead, we make recommendations as to the scope of such terms and what forms of taking and sharing should be included in intimate image offences. In particular we consider whether the current terminology is appropriate; and the limits of the meaning of "taking" in more ambiguous scenarios such as "screenshotting"[5] an image. We also consider whether to replicate the current distinction between the current "taking" offences and conclude that the conduct covered by the upskirting and voyeurism offences can be combined into a single taking offence. Finally, under "taking", we discuss installing equipment for the purpose of taking an intimate image. Such behaviour is currently criminalised within the voyeurism offences and we recommend an offence of installing equipment for the purpose of taking an intimate image.

4.5 We will briefly discuss the behaviours in the voyeurism offence that are outside the scope of this project: observing, and installing or operating equipment to observe, someone doing a private act. Such behaviours are outside the remit of this project as they involve "in person" observation, rather than images. We consider how our recommended offences will interact with the way the observing offences operate.

4.6 We consider the current scope of the disclosure offence and what forms of sharing should be included, and excluded, from any new intimate image offences. We recommend that any sharing offence should include sharing with the person in the image, an act that is excluded from the current disclosure offence.

4.7 In relation to possessing or making intimate images of adults without consent, we recognise that this conduct can be harmful and wrongful. However, we find that the arguments for criminalising possessing or making images alone are not sufficiently strong to justify the creation of specific offences to cover this behaviour. Instead, we argue that the focus of the criminal law should be on robustly pursuing the taking and sharing of intimate images (including intimate images which are made rather than taken) without consent.

4.8 We conclude that an offence based solely on possession of intimate images of adults without consent[6] would be overly broad in its scope and very difficult to enforce. Additionally, for some of the most serious contexts there are other offences – such as stalking and harassment and controlling or coercive behaviour – that may be available.

4.9 Similarly we do not recommend that the act of "making" an intimate image without consent should fall within the scope of the criminal law. Instead, we consider that the act of *sharing* a "made" intimate image – such as a "nudified" image, should be the focus of the criminal law. We recognise that this may be disappointing to those who have been victims of such behaviour. However, as with a possible "possession" offence, we consider that a "making" offence would be difficult to enforce, and that the

---

5 Capturing in a photo form the contents of a screen, usually a mobile phone, tablet or laptop.

6 There are offences of possession of indecent images of children under s 160 of the Criminal Justice Act 1988 and s 1(1)(c) of the Protection of Children Act 1978. Consent is not relevant for the possession offence in the indecent images of children regime, whereas it is a defining feature of intimate image offences. We discuss at para 4.258 why the possession of indecent images of children is not a suitable comparator for an offence of possession of intimate images. For the avoidance of doubt, we do not in any way question the appropriateness of criminalising the possession of indecent images of children.

most harmful consequences of this behaviour can be captured through a "sharing" offence.

TAKING

4.10 The notion of "taking" an intimate or indecent image is currently captured in two slightly different ways in the law of England and Wales.

4.11 Under section 67(3) of the Sexual Offences Act 2003 ("SOA 2003") it is an offence to "record" another person doing a private act without their consent. Similarly it is an offence to "record" an image beneath the clothing of another person, or of someone breastfeeding, without their consent under section 67A(2) and 67A(2B) of the SOA 2003.

4.12 The term "take" is used in relation to indecent images of children. Section 1 of the Protection of Children Act 1978 ("PCA 1978") makes it an offence to "take, or permit to be taken, or to make, any indecent photograph or pseudo-photograph of a child".

4.13 The terms "take" and "record" are not further defined beyond their ordinary meaning.

4.14 In our consultation paper we asked whether the terms "take" or "record" were causing practical difficulties by failing to cover forms of conduct that should be captured by these terms. At Consultation Question 13 and Summary Consultation Question 10 we asked:

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

Consultation responses

4.15 The majority of legal and judicial stakeholders agreed that there were no other forms of taking not currently captured by the existing offences. HM Council of District Judges (Magistrates' Courts) Legal Committee submitted that the offences we mentioned "do capture all forms of 'taking'", adding that "[they] are not aware of any problems with the terms used in the above legislation".

4.16 West London Magistrates' Bench noted that "this terminology has not caused any issues with prosecuting offences under current legislation", concluding therefore that "it would be better to leave them as their ordinary meaning". They agreed that there is no need to define the terms as long as "the words used cover the recording of individual still and video images by whatever type of recording equipment (analogue or digital)".

4.17 Those who considered that there were forms of taking not captured by the current intimate image offences were generally referring to images or behaviours that are excluded by other elements of the offence. These included:

(1) downblousing images, which we recommend fall within the definition of "intimate";[7]

[7] For further discussion of downblousing, see Chapter 3.

(2) creating deepfakes, which is a form of making an image, rather than taking;[8]

(3) hacking or theft of images;[9] and

(4) taking without intent to obtain sexual gratification or humiliate, alarm or distress.[10]

4.18 The Centre for Women's Justice and Ann Olivarius submitted that the making of intimate audio recordings without consent should be criminalised in a similar way to the taking of intimate images without consent. Audio recordings are outside the scope of this project, as our remit is limited to images. We explore this further in Chapter 3.

4.19 Consultees commented on the term "taking"; one suggested using "capture" or "depict" instead.[11] The Crown Prosecution Service ("CPS") considered that "taking" should be given its ordinary meaning, as it is "well understood by practitioners".

4.20 Consultees were keen to ensure that any definition would appropriately capture technological advancements. Honza Cervenka noted it is important that the terms used are defined "clearly and broadly with technological advancements in mind" and welcomed our approach to include images captured by any means. Another consultee submitted that a definition "must be non-specific to allow future image recording methods to be included in the legal definitions of an image".[12] The CPS advised that the "definition of 'taking' is sufficiently wide to take into account developing technology".

Analysis

4.21 Our consultation process did not reveal any conduct deserving of criminalisation that falls outside the use of the terms "take" or "record" in the existing offences. The selection of appropriate legislative language and the need for a statutory definition are matters for those drafting the legislation. We note that the term "taking" has support, and when given its ordinary meaning does not exclude any forms of taking an intimate image that should be captured by an offence. We remain of the view that "taking" in any intimate image offence should include any means by which such an image could be captured and produced. As we explained in the consultation paper, this would include "taking a photo or video with a camera whether digital or analogue and using a mobile phone or computer to capture a photograph or video, whether using the camera function or an app".[13]

4.22 During consultation we were made aware of software that captures an image in the same way standard photography would, but instantaneously produces an "altered" image without creating an original image that reflects exactly what was in front of the

---

8 See the discussion of making and sharing from paras 4.106 and 4.172 below.

9 Distinct forms of behaviour that we consider further at para 4.64 below.

10 This refers to the motivation rather than forms of taking. We address motivation in Chapter 6 where we consider the fault elements of the offences.

11 Honza Cervenka, Consultation Response.

12 Tina Meldon, Consultation Response.

13 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.15.

camera. This may be through the use of filters, for example. Where the image that was being taken meets the definition of intimate, this behaviour should be included in any taking offences in the intimate image abuse regime. We do not recommend a simple making offence, for the reasons we explain at paragraph 4.215 below. We consider this behaviour as distinct. Simple making of an intimate image involves creating an altered image utilising existing images of the victim. Where the alteration is instantaneous to the taking and an unaltered image does not result, the behaviour should still be considered taking. The immediate violation in the presence of someone who is in an intimate situation by taking an image of them without their consent is the wrongful behaviour.

Recommendation 14.

4.23 We recommend that the act of "taking" an image should form a component of our recommended intimate image offences.

4.24 "Taking" should be understood using the ordinary meaning of the term. It should include any means by which a relevant image is produced, including taking a photo or video with a camera whether digital or analogue and using a device to capture a photograph or video, whether using the camera or an app.

4.25 "Taking" an intimate image which is instantaneously modified by software – such as through a filter – should also be included in a "taking" offence.

Copying as a form of taking

4.26 The second issue we considered in our consultation paper was whether making a copy of an image should be considered "taking".[14]

4.27 Modern technology has facilitated certain forms of image capture and reproduction that blur the boundaries of what might be considered the "taking" of an image. These include:

- copying or reproducing an image;
- screenshotting an image;
- screenshotting a video call;
- screenshotting a time-limited digital image (the "Snapchat example");[15] and

[14] Above, paras 7.16 to 7.24.

[15] Snapchat is a social media site that is often referred to in these circumstances; consultees have referred to this type of conduct as the "Snapchat example". Snapchat enables users to send images to others that automatically disappear after a short period of time, usually seconds. It is possible to take a screenshot of an image that has been sent through Snapchat before it is automatically deleted, as a way of retaining a permanent version of the image.

- downloading an image or video from a website.

4.28 In our analysis of these behaviours in our consultation paper, we drew a distinction between the reproduction of an image that already exists, and the "taking" of an entirely new image.

4.29 We concluded that taking a screenshot of a videocall being shown in real time should fall under the definition of taking, because this conduct creates a "still" image that does not otherwise exist. However, we argued that copying an image or video that already exists should not. Criminality might attach to the conduct of someone who then shares such an image without consent – an issue we discuss further from paragraph 4.106 below – but the conduct of copying or screenshotting an existing image or video is not a form of "taking".

4.30 We proposed that a way to understand this distinction is to limit the definition of "taking" to situations where, but for the acts of the perpetrator, the image would not otherwise exist. This would include the videocall example as the still image only exists because it was captured by the person who "took" this image. Taking would not include any of the other examples, as those images existed in their original form at the time of the copying; the acts of the copier only served to produce a second version of the image. We asked the following question at Consultation Question 14 and Summary Consultation Question 11:

> 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?

Consultation responses

4.31 The majority of consultees who responded to this question agreed with our proposed limitation on the scope of "taking" (163 out of 267). West London Magistrates' Bench agreed that our definition "captures the essence of 'taking' an image". Slateford Law described it as "a reasonable and practical qualifier" and noted that it would only limit the scope of a taking offence, not sharing. The Bar Council agreed and noted that "there would often in practice be significant difficulties in proving that the 'copier' of the image had knowledge or reasonable belief that V did not consent". The CPS submitted that it would "appropriately capture the intended behaviours, whilst ensuring that the offence is not too broad" and that "the concept can be easily understood and applied in practice". The Magistrates Association agreed with the proposal describing it as a "sensible definition".

4.32 However, some consultees caveated their support by suggesting that retention or possession should be a separate offence. Consultees who responded positively, negatively, and neutrally to the question argued that retention of a time-limited image (such as the "Snapchat example") should be criminalised. South West Grid for Learning, who run the Revenge Porn Helpline amongst other services, submitted that retention should be included, along with copying a time-limited image such as the "Snapchat example". Dr Charlotte Bishop, Women's Aid, Refuge, and Ruby Compton-Davies also all argued that the "Snapchat example" should be included in an offence.

4.33 Refuge provided comment from their experience:

> [Our] tech abuse team have indicated that perpetrators frequently use screenshots to permanently capture and retain an intimate image of the victim-survivor that she did not consent to becoming a permanent image and have used the disclosure of these images, or threat of disclosure, to abuse her.

Refuge explain that this includes taking screenshots of both Snapchat images and videocalls. They acknowledge the distinction we draw between the two behaviours but argue that the key is the defined consent that underpins the original sharing in both examples.

4.34 Women's Aid agreed that taking a screenshot or downloading an image should not be considered taking but argued that taking a screenshot of a time limited image, such as on Snapchat, should be. They stated:

> It is crucial to acknowledge that the woman who sent the photo may not have consented to the photo being saved and may remain unaware that it has been. Access to the image is for an intended limited time period only, and once that time period has finished, access and consent to the image has been removed.

4.35 Campaign group My Image My Choice argued that taking a screenshot of a time-limited image should count as taking under our proposed test, as but for the acts of the perpetrator, a *permanent* image would not exist.

4.36 Professors McGlynn and Rackley considered our proposed limitation "helpful" but argued that retaining and making an image should also be criminalised. They suggested instead that an offence of taking, making or retaining would add clarity and avoid the unnecessary distinction between the three acts.

4.37 Professor Tsachi Keren-Paz strongly disagreed with our proposal. He submitted that taking possession of an image (such as screenshotting a Snapchat photo) should be criminalised. He submitted that the argument for including this as a form of taking was particularly strong if we were not intending to recommend a possession/retention offence (which he would favour). He argued that creating a permanent version of an image is a taking behaviour, as the perpetrator captures an image that is not there the moment that the image disappears from the perpetrator's phone.

4.38 A number of consultees raised the taking of frames from CCTV or surveillance footage. For example, Gregory Gomberg argued that our proposed limitation would exclude from criminality a perpetrator who "selects" frames from surveillance footage they have accessed.

4.39 As with the previous question, consultees[16] suggested that "taking" should include theft or hacking of images. Using "taking" to mean "stealing" is a common usage of the word.

4.40 Consultees[17] raised concerns about images taken as a result of coercion or grooming and queried whether our proposal would exclude images taken of someone coerced

---

16 Including Anon 15; Anon 110; and Samuel Lawrence (personal responses).

17 Including Anon 4; Anon 68 (personal responses); Equality Now; and Welsh Women's Aid.

to perform for the camera or coerced into taking an image of themselves. Welsh Women's Aid agreed that the concept of taking should pertain to the actions of the perpetrator, but requested clarity on the role of control and coercion:

> Consideration should be given in instances where there is perceived consent from the depicted person to the possibility of coercion in that situation. Although these instances should still be considered as … images otherwise not existing if it had not been for the actions of the perpetrator, we feel this section would benefit from additional information around coercive control to avoid this misinterpretation.

4.41 Equality Now recommended a wider definition of taking to incorporate coercive behaviour that leads to a victim taking an image themselves. They submitted that the definition of "taking" should

> [i]nclude 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.

4.42 Academic Jeevan Hariharan proposed a new conceptualisation of intimate image abuse that accounts for the different types of privacy that is violated by different acts. He suggested that taking is distinct from sharing in that it violates physical privacy (whereas sharing violates informational privacy). This conceptualisation helps to understand how copying is different from taking as copying does not often involve that physical violation. It could be argued that taking screenshots of a live stream does violate physical privacy in a similar way to other forms of taking.

4.43 During consultation we were also advised that a deliberate omission, as well as an act, could lead to an intimate image being taken. For example, deliberately failing to stop a recording so that something intimate was captured. This should be included within the scope of taking.

Analysis

4.44 There is significant support for the limitation to "taking" as proposed. A number of legal stakeholders commented that it is understandable and appropriate.

4.45 We recognise the harm that has led for calls for screenshotting to retain time-limited intimate images to be included within the definition of "taking", or otherwise criminalised. It is a common behaviour, but this does not make it condonable. We accept that there are parallels with more standard "taking" in terms of the harm that both can cause to victims. However, we consider that to include copying or reproduction of an existing image within the definition of "taking" stretches the meaning of the term beyond its logical limits in this context. To the extent that criminal liability should attach to this copying behaviour, it is better considered in the context of "making" or "possessing" an intimate image without consent – conduct which we discuss later in this chapter. If an intimate image has been copied, such as by screenshotting a time-limited image, and then the copy shared without consent, that behaviour would be covered by our sharing offence.

4.46 Though it is a fine distinction, we consider that screenshotting an intimate image without consent during a live video stream – for example, a Zoom call – can logically fit within a taking offence. Taking an image by taking a screenshot of a live stream or videocall is similar to taking an image of someone who is present in real life. The person depicted is existing, performing, interacting, while another person, without their consent, records them. The person depicted has no autonomy over how they are depicted in the resultant image. This is distinct from copying without consent an image that was taken with consent. In such cases, the person depicted has control over how they were depicted; they can see the image that was taken and decide, knowing the content, if they want to share it.

4.47 CCTV footage that consists of a series of still (rather than continuous) images further complicates the boundaries. However, the same principle can apply. CCTV is essentially a live video. It may be recorded (where a version is saved as or shortly after it is being streamed) or may be a live stream only. Where it is live stream only, we consider this to be sharing an intimate image, rather than taking one.[18] We consider this at paragraph 4.108 below. Unless the CCTV is being recorded and stored, an image has not been taken. A further distinction is that a CCTV camera streams whatever is in front of the camera; this may include intimate and non-intimate images. Only at the moment someone intentionally takes a copy (screenshot or video) of a section of the CCTV that shows something intimate do we consider it to be "taken" for the purposes of this offence. By contrast, the Snapchat example still relies on the pre-existence of a recorded intimate image, even if that image is automatically deleted later.

4.48 We considered the suggestion that taking could be limited to cases where, but for the acts of the defendant, a *permanent* image would not exist. The intention would be to include as a form of "taking" the Snapchat example and any other instance where someone creates a permanent copy of a time-limited image. Again, we understand the arguments for including such images and acknowledge that we have drawn a fine distinction here. However, defining the act of taking in the way suggested adds confusion and may not achieve the desired aim. It raises the difficult question of when an image is permanent. It could also create undesirable distinctions. Images shared in a way that means the recipient only has access to them for a specific length of time may or may not exist already permanently. Consider two examples: A has a nude image of herself saved on her phone; she sends it to B using the "disappearing message" function on Instagram. B only has access to the image for seconds before it disappears. A still has the original on her phone. C opens up his Instagram app and takes and sends a nude image of himself to D using the "disappearing message" function. The image is not stored on C's phone or elsewhere. D only has access to the image for seconds before it disappears. B and D each take a screenshot of the images before they disappear. With the suggested formulation, only D has "taken" an image because a permanent image of A already existed. The "permanency" actually relates to the recipient's ongoing ability to access the image. It is still therefore better

[18] Live streaming here means broadcasting live action, where that stream or broadcast is not being recorded or stored anywhere. The CPS also explain this: "In cases involving live-streaming, once an image or video has been viewed, there is no forensic trace left on the device used to view that image or video." Crown Prosecution Service, *Indecent and Prohibited Images of Children – Legal Guidance* (30 June 2020) https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children.

categorised as a method of retaining or possessing an image rather than a method of "taking".

4.49 We therefore recommend that the limitation we proposed in our consultation paper form part of the definition of "taking".

Recommendation 15.

4.50 The definition of "taking" an image should only include such behaviour where, but for the acts or omissions of the defendant, the image would not otherwise exist.

4.51 Two further important issues were raised by consultees in this context – hacking of images, and the coercion of a victim either into taking an intimate image of themselves or agreeing to have an intimate image taken by another.

4.52 In the case of coerced taking, we consider that there are a range of existing criminal offences that may be used to address this conduct.

4.53 In the case of hacking, we note that there are various offences that may be available, though these do not directly criminalise "taking" these images without consent. However, further sharing these hacked images without consent would fall within our recommended sharing offence.

Coerced taking

4.54 There are a number of offences which may be applicable in circumstances where a victim is coerced into taking an intimate image of themselves or allowing another person to take an intimate image of them. These include:

- The offence of causing a person to engage in sexual activity without consent contrary to section 4 of the SOA 2003.
- The offence of controlling or coercive behaviour in an intimate or family relationship contrary to section 76 of the Serious Crime Act 2015.
- The offence of blackmail contrary to section 21 of the Theft Act 1968.
- Communications offences, currently in section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. These will be replaced by new communication offences in the Online Safety Bill, based on the recommendations in the Law Commission review of the communications offences (see Chapter 2 for further detail).[19]
- Fraud by false representation contrary to section 2 of the Fraud Act 2006.

[19] Modernising Communications Offences: A final report (2021) Law Com No 399.

- Indecent or prohibited images of children offences contrary to section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988.

4.55 The most directly applicable of these is section 4 of the SOA 2003, which provides that:

> (1) A person (A) commits an offence if—
>
> (a) he intentionally causes another person (B) to engage in an activity;
>
> (b) the activity is sexual;
>
> (c) B does not consent to engaging in the activity; and
>
> (d) A does not reasonably believe that B consents.

4.56 This offence may apply to circumstances of coerced taking of intimate images. For example, A may be liable where they have intentionally caused B to take an intimate image of themselves using coercion, B does not consent to taking the image and A does not reasonably believe that B consents. However, the offence is limited to contexts that are "sexual", and therefore may not extend to non-sexual intimate contexts such as toileting.

4.57 The offence of controlling or coercive behaviour may be available in circumstances of an abusive relationship where the victim has been coerced into taking an intimate image of themselves as part of a wider pattern of abuse. Its scope is, however, limited to this context of intimate relationships and a pattern of ongoing abuse.

4.58 The offence of blackmail may apply where, for example, A demands that B take intimate images of themselves, otherwise A will use violence towards B or will share intimate images taken consensually by B previously.[20] To constitute blackmail, A must make this demand with a view either to gain money or other property, or cause someone else to lose money or other property.[21] In this context, A might act with a view to gaining B's intimate images.[22]

4.59 Communications offences may apply in circumstances where a threatening or menacing message is sent to coerce the victim into taking an intimate image of themselves.

4.60 The offence of fraud by false representation contrary to section 2 of the Fraud Act 2006 may apply in circumstances where a victim has been misled into taking a photo of themselves on the basis that it will not be further shared, when in fact the defendant plans to share this photo more widely. In doing so, the defendant must intend to make a gain or cause a loss.

---

20 See, for example, *R v C* [2015] EWCA Crim 1519: V (16-year-old boy) sent J (14-year-old girl) a photo of his penis, which J's 33-year-old brother-in-law (D) saw. D replied to V, saying he would beat up V and report him to the police unless V paid D. D was convicted of blackmail under section 21 of the Theft Act 1968.

21 Theft Act 1968, s 34(2)(a).

22 Digital images are likely to amount to property within the meaning of s 4(1) of the Theft Act 1968.

4.61 Finally, the indecent images of children offences (section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988) apply to a range of conduct involving indecent images of children. The consent of the child depicted is irrelevant for the majority of offences concerning indecent images of children. Therefore, in relation to a child, being in possession of an image taken by coercion, taking an image, or permitting an image to be taken whether by coercion or not, will be an IIOC offence.

4.62 Where A takes an intimate image of B having coerced B to provide apparent consent, the intimate image offences could apply as the taking is without B's genuine consent.

4.63 Taken together, we consider that there are adequate existing criminal remedies available in circumstances of coerced taking, and there is no need for a further specific offence to cover this conduct.

Hacking or stealing intimate images

4.64 CPS guidance on cybercrime classifies "hacking" as cyber-enabled crime.[23] In the context of intimate image abuse it may refer to the accessing, copying, downloading, or moving of intimate images from the victim's device or cloud.[24] Usually a copy is made; the original image still exists in its original form on the original device or cloud. Stealing an image would involve taking a hardcopy photo or film, or negative from the possession of another. They are both different behaviours from the "taking" of an image. They are methods of coming into possession of an image rather than taking an image where one did not exist before. The behaviour is deplorable. The most wrongful behaviour, with the highest risk of causing harm, is when those hacked or stolen images are subsequently shared or used as part of a threat or blackmail. We discuss offences that would cover these behaviours from paragraph 4.106 below and in Chapter 12. Where the hacking or stealing only results in someone coming into possession of an image, and no further action, this kind of possession is better considered with the criminality of possession at paragraph 4.246 below. We now briefly consider the actual acts of hacking or stealing intimate images. Hacking or stealing images, as with hacking or stealing any other sort of document or property, may be subject to specific offences.

4.65 The Computer Misuse Act 1990 ("CMA 1990") is the most directly applicable legislation to cases of hacking.

4.66 Section 1 of the CMA 1990 provides that:

> (1) A person is guilty of an offence if—
>
> (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured;

---

23 Crown Prosecution Service, *Cybercrime - prosecution guidance* (26 September 2019) https://www.cps.gov.uk/legal-guidance/cybercrime-prosecution-guidance.

24 A cloud storage system involves the storage of data on remote servers. These servers are physically hosted in what are termed data centres, server rooms or server farms.

(b) the access he intends to secure, or to enable to be secured, is unauthorised; and

(c) he knows at the time when he causes the computer to perform the function that that is the case.

4.67 This offence is intended to protect computers from hacking, rather than the private information stored on them. However, it may still be used to protect the latter. Though the offence does not specifically address "appropriating" behaviours (as it does not require anything to be "taken" from the computer), it may be used to capture related behaviours (for example, the steps the defendant carries out *before* actually "taking" an image).

4.68 Furthermore, where the defendant has an intent to commit or facilitate commission of further offences, they may be liable under section 2 of the CMA 1990. Under section 2 it is an offence to access a computer without authority with an intent to commit or facilitate commission of a further offence. Section 2 would apply where, for example, someone accesses a computer without authority (a section 1 offence) to be able to commit fraud using that computer later. It could also be used where someone accesses a computer without authority to install a programme that records someone doing a private act with the intent of looking at the images for the purpose of obtaining sexual gratification. In such a case, the unauthorised access would be with the intent of committing a voyeurism offence. A man was recently convicted of multiple counts of voyeurism and computer misuse offences after he (amongst other acts of voyeurism) hacked into home security software enabling him to use the cameras inside people's homes to commit the voyeurism offence. He saved over 1,400 intimate videos recorded by these hacked devices. Prosecutors were able to charge both the acts of hacking and the acts of recording.[25]

4.69 The offence of theft contrary to section 1 of the Theft Act 1968 may also be applicable in some limited circumstances, though where the image is not deleted from the original source, such as the victim's phone, the requirement that the defendant had the "intention of permanently depriving" the victim of the image will not be met.

4.70 Fraud offences may also be available where the defendant dishonestly accesses (or tries to access) or possesses the victim's intimate images. Such offences might include fraud by false representation,[26] possession of an article for use in fraud,[27] and obtaining services dishonestly.[28]

---

25 "Secret filming victim feels let down by courts" (7 May 2022) *BBC News*, https://www.bbc.co.uk/news/uk-england-59399309.

26 Fraud Act 2006, s 2.

27 Fraud Act 2006, s 6,

28 Fraud Act 2006, s 11.

4.71 There may also be limited circumstances where data protection[29] and copyright offences[30] are applicable, though these are limited to largely commercial contexts.

4.72 We conclude therefore that there are sufficient criminal offences that could apply to the act of hacking or stealing intimate images. It is neither necessary nor appropriate to consider them as a form of taking.

Installing

4.73 In the current voyeurism offence, there is a specific offence of installing equipment, constructing or adapting a structure to enable oneself or another to commit the observation offence.[31] There is no equivalent offence of installing equipment etc to enable the commission of the recording offence. This creates unsatisfactory gaps. Explaining the decision to limit the application of the installing offence to the observation offence only, the then Lord Chancellor, Lord Falconer, said:

> We consider that an offence of this nature would be too complicated. A jury would have to consider whether a person installed equipment with the intention of enabling another person to record a third person doing a private act with the intention of enabling a fourth person to obtain sexual gratification from looking at the image. However, if a person installs equipment in such circumstances, he may still be guilty of conspiring to commit a subsection (2) or (3) offence[32] or of aiding and abetting such an offence.[33]

4.74 In the consultation paper we explained that offences of aiding and abetting would only apply where more than one person is involved in the conduct. This potentially excludes much culpable behaviour. We did not have evidence of installing equipment for the purpose of taking an intimate image where the taking did not then occur. At Consultation Question 15 we asked:

> 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?

Consultation responses

4.75 Fifteen consultees provided a comment or example in response to this question. Some provided examples or evidence as to prevalence. Most consultees were concerned with equipment designed to capture covert images, and the fact that it is not always possible to know whether recordings were made or not.

---

29 Data Protection Act 2018, s 170.

30 Copyright, Designs and Patents Act 1988, s 107.

31 Sexual Offences Act 2003, s 67(4).

32 The offence of installing equipment, constructing or adapting a structure to enable oneself or another to commit the observation offence.

33 *Hansard* (HL) 19 May 2003, vol 648, col 571. Under s 67(2) it is an offence to operate equipment with the intent of committing an observation offence. Section 67(3) is the recording offence; it is an offence to record another doing a private act without their consent for the purposes of obtaining sexual gratification.

4.76 There were conflicting views on the question of prevalence. HM Council of District Judges (Magistrates' Courts) Legal Committee noted that they are not aware of such incidents suggesting, "anecdotally at least", that it is an uncommon occurrence. Muslim Women's Network UK noted that they were not aware of any examples but suggested that might be because it is "undisclosed or unreported". Conversely, a number of consultees provided examples from their professional work including South West Grid for Learning, Refuge, Backed Technologies Ltd and Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society).

4.77 South West Grid for Learning submitted that the Revenge Porn Helpline

> [s]ee cases where clients have discovered recording equipment in places where they have been intimate but not necessarily discovered whether content was actually created with the equipment: the other person may deny it, say it has never been used, or deleted content.

4.78 They described the harm of such discoveries, stating that the cases "cause extensive distress and paranoia that content has been created and shared without their knowledge". They explained that the victim cannot be reassured that such sharing did not happen as the only person who could do so has breached their trust already by installing the equipment.

4.79 Justices' Legal Advisers' and Court Officers' Service also advised that they were aware of relevant cases:

> We are aware of offences where cameras were found (for example in hotel rooms) where the police had no evidence of any images being taken, but the intention being clear, and where it is likely that in fact images had been taken.

4.80 Laura Bloomer of Backed Technologies Ltd submitted that "home or hidden cameras are a growing concern for many" in particular for lone female travellers staying in hotels and Airbnbs.[34]

4.81 A number of consultees were not able to provide examples or evidence of prevalence but submitted that the behaviour should be criminalised. For example, Muslim Women's Network UK supported including those who prepare to take intimate images without consent in the criminal law and noted that there are different harms and intent associated with the behaviour that the sentencing regime could help distinguish between these. Some consultees considered such installation was evidence of an intent to commit an offence. Ann Olivarius noted that her law firm did not have any case examples, however "the installation of such equipment would certainly suggest to a reasonable person the intent to commit a crime or to threaten the person".

4.82 Conversely some consultees suggested that the behaviour is already appropriately covered by criminal law. Professor Gillespie commented that in many instances the law of attempts would capture the behaviour. Kingsley Napley LLP suggested that it is

---

[34] Hidden cameras in Airbnb properties have been the subject of media articles, and "how to" videos to help travellers look for any hidden recording devices. See for example Sidney Fussell, "Airbnb Has a Hidden-Camera Problem" *The Atlantic* (March 2019) https://www.theatlantic.com/technology/archive/2019/03/what-happens-when-you-find-cameras-your-airbnb/585007/.

"a highly unusual event that is already covered by existing offences" and that it would be a "significantly aggravating feature" to a substantive charge.

Analysis

4.83 Evidence provided by consultees suggests that installing equipment to take an intimate image, where an image is not taken or it is unclear if an image was ever taken, is extremely concerning behaviour. Covert recordings are a particular area of concern. It is highly culpable and can result in significant harm to victims.

4.84 It would be problematic to leave a gap in legislation that allows installing equipment for the purpose of taking an intimate image without consent in light of the evidence regarding covert recordings. Such an offence could be used in cases where a hidden camera is discovered and there is no available evidence of recordings. The intention to record an intimate image would often be clear from the placement of the cameras in places where it is likely an intimate image would be captured, such as a changing room or toilet. It might, necessarily, be more difficult to prove the required intent if the camera was somewhere like a bedroom[35] or hallway.

4.85 We are not convinced that existing offences sufficiently address this behaviour. The inchoate offences will not always be sufficient. For example, where the perpetrator is acting alone, the offences of aiding and abetting or conspiracy will not apply. If the installing of equipment is "merely preparatory" to the commission of the substantive offence of taking an intimate image, it will not constitute an attempt.[36]

4.86 The rationale for not including such an offence at the time the voyeurism offence was drafted, at paragraph 4.73 above, is not compelling. It fails to consider the fact that a person can install equipment with the intention that they themselves commit the recording offence. Further, the availability of equipment with which to record an image has moved on substantially from 2003 when those comments were made, and it is perhaps easier now to envision how one can install equipment for oneself or another to operate to record. Parliament has already criminalised installing equipment for real time viewing of a private act without consent. That is more analogous now, with the technology available, to installing equipment to record someone doing a private act.

4.87 Accordingly, we conclude that the behaviour is sufficiently wrongful and harmful to justify its criminalisation. We recommend that it should be an offence for D to install equipment with the intent of enabling D or another to take an intimate image.

---

35 Placement in a bedroom alone may not always be sufficient to demonstrate intent to record an intimate image. For example, Airbnb properties and hotels may offer a "bedroom" that also includes some living space, such as a sofa or desk where intimate images may not usually be captured. It may be more difficult to evidence intent in such circumstances, but not impossible; for example, it may require evidence that the camera was aimed at the bed instead of a desk.

36 Criminal Attempts Act 1981, s 1.

Recommendation 16.

4.88 We recommend that it should be an offence for D to install equipment with the intent of enabling D or another to commit the offence of taking an intimate image without consent.

Observation, operating equipment and installing for the purposes of observing

4.89 As part of this discussion, we considered the full scope of the voyeurism offence. If our recommendations were implemented, those parts of the voyeurism and upskirting offences that relate to recording images would be repealed and replaced with our recommended taking offences. This would mean that the offence of observing[37] and the offences of operating equipment[38] or installing equipment[39] to enable the commission of the observation offence would remain as separate voyeurism offences.[40]

4.90 In this project we have not considered acts of observing, or installing or operating equipment in order to enable observing, someone doing a private act without consent. The behaviour does not result in an intimate image being taken, made or shared, and is therefore outside the scope of this project. While there are obvious overlaps with taking intimate images, it is a distinct behaviour. We have not asked for, nor looked at, evidence relating to observing the motivation, harms or prevalence of these acts, or how well the current offences address them.

4.91 We do note that the recording offence, which we have considered in great detail, and the observing offence under section 67 of the SOA 2003 utilise the same definition of intimate ("doing a private act") and fault element (for the purpose of obtaining sexual gratification). In the consultation paper and throughout this report we have described the benefits, purpose, and limitations of both of these elements as they relate to the recording offence. We are recommending offences of taking an intimate image without consent that would be wider than the current voyeurism recording offence. The key differences are as follows:

(1) We recommend a different definition of an intimate image.

(a) We recommend that the definition of partially-nude images is images where the breasts, buttocks or genitals are covered by anything being worn as underwear, or are similarly or more exposed than if wearing underwear, that is of a kind not ordinarily seen on a public street. The voyeurism offences include taking an image of a person or observing

---

37 Sexual Offences Act 2003, s 67(1).

38 Above, s 67(2).

39 Above, s 67(4).

40 We have acknowledged that the breastfeeding voyeurism offence covers some images and conduct that would not be covered by our offences, and therefore it may be considered appropriate for that offence to remain alongside our offences. See para 4.104 below and Chapters 3 and 15 for further discussion.

them where "the person's genitals, buttocks or breasts are exposed or covered only with underwear".[41]

(b) We recommend a definition of sexual that includes an image that shows something that a reasonable person would consider to be sexual because of its nature; or, taken as a whole, is such that a reasonable person would consider it to be sexual, and is of a kind not ordinarily seen on a public street. The voyeurism offences include observing or recording an image of someone "doing a sexual act that is not of a kind ordinarily done in public".[42] Something that is sexual in nature but is not a sexual act (such as posing provocatively) may not be included in the voyeurism offence.

(c) We recommend including toileting images of a kind not ordinarily seen on a public street including images of someone in the act of defecation, and urination, and of personal care associated with genital or anal discharge, defecation, or urination. The voyeurism offence includes "a person using a lavatory".[43]

(2) We recommend a reasonable expectation of privacy test that considers the context in which the image was taken, rather than just the place in which it was taken. Under the voyeurism offence, "a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy".[44] While this test has proven to be somewhat flexible in case law,[45] it potentially excludes observation for the purposes of sexual gratification of someone who is breastfeeding in public, is being sexually assaulted in public, or is nude or partially nude in public against their will. Our recommended taking offence would include taking an image in such circumstances.

(3) Our recommended offences would criminalise behaviour that is committed for purposes other than obtaining sexual gratification.

(a) The base offence does not require any specific intent when taking an intimate image without consent.

(b) We also recommend an offence of taking an intimate image without consent for the purpose of humiliating, alarming, or distressing the person depicted (this would be more serious than the base offence, and as serious as an offence committed for the purpose of obtaining sexual gratification).[46]

---

41 Sexual Offences Act 2003, s 68(1)(a).

42 Above, s 68(1)(c).

43 Above, s 68(1)(b).

44 For further discussion of this issue see Chapter 10.

45 *R v Bassett* [2008] EWCA Crim 1174, [2009] WLR 1032; *R v Richards* [2020] EWCA Crim 95, [2020] 1 WLR 3344, and the discussion in Chapter 10.

46 See Chapter 7 for further discussion on the structure of the recommended offences and suggested sentencing range.

4.92 If our recommendations were implemented, the observation offence would retain all the current definitions and elements in the voyeurism offence, whereas the current recording offence would be replaced by a taking offence that has the different definitions and elements we recommend as above.

4.93 As noted above, observing is a distinct behaviour from taking, though both require a proximity to the victim, either in person or by equipment. We have only been able to analyse the gaps in the current offence as they relate to the act of taking (and the acts of sharing and making). Therefore, we make no comment on the gaps as they would relate to observing. If enacted, the offences that we recommend will create a regime separate from an observation offence, which will have a different definition of intimate, a different reasonable expectation of privacy test, and different intent elements. We conclude that these differences are all necessary and justified in the context of taking and sharing intimate images. We also acknowledge that having different regimes for similar behaviour can cause difficulties when understanding and applying the law. If the recommendations in this report are accepted, we suggest that the Government consider whether these differences necessitate amendment of the remaining voyeurism offences.

A single taking offence

4.94 The final issue to consider under the act of taking concerns the structure of the current taking offences. Voyeurism, upskirting and breastfeeding voyeurism are three separate offences in the SOA 2003. The upskirting offence was introduced in 2019 to address the gap created by elements of the existing voyeurism offence that excluded "upskirting" images. Breastfeeding voyeurism was introduced in 2022 (after the consultation paper was published) as conduct identified as worthy of criminalisation which was not included in either the voyeurism or upskirting offences. We explain these gaps and set out the full extent of these offences in Chapter 2. In the consultation paper we explained that in principle, it would be desirable to combine the current taking offences[47] into one taking offence:

> It would simplify and consolidate the law, so that police and prosecutors would no longer have to consider two offences (alongside a myriad of other offences not designed to target image abuse) when faced with a case of non-consensual taking.[48]

4.95 Additionally, we now recommend a definition of an intimate image that would satisfactorily capture both upskirting images and images caught by the current voyeurism offence, as well as downblousing. Therefore, there is scope to apply the definition to a single taking offence, capturing the full range of images currently caught by both existing offences. We proposed to combine the behaviour currently criminalised by both the voyeurism and upskirting offences into a single taking offence. At Consultation Question 16 we asked:

> 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?

---

47 At that time, voyeurism and upskirting in ss 67 and 67A of the SOA 2003.

48 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.31.

Consultation responses

4.96 The majority of consultees who responded to this question agreed with our proposal (26 out of 38). The CPS submitted that "it is unhelpful for there to be two distinct offences covering this behaviour, especially when the offences contain differing elements". The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) argued that the current distinction between the "precise manner of taking" between the offences is "irrelevant both to culpability and harm". Dr Charlotte Bishop submitted that "simplifying and consolidating as much relevant behaviour as possible" is "necessary and desirable". The Bar Council agreed it would bring "clarity and consistency". Professors McGlynn and Rackley submitted that the law must be as straightforward as possible with "a single, comprehensive provision".

4.97 Consultees[49] noted that combining offences will help reduce complexity and allow for more effective application of the law by police and prosecutors. Some consultees asked or commented about the impact this has for victims. The Mayor's Office for Policing and Crime (London Mayor) queried what the consequences would be of a combined offence for victims. Refuge suggested that consolidation can avoid gaps in protections for victims. Muslim Women's Network UK explained how it might reduce some of the barriers faced by marginalised groups accessing the criminal justice system. They submitted that combined and simplified offences "will allow better consistency in implementation of processes" and benefit victims and criminal justice agencies. They explained that one of the key issues from their work on access to the criminal justice system for Muslim women was the "lack of information or inaccurate or incomplete information provided to them by police and legal representatives" and submitted that clarity in law can help avoid this.

4.98 HM Council of District Judges (Magistrates' Courts) Legal Committee agreed "on balance" but noted that a combined offence that covers a range of behaviours will mean that the nature of particular offending may not be as obvious from a defendant's antecedent history as presented to the court as it is now. They recognised that parties should still be able to provide such detail when necessary.

4.99 Two consultees disagreed with the proposal and submitted that the two behaviours were sufficiently different to warrant separate offences. Senior District Judge (Chief Magistrate) Goldspring submitted that "the level of invasion of privacy is utterly different". Kingsley Napley LLP stated:

> Upskirting is a significant invasion of privacy and voyeurism tends to capture a greater amount of private activity. Combining the offences may dilute voyeurism or aggravate upskirting. There needs to be separation between the acts.

4.100 Both Muslim Women's Network UK and Garden Court Chambers Criminal Law Team raised the issue of offences under section 67 of the SOA 2003 that would remain if the taking offences were consolidated.[50] We address this at paragraph 4.89 above.

---

[49] Including South West Grid for Learning; Muslim Women's Network UK; CPS; Dr Charlotte Bishop; and Magistrates Association.

[50] The offences of observation of a private act and installing or operating equipment in order to commit the observation offence.

Analysis

4.101 In the consultation paper we suggested that a combined offence would make it easier for police and prosecutors to apply the relevant offence. We anticipated that this would benefit victims, and we are satisfied that the responses from Refuge and Muslim Women's Network support this. We have not identified any adverse consequences for victims if a more comprehensive offence is appropriately drafted.

4.102 There is substantial support from consultees for combining offences where the behaviours are similar; it promotes clarity and consistency and enables a more effective response from police and prosecutors which improves the experience for victims.

4.103 We acknowledge that a single taking offence needs to cover a very broad range of taking behaviours. They will differ in seriousness, culpability, harm, and motivation. We acknowledge, as raised by consultees who disagreed with our proposal, that upskirting is a different type of taking than the others, and it can be a different type of privacy violation. We do not think this justifies retaining or creating separate offences. The definition of an intimate image we have recommended satisfactorily captures upskirting images alongside all other intimate images. Further, there are a myriad of different taking behaviours; it would not be appropriate to try to create offences for them all. Where motivation differs, this will be addressed by the intent elements of the recommended offences. Where culpability and harm differ, this will be reflected in sentencing. We therefore recommend that the behaviour prohibited by the current voyeurism and "upskirting" offences should be combined in a single taking offence.

4.104 The breastfeeding voyeurism offence was introduced after the consultation paper was published and therefore consultees' responses do not directly address it. It is an offence of recording, but it is distinct from voyeurism and upskirting in that it focuses on the act of recording someone who is breastfeeding, rather than focussing on the type of image that is being recorded. The offence was deliberately drafted broadly so that it would include the conduct of recording someone while breastfeeding, even if the resultant image did not show any of the breastfeeding activity. It also extends to recording someone who is adjusting their clothing before or after breastfeeding. This makes the offence in one way broader than the taking offence we recommend as it covers the taking of images that are in no way intimate (for example taking an image of someone's foot while they breastfed would be covered). At the same time, it is narrower than our recommended offences as it is limited to recording with an intent that someone will look at the image either to cause humiliation, alarm or distress, or to obtain sexual gratification. Therefore, an image of someone breastfeeding where the breast is fully exposed (making it an intimate image for our offences) that was taken for a laugh, to sell or for no reason at all would not be covered. The breastfeeding voyeurism offence targets a particular harm; the violation and distress experienced by people who are recorded without their consent while breastfeeding. It does not focus on the harm caused by, and privacy violations specific to, the taking or sharing of intimate images. By introducing this offence, Parliament has decided that the recording of non-intimate images in these circumstances is criminal conduct. The full range of offences we recommend would criminalise conduct that is not currently criminalised by this offence, but it would not criminalise the taking without consent of those non-intimate images. Therefore, we conclude that it is not necessary to repeal the breastfeeding voyeurism offence in order to implement our recommended

framework of offences. There may be a narrow range of conduct that could fall within the scope of both the breastfeeding voyeurism offence and a new offence of taking an intimate image without consent. This is not unusual, and the CPS have guidance for determining which offence is more appropriate to charge in any circumstance where more than one could apply.[51]

Recommendation 17.

4.105 We recommend that the behaviour prohibited by the current voyeurism and "upskirting" offences should be combined in a single taking offence.

SHARING

4.106 At present it is an offence to "disclose" a private sexual image without consent, with the intention to cause the person in the image distress.[52] The term "disclose" is defined in this offence as follows:

> (2) A person "discloses" something to a person if, by any means, he or she gives or shows it to the person or makes it available to the person.
>
> (3) Something that is given, shown, or made available to a person is disclosed—
>
> (a) whether or not it is given, shown, or made available for reward, and
>
> (b) whether or not it has previously been given, shown, or made available to the person.[53]

4.107 In our consultation paper we expressed the provisional view that the scope of conduct captured by this definition of "disclose" is appropriate. It captures:

- Images that are disclosed online, including on websites, via email or through private messaging services.
- Images that are disclosed offline, for instance images that are printed out and sent in the post or distributed by hand.
- Showing images, for instance showing someone an image on a device or a printed copy of an image, without sending or giving them the image so they cannot retain it.

---

51 Paras 6.1 to 6.5 of the Code for Crown Prosecutors provide guidance on selecting the appropriate charge. Para 6.1 states that charges should be selected which: "reflect the seriousness and extent of the offending; give the court adequate powers to sentence and impose appropriate post-conviction orders; allow a confiscation order to be made in appropriate cases, where a defendant has benefitted from criminal conduct; and enable the case to be presented in a clear and simple way".

52 Criminal Justice and Courts Act 2015, s 33.

53 Criminal Justice and Courts Act 2015, s 34.

4.108 We argued that this concept would provide an appropriate basis for any further offence. It would include, but would not be limited to, posting or publishing images on websites, sending images via email or private messaging services such as WhatsApp, and live streaming. It would also include offline acts such as sending an image to another by mail or by hand or showing an image to another in person, whether stored on a phone or a hard copy. It would also include making an image available by storing it somewhere for others to access such as a joint filing system or a shared folder on a computer. We then asked for consultees' views on this, and also whether there were any additional forms of sharing that should be included in intimate image offences. At Consultation Question 20 and Summary Consultation Question 12 we asked:

> We provisionally propose that "sharing" an intimate image should capture:
>
> 1) sharing intimate images online, including posting or publishing on websites, sending via email, sending through private messaging services, and live-streaming;
>
> 2) sharing intimate images offline, including sending through the post or distribution by hand; and
>
> 3) showing intimate images to someone else, including storing images on a device for another to access and showing printed copies to another.
>
> Do consultees agree?
>
> 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"?

Consultation responses

4.109 The vast majority of consultees who responded to this question agreed with the forms of sharing we proposed to include (305 out of 317). For example, Professors McGlynn and Rackley submitted that "we agree that all these forms of sharing must be included in any new offence to ensure that it is comprehensive and future-proofed".

4.110 Consultees observed that the harm experienced does not depend on the means used to share. For example, in their joint response, the North Yorkshire Police, Fire and Crime Commissioner and North Yorkshire Police submitted that "if an image is shared in whatever means, it should be an offence as the impact on the victim is the same". Professor Andy Phippen supported the inclusion of both online and offline forms of sharing: "it is good to see proposals to extend "sharing" to include offline as well as online means… I have heard of many accounts of abusers sending print outs of images to family or employers".

4.111 Consultees supported a comprehensive understanding of sharing to avoid perpetrators exploiting loopholes.[54] In this regard, some suggested that while useful to have a list of examples, it should not be exhaustive.[55]

4.112 A number of consultees noted that while it was useful to include examples based on methods of sharing we understand presently, it is important in the context of advancing technology to allow for inclusion of future developments. The concept of sharing needs to be sufficiently wide to be futureproof. For example, dating app Bumble argued that "it is important that the law remains up to date, and can adequately respond to technological changes that may create new possibilities for sharing images or videos in the future". The Centre for Information Rights suggested that "the phrasing of any actual drafting in this area will need to be done carefully so as to ensure future-proofing from a technological perspective".

4.113 Some forms of sharing discussed warrant further consideration. We explore these below.

Showing an image

4.114 Consultees' responses demonstrated support for including "showing" an image to another in a sharing offence.[56] Some consultees argued that sharing does not need to include transfer of the image. For example, Professor Phippen "would also suggest that showing the image to someone else on a device should also be considered to be sharing, regardless of whether a digital or physical artefact has been exchanged". West London Magistrates' Bench argued that "the retention of the intimate image by a third party should not be necessary for the 'sharing' offence to be made out".

4.115 However, Kingsley Napley LLP opposed this inclusion:

> We do not agree that this should be included in 'sharing' an intimate image, given that there is no transmission of the image. It should be noted that in certain circumstances, showing an intimate image with malicious intent would be covered by existing offences. For example, if a young boy shows a picture of a naked girl to his friends of the same age, he would be committing the offence of possessing an [indecent image of a child] but would not be committing an offence of distributing. The same approach should be taken here. There is a qualitative difference in the harm caused by somebody showing an image to another and the loss of control over the image if it is sent/shared or distributed.

4.116 Corker Binning were concerned that including "showing" an image risks overcriminalisation particularly of children as they show each other images on their phones often.

4.117 We accept the harm can be different when an image is shown to another compared to an image that is distributed to a large audience on the internet to keep or share onwards. However, we have concluded that both are sufficiently harmful to warrant criminalisation. We have heard from consultees that the harm caused to victims does

---

54 Including James Ellis and Clive Neil (personal responses).

55 Including Cherry Bradshaw (personal response).

56 Including Professor Tsachi Keren-Paz; Ann Olivarius; and Professor Alisdair Gillespie.

not depend on the method of sharing. Sharing causes harm because it enables someone to see an intimate image who does not have consent to see it. Sharing that results in versions of an image being in the control of others can cause additional harm because of the loss of control of the image. However, it is not the only harm that makes sharing wrongful behaviour. Showing an image can still result in lengthy observation by one or many people. If we did not include showing, that may exclude conduct such as displaying an intimate image on a billboard or projecting it in a classroom. We note that within the current disclosure offence, showing an image is expressly included in the definition of "disclose" under section 34(2) of the CJCA 2015.

Suggestions for other elements to include or clarify

4.118 There were some categories of sharing that came up in a number of consultation responses. These were usually accompanied by a request for clarification that they would be, or arguments that they should be, included as a form of sharing for the purposes of intimate image offences.

(1) Peer to peer messaging such as AirDrop, Bluetooth, and near-field communication (NFC). Bumble said: "there should also be care to ensure that the forms of sharing specified include all possibilities of image transfer between devices, such as via Bluetooth (such as AirDrop)".

(2) Social media platforms. This may include posting to a public page or private messaging within the platform. My Image My Choice also suggested intimate images can be shared on social media as a profile picture.

(3) Physical displays such as printing, posters and broadcasting. For example, the CPS thought "that there may be some value in including 'displaying an image in public' within the definition". Some consultees mentioned that sharing to, by and in, the media should be specifically included.

4.119 All of the above examples should and would be included as a form of sharing for the purpose of intimate image offences.

Sharing by describing or encouraging

4.120 Two consultees explained the harm experienced by an image being "shared" by being described to another. In their joint response, The Angelou Centre and Imkaan argued that "describing an image in detail (even if you are not directly showing it) could constitute as much harm as sharing the intimate image itself". They also argued that this has particular relevance to Black and minoritised victim-survivors:

> In creating the same level of harm to the victim-survivors the Law should be considerate of the additional impact that this will have on Black and minoritised victim-survivors who may have insecure immigration status or [no recourse to public funds]. In these cases, immigration abuse and so-called honour-based violence can be perpetrated due to a 'perceived' belief that the victim-survivor has acted outside of expected norms in a context of structural inequality. In these cases, the mere description of a photo that is deemed to break codes of social expectation or to be 'shameful' could lead to serious and additional harm.

4.121 We do accept that harm can occur in such cases, but we consider that describing an intimate image to someone would stretch the definition of "sharing" too far. There are also many instances when describing an intimate image to someone is neither wrongful nor harmful. The Angelou Centre and Imkaan's concern is a tangible harm. However, a description of an image is not an image and these proposed offences necessarily target images. There may be communications or harassment offences that could apply where the description of an image to another causes serious harm.

4.122 Jo Jones suggested that "encouraging others to view this type of image eg online should be included". It is likely that a proportion of "encouraging behaviour" would involve more tangible sharing, for example encouraging someone to view an image by sending them a link. Where someone simply tells another to access an image this would again stretch the definition of sharing too far. Harm is caused where someone makes an image available to view. That is where a criminal offence should focus.

Forms of sharing where the perpetrator "makes it available" to another

4.123 We now consider forms of making an image available,[57] a type of sharing that requires more detailed consideration.

4.124 In the consultation paper we explained making an image available:

> The parameters of "makes it available" are not defined, nor has there been any case law clarifying its meaning. However, Alisdair Gillespie has suggested that the ruling in *R v Dooley* would be followed when interpreting "make it available" in the disclosure offence.[58] *Dooley* concerned possession of indecent images of children "with a view to their being distributed", which is an offence under section 1(1)(c) of the PCA 1978. In this case, Dooley joined an internet-based peer to peer file sharing network and had several indecent images of children stored in a folder named "my shared folder" on his computer. The Court of Appeal held that Dooley would be in possession of indecent images of children with a view to their being distributed provided that one of the reasons why he left the images in the shared folder was so that other individuals could view them.[59]

4.125 South West Grid for Learning suggested including "making an image available to be seen", to capture cases where an image was shared but not seen by anyone.

Cloud and file sharing

4.126 Cloud based file sharing raised questions for consultees. Bumble suggested including "cloud services that may not include a copy stored on a user's device". One consultee explained that making an image available through a cloud service is "sharing the means" to access an image and should be explicitly covered.[60]

---

57 See Criminal Justice and Courts Act 2015, s 34(2).

58 Alisdair Gillespie, "'Trust me, it's only for me': "revenge porn" and the criminal law" [2015] *Criminal Law Review* 868.

59 *R v Dooley* [2005] EWCA Crim 3093, [2006] 1 WLR 77; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.115.

60 Sally Billenness, personal response.

Links and encryption

4.127 HM Council of District Judges (Magistrates' Courts) Legal Committee and an anonymous consultee[61] both suggested including sending a link as a form of sharing and making an image available. West London Magistrates' Bench suggested a more tangible method to include as an example: "copying of an intimate image to a USB stick or other temporary digital storage device then sharing / giving this device to someone else". Queen Mary Legal Advice Centre suggested that the recipient need not have the means to open or access the image for the act to be complete:

> We considered sharing links that were not able to be readily accessed by the person receiving them (perhaps due to device constraints etc.) but could be accessed by others. These should be covered. Sharing is about the sending of an image that technically can be accessed (even if it is quite difficult or highly restricted) rather than it actually being accessed.

4.128 By sending such information one is making an intimate image available to another. Sending by way of a link or encryption is arguably similar in practice to sharing by way of file sharing. It is making the image available to be seen by another and providing another with the means to see it. Current case law (*R v Dooley*) suggests that file sharing is making an image available. Were these behaviours excluded entirely, it would leave a loophole that could be exploited by those committing extremely harmful and wrongful behaviour. It is noted that our fault element requires "intentionally" sharing. This would limit the offence to those who knowingly send a link to, or encryption code for, a non-consensual intimate image.

4.129 There is however concern that behaviour that effectively provides information needed to access the image (such as sending a link) is not always sufficiently culpable. In some cases it is the sole means by which an image is shared. Consider the following example: A uploads an intimate image of C to a secure website that cannot be accessed by members of the public, A then shares the link to the website and grants access to B. Here A has made the image available to B by both uploading it to a website and sending the link.

4.130 Consider a variation on this example: a celebrity has a "sex tape" stolen and shared without their consent online to a number of websites. One website reports the story and includes a still image from the recording which it describes as "leaked". The image of the celebrity is sexual; the description of "leaked" makes it clear it is being shared without the celebrity's consent. If D sends a link to this story to a friend, E, D has shared it. This is less culpable behaviour than the original sharing, although it is still unpleasant behaviour. It is also extremely common. The same effect would be achieved if D and E were meeting in person and D told E the name of the webpage or its URL for E to visit later. Including this as a form of sharing would be to stretch the meaning of sharing too far. It would also be unenforceable.

4.131 A key distinction is that in the second example, D is resharing an image that has already been made available to the recipient. E could access the image at the original source if they found the website themselves. D has not actually made the image available to E; the person writing the story did that. The story writer's behaviour is

---

[61] Anon 59, personal response.

culpable and should be caught by a wide definition of sharing.[62] D's behaviour is reprehensible but not sufficiently culpable to be criminal. In these very narrow secondary sharing circumstances, D has not made the image available and should be excluded from a sharing offence.

4.132 If instead, D saved the image on the website, or the sex tape and sent it to E, this is sufficiently culpable behaviour. It is distinct from sharing a link; they have shared an image. This sort of resharing is harmful and wrongful. It adds to the proliferation of images taken or shared without consent.

4.133 The "previously shared in public test" (see Chapter 10) would carve out some of this less culpable behaviour. It would not however carve out examples where the place the image was originally shared (and the link to which is then shared further) was private (but still available to the recipient of the secondary sharing), not public. It would also not carve out examples where the previous sharing was without the consent of the person depicted such as so-called revenge porn websites, or a story on a website about a "leaked sex tape". A key distinction is that someone else has first made the image available to be shared onwards by way of a link.

Jurisdictional issues

4.134 Honza Cervenka argued that "causing to receive" should be included within the definition of sharing to enable prosecution when the sharer is outside the jurisdiction, but the receiver is in the UK. He noted that some US states include such provisions, including Virginia where the relevant statute provides: "Venue for a prosecution under this section may lie in the jurisdiction where the unlawful act occurs or where any videographic or still image created by any means whatsoever is produced, reproduced, found, stored, received, or possessed in violation of this section".[63] We consider the issue of jurisdiction in Chapter 15.

Analysis

4.135 We consider that the definition of sharing an intimate image should be broad enough to encompass a wide range of circumstances where the defendant has acted in such a way as to make an image available to another person. This should include physical posting, showing, or displaying, sharing on social media, peer to peer messaging, or making the image available digitally through transferring a file, sending an encrypted file, link, or other instructions on how to access the file from a place where the sender has stored it.

4.136 However, the scope of a sharing offence should not extend to "secondary sharing". This means sharing information as to the location of an intimate image (such as a link) that has already been made available by a third party and is in fact already available to the recipient. This would also apply to offline behaviour: for example, it should not be an offence for A to tell B where they can find a public billboard showing an intimate

---

62 In Chapter 11 we consider the circumstances where a journalist may have a reasonable excuse to publish an intimate image without consent where it is in the public interest to do so.

63 Code of Virginia, ss 18.2-386.2.(C).

image of C that was put up in a town centre without C's consent. A has not shared the image of C. The image was already available to B.

4.137 While we recognise that there is wrongdoing in this "secondary" form of sharing, we do not consider it to be as serious as the act of making the image publicly available on the website in the first place. We are also concerned that criminalisation of secondary sharing could widen the reach of the criminal law to an extent so as to make it far more difficult to enforce, and potentially distract from the pursuit of the most serious wrongdoing committed by the "primary" sharer of the image.

4.138 If A provides information to B about the location of an image of C *and* information necessary to access the image (such as a password to an encrypted file, or a key to a physical location), this is included in the definition of sharing. If B did not previously have the password or key, and they were needed to access the image, B did not already have access to the image; A's actions made the image available to B.

4.139 If a person shared an actual image that has previously been shared rather than its location, for example by downloading and emailing it, that would fall within the scope of our recommended sharing offence. This is because it is sharing an actual image, rather than information about accessing an image.

4.140 We note the issue regarding jurisdiction raised by Honza Cervenka. We acknowledge that, as with many cyber-enabled or communication offences, jurisdiction will be an issue with intimate image offences.

Recommendation 18.

4.141 We recommend that it should be an offence to share an intimate image without consent.

4.142 The definition of sharing should include all behaviours that have directly made the intimate image available to another. This should include physical posting, showing, or displaying, sharing on social media, peer to peer messaging, or making the image available digitally through transferring a file, sending an encrypted file, saving the image at a specific location and enabling someone to access it, sending a link, or other instructions on how to access the file from a place where the sender has stored it.

4.143 The definition of sharing should not include "secondary sharing" in cases where a person D has informed a third person E where to find an image (for example, by sending a link to a website) that another person F has made available there, D has not shared the image itself or otherwise made the image available, and the image was already available to E.

Sharing with the person depicted in the image

4.144 The current disclosure offence excludes instances where someone shares an intimate image with the person depicted.[64] This could be explained by the focus of the offence: so-called revenge pornography. That behaviour was generally understood to involve sharing intimate images with other people to cause distress to the person depicted. Often the images were originally taken consensually by the person depicted. Scotland and a number of Australian jurisdictions also excluded sharing with the person depicted from their intimate image offences.[65] However, some Australian jurisdictions did not exclude such sharing.[66]

4.145 We were told by stakeholders that images are sometimes sent to the person depicted as part of a threat of further distribution. An offence of threatening to share an intimate image would satisfactorily address such threatening behaviour. However, it might not always be the case that a threat could be evidenced, but significant harm might still be caused. We suggested three further occasions where it might be harmful and wrongful to share an intimate image with the person depicted, without their consent:

(1) An image depicting the victim being sexually assaulted.

(2) An image taken without consent, or originally taken with consent and where the person who took it promised they had deleted it. Sending such an image to the person depicted could cause them serious distress, especially if they did not know the image existed or was still in existence.

(3) An image that is disclosed to the person depicted by someone other than the person who took it or with whom it was originally shared. For example, A sends an intimate image of their girlfriend, B, to A's friend C without B's consent. C then sends it to B and says, "look what your boyfriend sent me". Both A's and C's actions are wrongful and harmful.

4.146 We suggested that these behaviours would not currently be caught by the existing intimate image offences. We provisionally concluded that they are wrongful and could cause serious harm. However, we felt that more information and evidence was needed before we could make a proposal as to criminalisation. At Consultation Question 22 we asked a three part question:

Part 1:

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

---

64 Criminal Justice and Courts Act 2015, s 33(2).

65 Including Victoria, Northern Territory and Western Australia.

66 Including New South Wales, Queensland, and South Australia.

(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?

Part 2:

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?

Part 3:

Can consultees describe the harm that sharing an intimate image with the person in the image without consent can cause?

Consultation responses

4.147 Generally consultees provided examples of the three categories we identified, described the harm caused by such behaviour, and were supportive of including it in intimate image offences.

4.148 Some consultees commented on its prevalence. Ann Olivarius, from cases seen by her law firm McAllister Olivarius, suggested all three categories are "prevalent". The CPS could not comment on prevalence but noted that the CPS Rape and Serious Sexual Assault Units have encountered all three categories of behaviour.

4.149 Senior District Judge (Chief Magistrate) Goldspring submitted that such images could be used as evidence for another offence, such as for the substantive sexual assault in category (1), or for a controlling or coercive behaviour offence, or a communications offence for categories (2) and (3).

Category 1 – sexual assault images

4.150 Refuge advised that this is an "unquestionable" form of domestic abuse "that is designed to cause distress and traumatisation", and suggested that such images may be used to "intimidate, frighten or coercively control" the victim further.

4.151 Muslim Women's Network UK advised that such behaviour is

> Sadly a very common tactic amongst sexual predators and grooming gangs to target vulnerable Muslim/BAME victims, rape and sexually assault them and film the whole ordeal and then share these with the victim as part of a threat that these will be shared further if the victim does not comply with their demands.

They referred to their report Unheard Voices[67] which contains examples of images of sexual assault being shared with the victim.

4.152 #NotYourPorn explained that they have worked with individuals who have had videos of their sexual assault uploaded to porn websites. They described how people

---

67 Shaista Gohir MBE, *Unheard Voices: The Sexual Exploitation of Asian Girls and Young Women* (September 2013) Muslim Women's Network UK, https://www.mwnuk.co.uk/go_files/resources/UnheardVoices.pdf.

subsequently "tag" the victim in the video; a form of alerting someone and sending them electronically to where the video is uploaded.

Category 2 – sharing non-consensual or not deleted images

4.153 Honza Cervenka advised that many victims of so-called revenge porn are sent intimate images by their partner after the relationship breaks down, before they are then shared with others. He suggested this is to "cause them distress, extort or blackmail them; in other words demonstrate the power they hold over their victims". South West Grid for Learning stated that "it is very common that intimate images are shared with the person in the image" and suggested that:

> It is a warning and reminder that the content exists and is in the perpetrator's control. It can also be a means of initiating or continuing contact between the perpetrator and victim.

Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) also suggested that the behaviour occurs alongside threats, and in abusive relationships. They stated that they have "frequently encountered examples" in this category.

Harm

4.154 Responses from consultees suggested that the harm caused by such behaviour is similar to harm experienced by other types of intimate image abuse. In fact, Professors McGlynn and Rackley noted that the behaviour is closely intertwined with the experiences of taking, sharing and threats to share, and that it is not helpful for the victim survivors to try and separate out the harms. Consultees described emotional distress and fear of violence. B5 Consultancy explained in great detail the emotional impact this has had on Leigh Nicol, including suicidal ideation. South West Grid for Learning noted that the harm is "instant on finding the content, and can be long-lasting".

4.155 Consultees also described in a visceral way the high level of harm caused by the power dynamic of sharing an image with the person depicted. For example, Dr Aislinn O'Connell described it as "a sadistic method of controlling or coercing a person after a relationship has ended".

4.156 On the specific categories:

(1) The Magistrates Association added that "the distress would be even greater if the image had been either taken without the person's consent or if they had refused to destroy it".

(2) Where the image is of sexual assault, Dr Bishop submitted that it is "likely to result in serious harm…The image is a reminder that this assault/coerced sexual activity occurred and helps to sustain power and control over V".[68]

[68] Dr Bishop also noted that if the act in the image appears consensual it would not amount to an offence of possession of extreme pornography under s 63 of the Criminal Justice and Immigration Act 2008.

4.157 Senior District Judge (Chief Magistrate) Goldspring suggested that the harms could be addressed by existing offences, either a communications offence or as part of the substantive offence of which such an image is evidence (for example the sexual assault).

Threats

4.158 A number of consultees described how sharing an image with the person depicted is experienced as a threat, explicit or implicit, and therefore likened the harm to that experienced by recipients of threats. There is harm that can arise from being sent the image, and harm that can arise from a threat. Both may occur in such circumstances.

4.159 Dr Bishop directly considered whether our proposed threat offence would satisfactorily address sending an image to the person depicted where there is an element of threat attached:

> Whilst in theory this would be included in the proposed threats offence, questions arise over how explicit the threat would need to be in order to fall under this offence. There may not even be much of a threat at all, if any, and yet the harm is there because the victim knows the perpetrator could share it and this may stop them reporting/disclosing abuse and sexual violence for fear of the image being distributed. This means an image can be sent to an individual which has the result of coercing and controlling them or harming them in some other way, but does not amount to a threat.

Category 3 – sharing by a third party

4.160 Consultees described examples of images being shared with the victim by friends of the person who took the image, new partners, and strangers on the internet. Muslim Women's Network UK described a case where a young Muslim girl was told by her boyfriend that his friend had taken his phone which had her intimate images on, and the friend now had them. They explained that the friend then "shared the images with her via social media and threatened to share these images further and expose her, which frightened the victim because she felt she would be at risk of honour based abuse if her father found out".

4.161 South West Grid for Learning explained that "the [Revenge Porn] Helpline regularly sees cases where images are sent to the person in the image by a previous or subsequent partner of the person who took the image … there is a desire to cause harm to the victim".

4.162 B5 Consultancy suggested it should be an offence to send an intimate image to the victim where there is a specific intent. They argued that such an offence would give the police clearer powers to act even if some of the behaviours may fall under the existing communications offences. They detailed the experiences of their colleague, and footballer Leigh Nicol, whose intimate images (including images from when she was 18 years old) were stolen in an iCloud hack in 2019 and shared extensively online ever since. Leigh describes her experiences of being sent her own images by people online:

> Worse still is the unsolicited online messaging. I have an Instagram profile – this is very usual for a professional football player and it has been something which has

> helped to some degree after I publicly spoke about my ordeal – but an Instagram account also allows people to send direct messages to me. The messages I regularly receive are sickening. I often receive messages from men which include references to the photos/videos, they will often send the images/photos to me, on a number of occasions I have received images or videos of the men masturbating whilst looking at my photos and an unsolicited picture of men's penis is a regular occurrence.

B5 Consultancy also represent other sports people who have been victims of intimate image abuse. They added "it is a profound part of the process of being a victim of this kind of criminal sharing of intimate images that the victim will often receive a barrage of messages from perpetrators to cause her further distress, humiliation and degradation". They noted there is often a malicious intent element to such behaviour:

> We do not wish to criminalise well-meaning (though misguided) individuals who send the images or videos to victims to ask the victim if they are aware of the leak. There must be a level of criminal intent. In Leigh's experience there was a significant amount of criminal intent. Men sending her disturbing messages which were designed to humiliate and degrade her and compound her agony.

Analysis

4.163 Consultation responses provide sufficient evidence of harm and prevalence to support criminalising sharing an image with the person depicted. This would primarily address the harmful behaviours of:

(1) People sending abusive/sexual messages along with the intimate image to victims who have had their images uploaded without consent to porn websites.

(2) Images that were taken without consent sent to victims, including but not limited to images sent to victims to remind them of a sexual assault.

(3) Images sent to victims as an implicit threat that would not be able to be prosecuted as a threat to share.

4.164 While some existing offences may currently apply to some of this behaviour, it is appropriate that the full range of harmful sharing to the person depicted is addressed by intimate image abuse offences. This will ensure victims receive consistent protection in the criminal law, and the relevant ancillary orders would apply.

4.165 Where an image is sent to the person depicted as an implicit threat, in some cases this could appropriately be charged under the threatening to share offence. We recommend that the threat offence should apply to implicit as well as explicit threats (see Chapter 12). We acknowledge that this would still not include all the threatening behaviour described by consultees. We have heard in responses to a variety of questions that the known existence of an intimate image can be experienced as a threat and causes significant harm to the victim, particularly in contexts of domestic abuse and controlling or coercive behaviours. While simple possession or retention of such an image may not be sufficiently culpable behaviour, here the perpetrator has taken an active step to cause the victim harm by sending them their own image. Harm can arise both from being sent an image of oneself, as well as from an implicit threat.

We conclude that this is sufficiently wrongful and harmful behaviour that should be within the scope of a sharing offence.

4.166 In many of the examples we have heard, described above, it could at least be argued that the person sharing with the person depicted was acting with an intent to cause humiliation, alarm or distress, to obtain sexual gratification, or to threaten a further sharing. In such cases the harm and culpability are clearly sufficient to warrant criminalisation.

4.167 We have also considered whether it is appropriate to include sharing with the person depicted where there is another, or no, specific intent under the base offence. This would cover a wide range of conduct, some of which will be significantly harmful and culpable, and some less so. Sharing an image of someone that was taken or made without their consent, for whatever reason, is likely to be experienced as a violation of bodily privacy and sexual autonomy. It would be very harmful to be confronted with an image that you did not know even existed of you, or that reminded you of a non-consensual act. Similarly, sharing an image of a sexual assault with the victim will undoubtedly cause them harm regardless of intent. A number of consultees describe sharing with the person depicted as part of abusive patterns; to exert power and control over the victim. As with other types of intimate image abuse perpetrated in this context, it is not always easy to evidence a specific intent to cause humiliation, alarm or distress, but it should nonetheless be criminalised because it is culpable.

4.168 Lower down the spectrum, in some circumstances sharing with the person depicted without a specific intent can cause less harm and is less culpable conduct. We note, for example, B5 Consultancy's concerns about criminalising people who share an image with the victim hoping to help by making them aware of its existence. We still think there is potential for real harm from such behaviour. In such circumstances, the person trying to help could have sent information about the image without sending the image, to ascertain whether the victim would consent to be sent the image. In other circumstances, the conduct may be even more borderline criminal. Consider an example: A and B used to have a casual sexual relationship during which they took and shared intimate images of each other consensually. They ended their relationship amicably and a year later, A decided to send B a picture they had taken together of B to remind them of the fun they shared. Although A did not have B's consent to share this image, it is not highly culpable behaviour. The image was taken and shared consensually previously, B is not likely to experience the same level or type of privacy violation that is common with other types of intimate image abuse. A may arguably have a reasonable belief that B consented to being resent the images. Even if the relationship had not ended amicably, an ex-partner may share intimate images taken together during happier times with their ex for a similar reason. It may be unwelcome, and violating, but it is less clear if this should always be a criminal offence.

4.169 We recognise that there is a broad scale of types of conduct, some of which are less culpable and harmful than others, but we conclude that it is appropriate to include sharing with the person depicted in the base offence as well as the specific intent offences. It is still non-consensual sharing; it would be inconsistent to exclude it from intimate image offences. Some of the categories discussed are so harmful that the intent of the person sharing the intimate image should not be determinative of criminal liability. Some of the conduct is highly culpable but will not always be covered by the

limited specific intent offences. We recognise that the category of offending is broad; the discretion afforded to the police and CPS will be important in ensuring cases are only prosecuted where it is in the public interest to do so. We acknowledge that in some circumstances such an image might be shared for a genuine reason, such as part of a criminal investigation or to help the victim. In such cases the defendant would have a defence of reasonable excuse (see Chapter 11).

4.170 We agree with Senior District Judge (Chief Magistrate) Goldspring that, in some instances, the image sent to the victim will form part of another offence or constitute evidence of that offence. However, this is only where the image was originally taken without consent or depicts a criminal act. There are examples described above that do not have another offence attached to the image, but are sufficiently harmful that they should be included in the offence of sharing an intimate image without consent.

Recommendation 19.

4.171 We recommend that offences of sharing intimate images without consent should include sharing with the person depicted.

MAKING

4.172 The difference between "taking" (considered in the first section of this chapter) and "making" an intimate image without consent is that "taking" involves capturing an image of an individual where they are nude, partially nude, engaged in a sexual act, or toileting.[69] "Making" involves altering an image to make it appear as though the depicted individual is nude, partially nude, engaged in a sexual act, or toileting.

4.173 Making an indecent image of a child is an offence under section 1 of the Protection of Children Act 1978 ("PCA 1978"). For the purposes of the PCA 1978, the term "making" has a very wide definition including intentional opening of an email attachment and simple copying. This regime is distinct from intimate image abuse and addresses different behaviours and harms. Therefore we did not consider it appropriate to use the same definition. In our consultation paper we defined "making" for the purpose of intimate image offences as creating an image that did not previously exist, and was not directly "taken" or recorded.

4.174 There is currently no offence of making an intimate image of an adult without consent, and we have not encountered any such offence in a comparable jurisdiction internationally. This is despite the increasing concern about the prevalence of what is commonly referred to as "deepfake" pornography, and the use of "nudification" software.

4.175 In our consultation paper we considered whether simply making an intimate image should be criminalised. "Simple making" is the act of making an intimate image,

---

69 This also includes, in cases of upskirting and downblousing, where the person depicted was not nude or partially nude in real life, but the image managed to capture genitals, buttocks or breasts whether exposed or covered by something being worn as underwear, for example underneath clothing.

without sharing or threatening to share it. We will consider sharing a made image from paragraph 4.221 below.

4.176 Most stakeholders we spoke to pre-consultation were hesitant about a simple making offence.[70] Some likened it to sexual fantasies which would be inappropriate to criminalise. Some were concerned that criminalising making images would infringe the maker's freedom of expression. There was also recognition that making an image was a physical manifestation of a fantasy which can render the behaviour more culpable and harmful.[71] It was further argued by academic Carl Öhman that deepfake pornography contributes to the systemic degrading and oppression of women,[72] beyond the harm to the individual. We acknowledged that making intimate images is a violation of the subject's sexual autonomy. We were less sure whether the level of harm was serious enough to criminalise simple making.

4.177 We described the relevance of knowledge; subjects who were unaware an image had been made of them may suffer less or no harm. This is distinct from being unaware that someone has taken an intimate image; taking violates privacy in a more tangible way, as well as violating sexual autonomy regardless of knowledge. Making can be done from a great distance, between people unknown to each other, and with no interaction at all between them. The person depicted in a made image need not have been in any sort of intimate situation. We described how other offences may apply where the subject is told about a made intimate image of them, including harassment and communications offences.[73] However, we also recognised that in some circumstances, informing someone of a made intimate image of them will not fall under any of the current criminal offences. We queried whether behaviour that does fall outside current offences is sufficiently harmful or wrongful to necessitate a new offence.

4.178 We acknowledged that we did not have sufficient evidence of how prevalent simple making is, what motivates individuals to make intimate images without consent, and what harms are caused by simple making. At Consultation Question 19 and Summary Consultation Question 15 we invited consultees' views on the following:

(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?

---

70 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.95.

71 Above, para 7.96.

72 Carl Öhman, "Introducing the pervert's dilemma: a contribution to the critique of Deepfake Pornography" (2020) 22 *Ethics and Information Technology* 133, 137.

73 For example, Protection from Harassment Act 1997, s 2; Communications Act 2003, s 127; Malicious Communications Act 1988, s 1; or the new communications offences in the Online Safety Bill. For full details see Chapter 2.

Consultation responses and analysis

Part 1: Prevalence

4.179 The majority of consultees were of the view that making is a prevalent behaviour. Many consultees remarked on the fact that it is more prevalent than people are likely aware of.[74] Victims of Image Crime (VOIC) suggested that victims do not feel empowered to report it:

> Prevalence of making intimate images without consent, without subsequently sharing/threating to share cannot be substantiated as many experiencers (victims) do not speak out for fear of societal victim blaming, lack of support or belief so we can only guestimate that this is widely carried out.

4.180 The Lucy Faithfull Foundation suggested that the nature of making images relies on self-reporting to understand prevalence:

> Prevalence of making intimate images without consent, where they are not shared or no threats to share are made is very difficult to identify, as self-reporting is rare.

4.181 Muslim Women's Network UK suggest that making without sharing is common, and explained that is usually because there is a threat to share and the victim complies with the demand so the subsequent sharing does not occur.

4.182 A few consultees provided specific examples of making images, the most common amongst those that did mentioned schools and child friendship groups.[75]

4.183 Laura Bloomer of Backed Technologies Ltd suggested that making is the more common intimate image abuse behaviour when the perpetrator is less familiar with the victim. She argued that it "tends to happen when the offender is less directly known to the victim (eg, not in an intimate relationship), a celebrity or public figure and shared without a direct trigger".

Technology

4.184 It is clear that current technology enables making intimate images on a very large scale. Consultees with experience in the technological field shared their understanding of how technology and technological advancements impact on prevalence of making.

4.185 Henry Ajder, an expert and advisor on deepfakes and synthetic media, advised:

> In the context of deepfake sexual image abuse, the technology's growing accessibility is leading to a significant increase in the amount of synthetic images being generated. Specifically, my research on a bot for synthetically stripping images of women hosted on the messaging app Telegram[76] found the 'gamification' of the technology had radically increased the amount of deepfakes being created,

---

74 Including Anon 12; Max Firth; Brian Foreman (all personal responses); and the Youth Practitioners Association.

75 Including Ruby Compton-Davies; Anon 102 (personal responses); and South West Grid for Learning.

76 Cloud-based instant messenger service based in Dubai.

> many of which targeted private individuals… A parallel can be seen here with novelty deepfake apps that have millions of users that are attracted to the novelty of the technology, and have significantly increased accessibility. Deepfakes' use in non-consensual sexual imagery is following a similar trajectory, albeit away from mainstream platforms and app stores.

4.186 Agnes E Venema stated:

> In order to assess the scale we can take a look at the channels that were recently taken down from messaging service Telegram. Reports by Wired claim that 104,000 women were targeted…[77] but it is likely that that number is merely the tip of the iceberg as … that number is of imagery made public… This is just one bot on one messaging service.

4.187 Marthe Goudsmit, an academic with expertise in image based sexual abuse, suggested that technological advancements will make software "readily and freely" available, which will mean the behaviour becomes "more and more prevalent". She argued it "should urgently be addressed".

Importance of prevalence

4.188 Some consultees queried whether prevalence was relevant to the question of criminalisation. Ann Olivarius submitted that she was "not persuaded that making this activity illegal should be premised on a rate of prevalence". Honza Cervenka also disagreed that evidence of prevalence is necessary, arguing that prevalence changes with technological developments. One further consultee added "its prevalence would probably be of little concern to a victim of it".[78]

Analysis

4.189 Consultation responses suggest the simple making is prevalent but we have not seen any quantitative research on the issue. Consultees have suggested why prevalence may be hard to quantify accurately, particularly where made images are not shared. One context in which we did receive specific examples of making is schools. We also note that technology has the potential to enable making on a mass scale.

4.190 We understand consultees' hesitations about the importance of prevalence. We do not consider it to be the sole, or determinative factor, for recommending an offence. The evidence we have now heard suggests it is likely to be a prevalent behaviour. This has not changed the evidential basis on which we based our provisional conclusions significantly.

Part 2: Motivation

4.191 The most common motivations raised by consultees were sexual gratification and power. A significant number of consultees mentioned those motivations together, suggesting a well understood link between personal sexual gratification and power.

---

77 Citing Matt Burgess, "A deepfake porn bot is being used to abuse thousands of women" *Wired* (20 October 2020), available at https://www.wired.co.uk/article/telegram-deepfakes-deepnude-ai.

78 Lionel Harrison, personal response.

For example, one consultee suggested "personal gratification; sexual or power-related (the two are linked)".[79]

4.192 79 consultation responses mentioned sexual gratification as a motivation for making images. For example, West London Magistrates' Bench submitted that "the most likely [motivation] would seem to us to be for the purpose of sexual self-gratification". Consultees also recognised the role of sexual curiosity in making intimate images.

4.193 59 consultation responses mentioned exerting, obtaining, or experiencing power or control as a motivation. For example, Ann Olivarius submitted:

> Most creators of image abuse are also motivated by the desire to exercise control over the person they photographed or videotaped. They wish to 'own' that person – their body, their sexuality, their privacy, their agency. That is to say, the perpetrator wants to be able 'to use' (sexually and otherwise) that person whenever they wish.

Power was also linked by consultees to abusive, controlling or coercing relationship dynamics. The Suzy Lamplugh Trust advised:

> Victims of stalking largely tell us that the motivation of the individual to make images without consent is part of a pattern of controlling and coercive behaviour, and ultimately power and control.

4.194 17 consultees mentioned motivations that they view as sitting within the spectrum of abusive relationships such as to control and coerce, distress, or humiliate their partner. For example, Northumbria Police and Crime Commissioner, in partnership with four local organisations,[80] suggested that making intimate images without consent is a "technique of preventing women and girls leaving abusive relationships and/or to continue to exploit them, for fear that the images will be shared".

4.195 14 consultation responses suggested that making intimate images is motivated by misogyny or a sense of ownership of, or entitlement to, female bodies. For example, Dr Aislinn O'Connell stated it is motivated by "an entitlement to women's bodies, and a societal perception that to exist in the world while being female is to present yourself for scrutiny and objectification".

4.196 Other motivations raised include: financial gain or blackmail;[81] to mock or humiliate the victim,[82] because technology enables it,[83] revenge,[84] insecurity,[85] peer pressure,[86]

---

79 Rosamunde O'Cleirigh, personal response.

80 The Angelou Centre; Victims First Northumbria; the Young Women's Outreach Project; and one partner who wishes to remain anonymous.

81 M Tunmore; Sarah Loughlin, personal responses.

82 Anon 2; and Anon 46, personal responses.

83 Silvia Ullmayer; and David Scott, personal responses.

84 Natalie O'Connor; James Compton; and Anon 113, personal responses.

85 Max Firth; James Compton; and Anon 41, personal responses.

86 Elizabeth Edmunds, personal response.

immaturity,[87] racism,[88] boasting,[89] reputation (as a deepfake "artist"),[90] as a joke,[91] and a belief that it is harmless.[92]

Analysis

4.197 The motivations suggested by consultees largely reflect the range of motivations for the full range of intimate image abuse behaviours. Some of the motivations raised cannot clearly be separated from sharing or threatening to share. For example, blackmail or financial gain are likely to include either a threat to share or sharing. Some making in the context of abusive relationships may also involve threats to share. In fact, some consultation responses mentioned sharing as well as making.

Part 3: Harms

4.198 The most common consultation responses to this question mentioned harms that are familiar within intimate image abuse: violation of privacy,[93] violation of sexual autonomy,[94] negative impact on mental health[95] and the wider harms to society.[96]

4.199 More unique to making an image, consultees also mentioned harm arising from a fear that it would one day be shared, and how simple making can be an implicit threat to share. Consultees described the stress and fear of not knowing when or if it will be later shared whether on purpose by the maker, or by a third party if the images are stolen or lost. For example, Muslim Women's Network UK advised:

> In our opinion the mere knowledge that intimate images exist and are in the possession of a third party that you have no control over (regardless of whether they are shared or a threat to share has been made) can have an adverse effect on an individual as ultimately they will be living in fear of these images one day being shared.

Henry Ajder differentiated the harm of making an intimate image from simple fantasy. He suggested that making it tangible means making an image that could cause harm were it to be shared: "I would add that once you create digital content of this kind, it becomes shareable or leakable in a way a fantasy is not".

---

87 Anon 53, personal response.

88 Fred Campbell, personal response.

89 Anon 59, personal response.

90 Sarah-Jane Moldenhauer, personal response.

91 Anon 127, personal response.

92 Anon 132, personal response.

93 Including Teuta Smith; Anon 4 (personal responses); and Centre for Information Rights, University of Winchester.

94 Including Anon 47; anon 109 (personal responses); professors McGlynn and Rackley; Refuge; Northumbria Police and Crime Commissioner.

95 Including Anon 83; Anon 106; Anon 119 (personal responses); Robert Buckland MP constituency office; and Muslim Women's Network UK.

96 Ann Olivarius.

4.200 Consultees also considered that the known existence of a made intimate image can be experienced as an implicit threat to share it. For example, Mr M Butler said "the image is the threat".

Knowledge

4.201 Consultees described potential harm being dependent on whether the victim was aware of the image, and some suggested that there is no harm where there is no knowledge. The majority of harm described appeared to rely on the victim being aware that an image was made of them. For example, Professors McGlynn and Rackley submitted:

> 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.

4.202 Some consultees stated that there is harm regardless of knowledge. For example, Peter Greenwood suggested that when making an intimate image without consent, "privacy has been breached whether the victim is aware or not".

4.203 The Law Society suggested there is harm either way, but the harm to the person depicted is impacted by their knowledge:

> If the individual is not aware of the taking of the image then there is question as to whether they are personally harmed. However, the act of taking such images is arguably harmful as a whole as it encourages a belief that the taking of such images is permissible, which in turn will lead to greater harm in the aggregate.

4.204 Other consultees suggested that where there is no knowledge, there is no harm that justifies criminalising the behaviour. For example, the West London Magistrates' Bench submitted:

> Where the person whose image has been used to make a pornographic video (or something else falling under the definition of an "intimate image") is not alerted to the fact that their image has been used, they are not caused any obvious harm… Where there is no sharing or threatening to share the images that have been manipulated to become intimate images, it seems to us to be difficult to justify criminalising behaviour of which the victim is unaware and causes them no harm. Of course, if the image is shared or threats are made to share, and/or the victim becomes aware of the existence of the image, then there would be harm caused to the victim, and the situation is to us quite different.

4.205 Professor Gillespie suggested that the harm, when a victim is made aware of an image, arises because of the message rather than the image itself. He suggested, as we considered in the consultation paper,[97] that communications or harassment offences may be more appropriate when those actions are sufficiently wrongful.

---

[97] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 7.103 to 7.104.

Sufficiently harmful

4.206 Some consultees stated that the harms of making were insufficient to justify criminalisation. Senior District Judge (Chief Magistrate) Goldspring suggested there is "minimal" harm and drew a parallel to using one's imagination. Professor Keren-Paz also considered the similarity with imagination and private fantasy:

> I do not consider that the making of an image harms the subject, or at least harms at a level justifying criminal prohibition (or for that matter, civil remedy). I think the making of an image for self-consumption is too close to fantasy to be regulated and the harm seems to me speculative.

He rejected the argument that the availability of technology itself as a contributor to sexual harm against women justifies criminalisation: "responsibility is too [diffuse] and lacking in proximity for any speculative harm to justify liability".

4.207 A number of consultees expressed their view that the harm only arises when a made image is shared. For example, one argued that "no harm is done until the images are made accessible to others".[98]

Analysis

4.208 Most of the harms raised in respect of simple making are similar to the harms we have discussed at length in respect of taking, sharing, and threatening to share intimate images without consent. We note that a number of responses to this part did not distinguish the harms of simple making from the harms of subsequent sharing. In fact, some specifically mentioned sharing, which we explore further below.

4.209 There is a strong argument that harm arises only when the person depicted is aware an image has been made. We understand that the creation of intimate images can be experienced as an implicit threat. It could be that, on the facts of an individual case, making an intimate image and communicating that to the person depicted does amount to a threat to share it. In such cases, the threats offence would apply (see Chapter 12). We understand that where the person depicted knows an image has been made of them, they may fear that it would be shared, or experience implicit threats that it will be shared. We have heard the same fears arise when an image (made or taken) is possessed or retained. We consider this behaviour in more detail below from paragraph 4.246.

Support for a simple making offence

4.210 Ann Olivarius and Professors McGlynn and Rackley supported a simple making offence. Ann Olivarius suggested that the wider harm to society of allowing such behaviour to continue is appropriate justification for criminalisation:

> Making intimate images without sharing is an unmistakable form of violence, not only against the person so depicted, but against all people, especially of the same gender as the victim. The violence is in the wider message that society approves of individuals intruding on the privacy and autonomy of another person's personality.

---

98 Gerry Bean, personal response.

She then expressly supported a simple making offence arguing that "[the conduct] is a gross violation of [the victim's] inalienable right to privacy and bodily and sexual autonomy".

4.211 Professors McGlynn and Rackley proposed a comprehensive taking, making, and retaining offence. They suggested that such an offence would cover the harms they see as justifying criminal sanctions within our discussions of making, taking, and possessing; where a victim-survivor is being portrayed in a sexual way to which they did not consent. This would include "the making of deepfake images", "semen images" and "photocopying of a photo (or taking a picture of the image with another phone)". They submitted that this approach "avoids difficult decisions in relation to whether an image is taken or made". They argued that "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". We do not consider that semen images should be included in the intimate image offences (see Chapter 3). We consider photocopying behaviour as retention or possession and discuss it further below from paragraph 4.246.

4.212 Henry Ajder considered the appropriateness of a simple making offence. As at pre-consultation, he suggested that there is a difference when a fantasy is made tangible by making an image: "part of me does consider digitally manifesting sexual imagery of a non-consenting individual in this way to be a violation of dignity that is 'made tangible'". Dr O'Connell agreed that "making an image is more involved than merely fantasising or using an existing image as erotic material, and causes more severe harm".

4.213 Henry Ajder also added: "it could be argued making 'simple making' an offence carries significant privacy implications". Professor Gillespie also considered the freedom of expression concerns that are engaged more with making than with taking: "some would argue that the creation of material can engage free expression, in a way that photography does not".[99]

Conclusion following consultation

4.214 There is no doubt that the emergence of realistic "deepfake" technology has created further, concerning opportunities for fraud and intimate image abuse. The behaviour has the potential to violate the privacy and sexual autonomy of victims. The behaviour also risks causing harm to society as a whole. Consultees' discussion of motivations and harm suggests making intimate images without consent can be a form of tangible misogyny.

4.215 Though some of this behaviour is highly problematic, we are not persuaded that the creation of an offence of simply making such an image – without further sharing or threatening to share – is a proportionate response to the wrongdoing. We agree with the arguments that a made intimate image is more tangible than imagination or fantasy but conclude that the tangibility in itself is insufficiently harmful to warrant criminalisation. There is also an argument that criminalising "making" interferes with the right to freedom of expression. Any such interference would need to be

[99] Professor Gillespie cited a Canadian Supreme Court case concerning fictitious child pornography: *R v Sharpe* [2001] 1 SCR 45.

proportionate to the harm caused by making without further sharing or threatening to share.

4.216 The evidence we have heard throughout consultation is that the harms associated with intimate image abuse manifest most significantly at the point at which an intimate image is taken or shared without consent. Therefore, we consider that these behaviours should be the primary focus of the criminal law. Evidence from consultees suggests that the more significant harm is caused when a made image is shared – or a threat to share it is made – rather than when it is simply made. We therefore recommend below including altered, or made, images in sharing offences. Currently they are excluded from the existing disclosure offence.

4.217 We are also concerned that an offence focused solely on the creation of an image will prove extremely difficult to enforce. Further, to the extent that such an image is likely to come to the attention of law enforcement agencies, it will almost certainly be as a result of that image having been shared – which is the point at which our recommended sharing offence will be engaged.

4.218 We agree that harm is more likely to arise when the person depicted becomes aware that an intimate image has been made of them without their consent. Where the conduct giving rise to this is sufficiently wrongful, a number of other offences may apply. We also recommend at paragraph 4.171 above that it should be an offence to share an intimate image with the person depicted, which is currently excluded from the disclosure offence. This would include made intimate images.

4.219 There is a persuasive argument that significant harm is caused by implicit threats, or by the knowledge that an intimate image exists coupled with fear it will be shared in the future. This is however not exclusive to made images and would apply equally to images that have been taken or were initially shared with consent and remain in another's possession. This issue is therefore better considered as part of our discussion of possession and retention below.

Recommendation 20.

4.220 We recommend that it should not be a criminal offence simply to "make" an intimate image without the consent of the person depicted.

Including altered images in a sharing offence

4.221 The Criminal Justice and Courts Act 2015, section 35(5) excludes from the definition of private and sexual images that do not consist of, or include, an image that is itself private and sexual, or images that are only private or sexual by virtue of alteration. Effectively, this means that images that are altered to appear intimate are excluded from the disclosure offence. At the time the offence was being introduced in the House of Lords, Lord Faulks argued this exclusion was justified:

> Although such images can still be distressing to those featured, we do not believe that they have the potential to cause as much harm as disclosure of photographs and films that record real sexual private events.[100]

4.222 In our consultation paper we described at length the prevalence and scope of altering images to appear intimate.[101] A common altering behaviour is sexual photoshopping which "involves the victim's head, and sometimes other body parts, being superimposed onto the body of someone engaging in a sexual act (usually a porn actress) so that it looks like the victim is engaging in the sexual act".[102] Deepfake pornography is an increasingly prevalent altering behaviour which is similar to sexual photoshopping, but works in a slightly different way. We described deepfakes in the consultation paper:

> Deepfakes take the facial features alone and animate those facial features with the expressions of someone else. Deepfakes are created by feeding a piece of software called an "autoencoder" with hundreds of images of an individual's face, which then studies these images to learn what they all have in common. The result is called a "face data set"[103]... The process of recognising and swapping faces in pictures and videos employs an artificial intelligence ("AI") method called "deep learning". By analysing a large number of photos or a video of someone's face, the artificial intelligence algorithm can learn to manipulate that face, and then map it onto another person in a video.[104]

Deepfake technology is also used to "strip" an image of clothing to make the person depicted appear naked.[105] Deepfake technology uses code and it can be made freely available on the internet.[106] We explained the astonishing prevalence of deepfakes, which continues to grow. Looking at the demand for deepfake pornography, technologies organisation Sensity found that in 2019, the four largest deepfake porn websites had attracted 134,364,438 video views.[107] Deepfake pornography overwhelmingly victimises women.[108]

---

100 *Hansard* (HL), 20 October 2014, vol 765, col 525.

101 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 2.33 to 2.54.

102 Above, para 2.34.

103 Henry Ajder.

104 Adam Dodge and Erica Johnstone, "Using Fake Video to Perpetuate Intimate Partner Violence: Domestic Violence Advisory" (26 April 2018), https://www.cpedv.org/sites/main/files/webform/deepfake_domestic_violence_advisory.pdf; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 2.37 to 2.39.

105 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.53.

106 Above, para 2.41.

107 Henry Ajder, Giorgio Patrini, Francesco Cavalli, and another, "The State of Deepfakes: Landscape, Threats, and Impact" (September 2019) Sensity (formerly known as Deeptrace), available at https://sensity.ai/reports/.

108 In the consultation paper we reported that Sensity found that of the 14,678 deepfakes they identified online, 96% were pornographic and 100% of the pornographic deepfakes were of women. Above.

4.223 We also described at length the harms caused by sharing altered intimate images, including deepfake pornography and sexual photoshopping. We summarised:

> The harms caused to those (predominantly women) whose images are used in deepfake pornography, or photoshopped to appear sexual, are often as significant as when a genuine image is shared. Victims describe feeling sexually objectified, and find the experience of losing control over how their bodies are portrayed to and perceived by the outside world extremely distressing.[109]

4.224 We also identified that a number of jurisdictions[110] recognise this harm by including altered intimate images in their intimate image abuse offences.

4.225 In the consultation paper we explained that:

> We have reached the view that sharing an altered intimate image without consent may cause serious harm and is a significant violation of the individual's bodily privacy, personal integrity and their dignity, and in some cases, their sexual privacy, autonomy and freedom.[111]

We provisionally concluded that it would be appropriate to include altered images in intimate image sharing offences. We recognised that the majority of altering is done digitally but that we should not exclude non-digital means from any offence.

4.226 At Consultation Question 21 we asked:

> 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?

4.227 At Summary Consultation Question 6 we proposed a definition of nude and partially nude, noting that it would include altered images, for a sharing offence and asked if consultees agreed.[112]

Consultation responses

4.228 The majority of consultees who responded to this question agreed with our proposal (55 out of 65). No consultees disagreed. The most common justifications for this position were that sharing altered images can be just as harmful as sharing unaltered images, and that this proposal is necessary to ensure that the law is future-proofed.

---

109 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.132.

110 Including Scotland, the US state of Virginia and the Australian territories of New South Wales, South Australia, Queensland, Western Australia, Northern Territory, and the Australian Capital Territory.

111 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.137.

112 Summary Consultation Question 6 also asked consultees about other aspects of the definition of intimate. We will only consider the responses that referred to this particular issue here.

4.229 Several consultees considered the exclusion of altered images from the current disclosure offence to be a dangerous gap in the law. Dr O'Connell argued that the "inability of victims to seek redress where deepfakes have been created and shared is a damaging and problematic situation created by the law". The Office for Northumbria Police and Crime Commissioner warned that perpetrators may utilise this 'loophole' in the law by altering intimate images to be shared and thus avoid liability. Refuge argued that "it would be a huge oversight for the new intimate image offence(s) not to capture these types of image within their definition".

4.230 A key theme among responses was that whether the intimate image shared is altered or unaltered, victims experience significant and similar harms. Professors McGlynn and Rackley explained that "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". Corker Binning submitted that "[g]iven the technology available, the harm caused by 'deepfake' images is indistinguishable from authentic images where the original image was non-intimate and the altered image is intimate".

4.231 We have heard examples of deepfake images of teachers being shared in schools. This impacted significantly on the victim's employment, standing within their profession and well-being.

4.232 Some consultees suggested that the harm caused by sharing altered images has the potential to be worse than sharing "real" images. For example, Senior District Judge (Chief Magistrate) Goldspring considered that altered images are "likely to portray acts which the offender would never have been able to witness and therefore the final product is rendered more shocking and degrading to the victim".

4.233 As detailed above, in response to consultation questions regarding simple making, consultees suggested that "made" intimate images cause significant harm when shared.

4.234 Some consultees highlighted that altered images have become more widespread as technology develops, and thus deemed our proposal necessary to ensure the law can respond to, and prepare for, technological advancements. Consultees identified an increase in prevalence of altered images and recognised the scope for future technological development in this area.[113] Ann Olivarius emphasised the need to "take care to word new laws to include emergent technologies".

4.235 The NSPCC submitted that our proposal would be wider than the current provisions under the indecent images of children regime:

> Existing [indecent images of children] offences do not include specific provisions relating to the production and sharing of deep-fake imagery of children meaning that, when read alongside the proposed intimate image laws, there is a higher legal precedence for digitally altered sexual images of adults than for digitally altered images that are prosecuted as child sexual abuse imagery.

[113] Including Honza Cervenka; #NotYourPorn; Refuge; South West Grid for Learning; the NSPCC; and the Magistrates Association.

We note that our recommendations will not exclude child victims. Therefore, our offence of sharing non-consensual altered intimate images would apply equally to children and adults. We consider wider issues relating to child victims, and the operation of the indecent images of children regime, in Chapter 14.

Limiting an offence to realistic altered images

4.236 Many consultees noted that altered images can be so realistic that those who see the image cannot tell the difference, suggesting this justifies altered images being included in a sharing offence. Dr Bishop submitted "[t]hose they are shared with won't know they are altered and so the harm to the victim is likely to be the same". Professor Gillespie similarly highlighted that "[d]eepfake and morphing technologies are advanced enough that it can be very difficult to identify whether they are real or not". Consequently, he argued, "many of the harms that exist with the distribution of images could apply equally to deepfake/morphed images". Ruby-Compton-Davies similarly stated that "[a]ltered images are also incredibly dangerous as they look so realistic nowadays".

4.237 This raises questions about whether an altered image caught by a sharing offence should be required to be realistic. Gregory Gomberg argued that the offence should extend "to images that may be reasonably taken to represent the alleged victim… however they have been made". Professor Keren-Paz stated that "images perceived to be real should be criminalised". The CPS argued that a sharing offence should cover altered images "only where the image is realistic". Furthermore, other consultees were in favour of restricting the offence by including altered images only where the "original subject" is identifiable.[114]

Analysis

4.238 There is significant support for including altered images in intimate image sharing offences. Consultees provided views that supported the rationale and provisional conclusions in our consultation paper that sharing altered images can cause significant harm, and is an undesirable gap in the current offences.

4.239 Beyond our consultation, there has been significant support for criminalising intimate image abuse that involves "nudification" and deepfake technologies. Dame Maria Miller MP has been a prominent campaigner on this issue, recognising that the law does not currently address this harmful behaviour satisfactorily.[115] Also, the Victims' Commissioner has advocated the inclusion of "fakeporn" images in intimate image offences, arguing that sharing them is just as harmful as sharing "real" images. [116]

4.240 We note the descriptions of harm relating to the "realness" of altered, or made, images. For many consultees, the harm attaches because the fake image appears to be a real video or photo, either to the victim or those with whom it is shared. We agree that the application of a sharing offence should be limited to images that appear to be

---

114 Anon 27; and Anon 38 (personal responses).

115 See for example Jane Wakefield. "MP Maria Miller wants AI 'nudifying' tool banned" *BBC* (4 August 2021) https://www.bbc.co.uk/news/technology-57996910 and *Hansard* (HC) 2 December 2021, vol 704.

116 Dr Madeleine Storry and Dr Sarah Poppleton, "The Impact of Online Abuse: Hearing the Victims' Voice" (1 June 2022) *Office of the Victims' Commissioner*, p 44.

a real photo or video of the person depicted. This will ensure that the offence would only apply to images that appear to be a video or photo, instead of a digital drawing or cartoon for example. We discuss in Chapter 3 why it is appropriate to limit these offences to videos and photographs and not include other types of images such as artwork. This limitation will also ensure that the offences will only apply to images where the person depicted is shown in a realistic way. We do not want to exclude all intimate images that include something that is not realistic. For example we want to include nude images where emojis are placed over the genitals. This could arguably be an "unrealistic" image as emojis are cartoons. What is key, however, is that it appears to be an intimate photo of the person depicted, even though it includes something unrealistic as a result of altering. We do want to exclude images where the altering is so unrealistic that the resultant image does not appear to be a photo or video of someone specific. For example, an image where the face of person A is glued on top of a photo of porn actor B who is a different ethnicity, size, and gender to A. Arguably this would not be a realistic photo of person A and therefore does not cause the same level of harm. This is more similar to placing a non-intimate image in a context which is sexual, for example a sex worker website. We describe in Chapter 3 how this harm is distinct from other examples of intimate image abuse and is better addressed by other offences such as communications offences. Where someone glued a photo of A on top of a photo of a porn actor who is not so obviously different from A, this could appear to be a photo of A and would therefore be included. Whether the image appears to be an intimate image of the person depicted will be a question of fact to be determined on the evidence by the trier of fact (jury or magistrates).

4.241 We note that the Scottish offence criminalises the disclosure of images that "appear to show" the victim in an intimate situation.[117] The indecent images of children regime uses the term "pseudo-photograph" to require an element of realism. Section 7 of the Protection of Children Act 1978 provides that:

> (7) "Pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.
>
> (8) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.

This brings into the scope of the Protection of Children Act 1978 altered images that convey the impression of a child. The National Society for the Prevention of Cruelty to Children (NSPCC) highlighted that the protection offered by these provisions is limited because determining whether an image conveys such an impression "can often come down to an individual judge's opinion in each case." They indicated that, as a consequence, it is not always clear which types of altered images may amount to a pseudo-photograph, leading to "clear gaps" in the protection of children.

4.242 The US State of Virginia includes in its disclosure offence:

---

117 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2.

> For purposes of this subsection, "another person" includes a person whose image was used in creating, adapting, or modifying a videographic or still image with the intent to depict an actual person and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic.[118]

4.243 Some consultees expressed concern about the meaning of the term "altered images", and asked what type of conduct/image would be included. Some discussed digitally *altered* images, and some digitally *created* images. The operation of the technology that produces altered images can differ; some technically creates a new image, some alters an original image. Henry Ajder explained that deepfakes are "technically entirely new pieces of media (not composites)", and suggested we define them as "realistic synthetically generated images, video, and audio". Advancements in technology may mean that such a distinction between altering and creating ultimately becomes obsolete. Any definition of altered or made intimate images should not unnecessarily restrict the application of the offences to images because of the technical way in which they were altered now or in the future. The discussion of realism assists here. Where the end result is an image that appears to be an intimate photograph or video, it should be included in intimate image sharing offences. This would include images that are taken; original non-intimate images altered digitally or non-digitally to appear intimate; and images created using technology that has "learnt" a face and is able to recreate it in a new intimate image. It would not include images that are created by digital (or non-digital) means that result in a new intimate image that does not appear to be a live action photograph or video, for example an animation.

4.244 We note that AI technology, including deepfakes, can be extremely positive where used consensually. Such technology has created solutions to make information more accessible, is used to identify and remove "fake news", and even assists with cancer screening.[119] Intimate image offences only seek to criminalise the narrow issue of sharing non-consensual altered intimate images which may utilise such technology.

Recommendation 21.

4.245 We recommend that sharing offences, including threats to share, should include images that are intimate as a result of altering, and that are created (whether by digital or non-digital means) if the altered or created image appears to be an intimate image of a person.

POSSESSING

4.246 As with "making" an intimate image without consent, the mere "possession" of an intimate image of an adult without the consent of the subject is not a criminal offence in England and Wales. This again contrasts with the position regarding the possession

---

118 Code of Virginia, title 18.2, s 386.

119 Bernard Marr "10 Wonderful Examples Of Using Artificial Intelligence (AI) For Good" *Forbes* (22 June 2020) https://www.forbes.com/sites/bernardmarr/2020/06/22/10-wonderful-examples-of-using-artificial-intelligence-ai-for-good/?sh=434da3e62f95.

of indecent images of children, which is a criminal offence.[120] The possession of "extreme pornography" (a much narrower category than intimate images) is also a criminal offence.[121]

4.247 As we noted in our consultation paper, there are some examples of offences involving possession of intimate images without consent in other jurisdictions – New Zealand,[122] Singapore[123] and Tasmania.[124] However, these offences are limited to circumstances where the initial image was taken without consent. They do not, for example, cover circumstances where consent was granted but later withdrawn.

4.248 This latter category of possession in not uncommon in cases where an intimate relationship breaks down. It may also occur in the context of an ongoing abusive relationship.

4.249 In our consultation paper we considered several other scenarios which may also be a source of harm to victims:

- Retaining an image that the depicted person only consented to them viewing for a very limited period (for example, a Snapchat image).
- Other forms of limited consent – such as consenting to an intimate image being viewed on a website, but not consenting to that image being downloaded and retained.
- The possession of images downloaded from a website – such as a so-called revenge porn website, where it is obvious that those images were taken or shared without the consent of the person depicted.
- Possession obtained through "hacking" of a victim's (or a third party's) device or cloud.

4.250 We suggested there were three main groupings of possession that should be considered in the context of any potential criminal offence:

(1) Consent to indeterminate possession – which may then be withdrawn; for example, after the breakdown of an intimate partner relationship, where images may have been taken or shared consensually initially.

(2) Consent to a defined possession – for example, the receipt of a time limited image over Snapchat or consent for a particular purpose.

---

120 Criminal Justice Act 1988, s 160.

121 Criminal Justice and Immigration Act 2008, s 63.

122 Crimes Act 1961, s 216I.

123 Criminal Law Reform Act 2019, s 377BD.

124 Police Offences Act 1935, s 13a to 13C.

(3) Never consent – possession of images where the victim never consented to any possession, such as the revenge porn website and hacking examples referred to above.

4.251 We recognised that possession of an image in each of these circumstances had the potential to cause harm to victims. It also may entail culpability on the part of the possessor – though the extent of this could vary significantly.

4.252 However, we also raised a number of concerns about the implications of introducing an offence of mere possession without consent (as opposed to more active forms of conduct; taking and sharing without consent).

4.253 We queried generally whether a criminal offence in circumstances of possession was a proportionate response to the wrong. We also considered that it would be very difficult and resource intensive for police to enforce in practice. If this were so, it may prove ineffective, and also potentially drain police resources away from pursuing the most culpable forms of intimate image abuse.

4.254 We also noted that some of the more culpable forms of behaviour that may flow from possession without consent could be criminalised in other ways. For example, were a possessor repeatedly to remind the subject that they had the photo, the conduct might amount to harassment or stalking contrary the Protection from Harassment Act 1997, a communications offence,[125] or in the case of an intimate partner relationship, a pattern of controlling or coercive behaviour contrary to section 76 of the Serious Crime Act 2015. Threatening to share the image might also engage these offences, our recommended offence of threatening to share, and additionally the offence of blackmail.[126] Where the possessor sends the image to the person depicted to alert them to the fact of possession, this could also be captured by our recommended sharing offence.

4.255 We considered that an offence of retaining an image after consent has been withdrawn (withdrawal of consent to indeterminate possession) would be particularly difficult to enforce. It was also not clear to us that it is appropriate for the criminal law to criminalise such circumstances in the absence of further, additional conduct, such as harassing behaviour or a threat to share. In particular, it could mean that a person could commit an offence by omission if they do not take steps to delete an image on request. Even when such steps are taken, someone could remain in possession without knowing it due to a lack of knowledge of cloud-based storage systems, or number of copies of an image. It would be very difficult to quantify in legislation the level of knowledge someone must have of how the image is stored and where to be criminally culpable. Similarly, it is difficult to quantify what would be considered sufficient effort in locating and deleting versions of the image to avoid liability for a retention offence. While not necessarily blameless, omissions of this kind are qualitatively different to taking active steps to take or share an image without consent.

---

125 Communications Act 2003, s 127; Malicious Communications Act 1988, s 1; or the new communications offences designed to replace these in the Online Safety Bill, when implemented.

126 Theft Act 1968, s 21.

As noted above, if the person then used possession of that image to harass, coerce, or threaten the victim, there are other offences that can be prosecuted.

4.256 Retaining possession of an image in contravention of consent to a clearly defined form of possession – such as screenshotting a Snapchat image – is arguably a more active form of wrongdoing. However, in our consultation paper we again expressed reservations about the appropriateness of criminalising this behaviour:

> While it may be immoral and a violation of the victim's autonomy, it is unclear whether these acts are inherently sufficiently wrongful and harmful to be criminal. There was consent to the original possession of the image; the continued possession is not an act so wholly different from the original consensual behaviour that it is obviously criminal. Again, this has the potential to be a very broad offence capturing wide-ranging, and potentially very common behaviour.[127]

4.257 In relation to the final category – where the victim never consented to possession – we noted that the arguments for criminalisation were strongest. It is the category that involves the greatest violation of the victim's sexual autonomy and bodily privacy. It also entails the most culpable conduct, as it requires that positive action be taken to obtain possession in the absence of consent. Given this, it is unsurprising that it is the only one of the three categories that has been criminalised in other jurisdictions (see paragraph 4.247 above).

4.258 Criminalising in these circumstances does still risk equating the possession of such material with the existing, very serious, criminal offences of possessing indecent images of children or extreme pornography. The harms associated with the latter two categories are particularly stark. Intimate images are not inherently harmful by themselves in the way that indecent images of children and extreme pornography are. When taken and shared consensually, they can be viewed as a positive, healthy part of people's lives. It would therefore be quite an extreme, potentially damaging, message to place them in the same category as indecent images of children and extreme pornography. There may be ways of appropriately distinguishing these groups. For example, a possession offence could (and likely would) have a less serious maximum penalty than these other two types of offences. But combined with the general challenges of enforcement and resourcing implications for law enforcement agencies, we formed the provisional view that the introduction of a possession offence was not desirable even in these circumstances.

4.259 While concluding this, we acknowledged the relative strength of arguments for criminalising possession when there was never any consent to possess, and suggested that any possession offence should be very limited and should only cover possession where there was never consent.

4.260 At Consultation Question 18 we asked:

> 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?

---

[127] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 7.80.

Consultation responses

4.261 Fewer than half of consultees supported this proposal. Slateford Law and Muslim Women's Network UK stated that they were "reluctantly" and "hesitatingly" agreeing.

4.262 Consultees in support generally agreed with our rationale in the consultation paper and raised concerns that a possession offence would be too broad and risk overcriminalisation. The CPS stated that our proposal "is proportionate and reduces the risk of criminalisation of non-criminal behaviour".

4.263 Others noted practical difficulties such as proving lack of reasonable belief in consent and requisite knowledge. The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) stated that an offence of possession without consent "would [be] likely to add significant complexity in presenting the case" and would probably lead to many cases where the defendant argues ignorant possession. Senior District Judge (Chief Magistrate) Goldspring warned that it would be "almost impossible to prosecute the further removed [the possession] was from the original "taking" of the image as it would be necessary to prove knowledge of the lack of consent". Similarly, the Bar Council considered it would likely be "extremely difficult to prove lack of reasonable belief in consent", which would be a necessary element of such an offence.

4.264 Some consultees suggested that the most harmful behaviours of possession are covered by our proposed offences (particularly sharing and threatening to share). For example, Professor Gillespie considered that a victim's "typical concern" is that the person in possession of their intimate image might share it with others, which can be dealt with through the offences of sharing or threatening to share. Other consultees considered that a possession offence would provide protection for victims who might fall between gaps in our provisional proposals, such as where a threat was implicit (particularly in domestic abuse contexts) or where original sharing was consensual, but that consent has been revoked.

4.265 Many consultees specifically considered the merits of a possession offence for images retained after a request to delete.[128] Refuge considered that such an offence would provide greater protection to victims of domestic abuse. The Centre for Women's Justice proposed an offence where the perpetrator refused to remove or delete the image following repeated requests from the victim (or on their behalf). They also noted that such conduct may be caught by the threat offence in a number of cases.

4.266 Ann Olivarius cited a German case in which the court held that ex-partners could demand the deletion of their intimate images and videos. This was because consent to take and share such images could be withdrawn, and that consent could be limited to the context of a relationship.[129] In such circumstances, the relevant consent is to the act of ongoing possession or retention of the image, rather than the acts of taking or sharing that gave rise to that possession. Taking and sharing are acts that are complete once an image is created or shared.

---

128 Including The Rt Hon the Baroness Morgan of Cotes.

129 Urteil des VI. Zivilsenats vom 13.10.2015 - VI ZR 271/14.

4.267 Professors McGlynn and Rackley did not support a possession offence. However, this is qualified, as they did support a taking, making and retention offence which would criminalise retaining an image to which there was never or limited consent to possess such as the Snapchat example. Some consultees suggested that the question should be reviewed after the provisional proposals have been implemented to see whether the need for a possession offence is made out.[130]

4.268 Consultees who supported a possession offence wrote about the harm experienced by victims from continued possession and about the invasion of privacy that ownership and access to intimate images without consent represent. South West Grid for Learning stated that "it seems illogical that sharing without consent would be a crime but not illegal to possess content where there has been no consent". Professor Keren-Paz said "it is border illogical to take out of the responsibility picture those who are the ultimate cause of harm to the victim". Marthe Goudsmit also highlighted this harm:

> The harm of image based abuse is caused to a substantial extent by those who access the image, in addition to the person who discloses it. It would be a good idea for the law to reflect the objectification and resulting inhuman treatment caused by possessing an intimate image of another without their consent. It shows no regard for that person's rights, and if done knowingly could be criminalised as it is harmful and wrongful.

4.269 Responses also argued that possession amounts to sexual offending.[131] Consultees identified a link between intimate image abuse and sexual autonomy or control/manipulation. Campaign organisation #NotYourPorn, for example, commented that permitting possession contributes to the misogynistic narrative that men are entitled to women's bodies.

4.270 Some consultees supported a possession offence on the basis that intimate images of adults should be treated the same as indecent images of children. For example, Honza Cervenka submitted:

> I do not see a fundamental reason why the offences surrounding image abuse should not include possession if the offences surrounding child pornography do. The law has already grappled with the associated ambiguities.

4.271 Ann Olivarius submitted that items with potential for harm should be criminalised. She argued in her consultation response to the question on simple making, that "the UK currently criminalises the possession of many things even if the person does not do or intend to do anything with the item to cause another person immediate and demonstrable harm". She cited ownership of weapons as an example.

4.272 Some consultees who responded negatively argued in favour of a possession offence only where the original taking, sharing, or possession was non-consensual. Ann Olivarius and Marthe Goudsmit both specified that the perpetrator must have known that the original taking or sharing was non-consensual to be liable. Ann Olivarius

---

130 Including Muslim Women's Network UK and HM Council of District Judges (Magistrates' Courts) Legal Committee.

131 Including Professor Tsachi Keren-Paz.

additionally stated that an intention to possess or retain the image must also be required.

4.273 Consultees considered the appropriateness of civil orders and a number called for take down or destruction orders.[132] We consider relevant civil ancillary orders in Chapter 13. Some consultees considered the implications of data ownership for whether a possession offence is appropriate.

Conclusion following consultation

4.274 There is no doubt that the mere possession of intimate images without consent can be a cause of significant harm and distress to victims. It will undoubtedly feel to some like a loss of control over their body, who sees it, when and how. We understand the strong desire of many victims for the possession of intimate images without consent to become a criminal offence. It is natural that a person in such circumstances would want this to be illegal, and for consequences to follow for individuals who refuse to delete images on request. We have carefully considered the arguments for criminalising such behaviour. Retaining or possessing an image without consent can be deplorable behaviour, however, we are not convinced it is criminally culpable.

4.275 We consider the rationale for the intervention of the criminal law to be weaker in circumstances of mere possession without consent, than in situations of taking and sharing such images without consent. Many instances of possession will be less harmful, and involve much less culpable behaviour, including simple omission. A key concern with a possession or retention offence is the ease with which it can be committed, making it potentially very broad in scope. Someone could be guilty of such an offence by omission, by failing to delete an image that had been stored in multiple places. One can possess or retain an image by doing nothing. It is also difficult to conceive the point at which criminal culpability starts: would a request to delete or a withdrawal of consent to possess have immediate effect? What is a suitable amount of effort to identify and delete known copies? We also have in mind the principle of minimal criminalisation; the starting point when considering any conduct is that it should not be a criminal offence unless there is a justifiable need for it to be.

4.276 Further, we are concerned that law enforcement agencies will already face a challenging task in seeking to enforce the widened scope of the taking, sharing and threat offences we are proposing in this report. We consider the strengthening of the criminal law in these areas to be an important and necessary reform. However, when the enormous scale of intimate image abuse is considered, a further offence of mere possession of such images is likely to render these laws almost unenforceable in practice. It is important for victims of intimate image abuse to feel that their reports are being taken seriously and investigated.[133] Possession offences would require vast resources to police given the potential scale of the offending. We are concerned in particular that police who have to provide a proportionate response would ultimately be limited in practice (due to limited resources) to telling the person to delete the image they possess. The police would not reasonably be able to follow up to check whether the image was in fact deleted from every device and cloud account. In

---

132 Including The Rt Hon the Baroness Morgan of Cotes and Refuge.

133 Dr Madeleine Storry and Dr Sarah Poppleton, “The Impact of Online Abuse: Hearing the Victims’ Voice” (1 June 2022) *Office of the Victims Commissioner*, p 43.

practice, such an offence is unlikely to give victims the recourse and peace of mind they seek.

4.277 We do accept that possession in "never consent" cases is the most borderline criminal behaviour. The harm and wrongdoing in these circumstances is likely to be the most serious, and the behaviour amongst the most culpable in terms of possession. We have carefully considered options, including those proposed by consultees to limit any possession offence to where there was never consent to possession, and the perpetrator knew there was no such consent. It is very finely balanced, but ultimately we conclude that even such a limited possession offence risks overcriminalisation and would be unwieldly to enforce. Let us take the two examples described at the start of this section: downloading and keeping an image from a so-called revenge porn website, and hacking a phone and saving an intimate image. Both are undoubtably wrongful. The latter has two elements that are wrongful: the hacking and the possession. It could therefore be a computer misuse offence (see paragraphs 4.65 above). The revenge porn example is troubling. We understand that harm is caused by knowing that people can access and keep an intimate image that was maliciously shared in the first place. However, the criminalisation of downloading such an image presents a number of evidential issues. It could be impossible, or disproportionately resource intensive, to prove how someone came into the possession of such an image (for example, if the image was saved or emailed or printed off in a way that disguises the origin). Then it must be evidenced that it was non-consensual and that the perpetrator was aware of this. Where the image itself appears to be consensual it would be extremely difficult to prove this if the origin of the image has been disguised. Where the image does show something non-consensual, the extreme pornography offences may apply. With all these difficulties in mind, we are reminded that this harmful behaviour arises as a result of the more wrongful and culpable behaviour of sharing the image in a place where others could access it in the first place. Therefore, we conclude it is most proportionate to focus the criminal law, and resources, on preventing and prosecuting taking and sharing behaviours. As noted previously, if an image that has been retained or possessed without consent is shared, or a threat is made to share it, our recommended offences would be available to address that harmful conduct appropriately.

4.278 Nonetheless, we understand the strength of argument, and feeling, for criminalising such possession. Should Parliament choose to criminalise some possession of intimate images without consent, we would recommend that it be limited to cases where there was never any consent to possession.

4.279 We also acknowledge the support for including in intimate image offences the Snapchat example. We have considered it both as an act of taking and retention. We are still of the view that the significant issues with a possession offence outweigh the benefits of criminalising such behaviour. In the most serious cases, where possession is used by the defendant to harass, threaten, blackmail, or coerce the victim, there are other criminal offences that can be applied, including our recommended intimate image offences. Further, where someone shares a retained image without consent, or threatens to do so, our recommended offences would apply. We acknowledge the concern that possession gives rise to implicit threats. We recommend that our threat offence includes implicit and explicit threats (see Chapter 12). Some instances of possession where there is a tangible threat, however communicated, will be

criminalised. Further, we recommend that a sharing offence should include sharing the image with the person depicted. This is currently excluded from the disclosure offence. Therefore, a perpetrator who sends an image to the person depicted, as a way of warning them or telling them they are still in possession of it, will have committed a sharing offence.

Recommendation 22.

4.280 We recommend that it should not be an offence to possess an intimate image without the consent of the person depicted.

4.281 If an offence based on possession of an intimate image without consent were to be introduced, we recommend that this offence should be limited to circumstances of possession where the victim never consented to the possession of the image by the defendant.

CONCLUSION

4.282 We have considered all the relevant acts associated with intimate image abuse: taking, making, sharing, installing, and possessing. We have concluded that taking and sharing are the most wrongful and harmful and therefore recommend taking and sharing offences only. We do not recommend a simple making or possession offence. We do recommend that sharing offences should include made or altered images, in recognition of the more harmful acts associated with making intimate images without consent.

4.283 We have also considered the acts beyond taking in the current voyeurism offence. We recommend an offence of installing equipment for the purpose of taking an intimate image without consent. We note that the voyeurism offence of observing, and installing or operating equipment in order to observe, someone doing a private act would retain the existing definitions and intent limitations. The current voyeurism recording offence, however, would be replaced by our recommended taking offence which has different definitions and intent elements. If the recommendations in this report are accepted, we suggest that the Government consider whether these differences necessitate amendment of the remaining voyeurism offences of observing someone doing a private act and installing equipment for the purpose of doing so.

Chapter 5: Fault: intention and awareness of lack of consent

INTRODUCTION

5.1 In this chapter and the next we consider the mental element of intimate image offences:

> The "mental element" (or "fault element") [of an offence] is the state of mind which must be proved by the prosecution to show that [the defendant] is responsible for the[ir] actions. Examples of mental elements include intention, recklessness, knowledge or belief (or the lack of it).[1]

5.2 This chapter considers what should be the minimum level of fault required so as to ensure the intimate image offences only apply to those who act with sufficient culpability. Fault requirements attach to the relevant acts of the base offence: taking or sharing of an intimate image without consent. The first part of this chapter outlines possible fault requirements and sets out the provisional proposals that were made in the consultation paper. In the second part of this chapter we turn to the consultation responses.

5.3 We conclude that two elements must be proved to establish fault. The first is that a person must act intentionally; that is, they must intend to take or share an image that is intimate. The second concerns the level of awareness as to lack of consent the defendant should have. We conclude that, in line with the threshold standard in sexual offences, this element will be established where the defendant did not reasonably believe that the person depicted consented to the taking or sharing of an intimate image.

FAULT REQUIREMENTS AND THE PROVISIONAL PROPOSALS

The content of fault requirements

5.4 Only sufficiently culpable behaviour should ever be caught by a criminal offence. In the consultation paper we therefore considered what fault requirements must be present to ensure the offences only apply where the perpetrator had sufficient culpability to warrant criminalisation when taking or sharing an intimate image. We provisionally proposed a fault requirement relating to the two alternative conduct elements of the offence and the associated circumstance element:

(1) The acts: The act of taking or sharing an intimate image must have been done intentionally.

(2) Without consent: The perpetrator must have had some awareness that the victim did not consent.

---

[1] Reform of Offences Against the Person (2015) Law Com No 361, para 2.3(2).

We consider these in turn.

Intention

5.5 There are two forms of intent typically associated with criminal offences. First, basic intent (which is an intention to do the act that is the subject of the offence). Secondly, specific intent (which is an intention to do that act with a particular motivation or to bring about a particular result).

Basic intent

5.6 Doing an act intentionally can be distinguished from, for example, doing an act accidentally. With current technology, taking and sharing images can involve just a touch of a button on a device. When the act can be completed so easily, it can be committed accidentally, for example, by scrolling through a photo album and accidentally sending an intimate image while trying to save it in another location. A number of stakeholders and consultees raised examples where someone intentionally takes a photo of a crowd, or on a beach, and does not realise that someone is nude in the background.

5.7 This behaviour is not highly culpable; the perpetrator did not mean to take or share the intimate image in question. We proposed in the consultation paper that the act of taking or sharing an intimate image must be intentional, in order to exclude such examples from the offences.[2] Both the act of taking or sharing, and that the image was intimate, must be intentional. In the scrolling example, the person did not intend to share an image at all. In the beach example, the person intended to take an image, but they did not intend to take an intimate image. Neither should be caught by the intimate image offences.

Specific intent

5.8 The current intimate image offences all have an additional, specific intent element. They require that the defendant acted either to obtain sexual gratification,[3] to distress the victim,[4] or both.[5] In the consultation paper we explored the positives and negatives of these intent elements, which we address in more detail in the next chapter. In summary, there was significant concern that only having offences with a specific intent element was an unsatisfactory limitation and meant that sufficiently culpable behaviour was excluded from the existing intimate image offences.

5.9 We therefore provisionally proposed that there should be an offence of taking or sharing an intimate image without consent. This offence would apply regardless of the reasons for the taking or sharing, and regardless of the impact the perpetrator intended. We refer to this as the base offence.

---

2 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.2.

3 The voyeurism offence.

4 The disclosure offence.

5 The upskirting offence includes intent to obtain sexual gratification, or to humiliate, alarm or distress, the person depicted.

5.10 This chapter will consider the basic intent element of the fault component for the base offence.

5.11 The next chapter will return to intention, examining the need and justifications for a base offence without specific intent, and how the law should consider circumstances where there is additional intent.

Awareness of lack of consent

5.12 Consent is key to the criminality of intimate image abuse. Where the person depicted does not consent, taking or sharing intimate images becomes wrongful. We considered whether this lack of consent was sufficient for criminalisation, or whether the perpetrator must also have some awareness of the lack of consent. Consider the example posed in the consultation paper:

> X sends Y a link to a new website advertising her lingerie shop and asks for his opinion. The website contains details of the shop location, opening hours and images of X modelling the underwear, some of which is see-through. Y sends the link to the website on to his friends for their opinions. Unbeknownst to Y, X had only set up the website as a prototype to show her photos to Y; it was not a publicly accessible website without the link. When Y visited the website there was nothing on it that would suggest it was anything other than a public website with the shop information and images. Y reasonably, but mistakenly, believed that his friends could access the website themselves via a search engine.

We provisionally concluded that in such circumstances Y's behaviour was not culpable enough to be criminal. We therefore discussed three options for formulating a fault requirement that would require a level of awareness of lack of consent:

(1) the defendant had "actual knowledge" of the victim's lack of consent; or

(2) the defendant had either actual knowledge that the victim did not consent or was reckless as to whether the victim did not consent; or

(3) the defendant did not reasonably believe that the victim consented.

Actual knowledge

5.13 The current voyeurism offence requires the defendant to have known that the victim did not consent to their action. Actual knowledge is a higher bar than most sexual offences (which generally require the prosecution to prove that the defendant lacked a reasonable belief in consent). We noted in the consultation paper that the actual knowledge threshold may be explained by the nature of the behaviour targeted by the voyeurism offence:

> The purpose of this offence was specifically to deal with 'peeping Toms' – taking images in particular contexts such as placing a camera in toilets, peeping into changing rooms, and so forth.[6]

---

6 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.18.

5.14 In such cases, the lack of consent would be known by the defendant; indeed often the gratification derived from the act is enhanced by the fact that the victim is unaware that they are being observed or recorded. We noted that intimate image offences cover a much broader range of behaviours than the voyeurism offence. Such a high bar would exclude a large amount of culpable behaviour where the defendant did not think to ask for consent, or even think that consent was needed. We therefore concluded that this fault requirement was not appropriate.

Actual knowledge or recklessness as to lack of consent

5.15 We considered whether the limitations of actual knowledge could be addressed by including an alternative "reckless" element. A defendant is reckless "if he is aware of a risk that a consequence will occur and unreasonably (in the circumstances known to the defendant) takes that risk". Case law[7] has determined that recklessness is a subjective test; the defendant must have been aware of the risk. Therefore, it would not include cases where the defendant was not aware of a risk, or did not turn their mind to the possibility of a risk.

5.16 We considered the following examples:

> Example 1: Tania posts a sexual image she has taken of herself on her Facebook account, which is set as private. Craig thinks this is hilarious, downloads the image from her Facebook account onto his phone, and sends it to all his friends who are not Facebook friends of Tania's.
>
> Example 2: Bob's girlfriend Sonia sends a sexual selfie to him. He sends this image on to his mate Ted, who also shares it with a number of his friends.[8]

Craig, Bob, and Ted have acted in a way that could cause serious harm to Tania and Sonia. We considered that their behaviour was sufficiently culpable to warrant criminalisation. However, they could argue that they were not reckless as to lack of consent as they did not turn their minds to the issue of consent. They reshared the images without even thinking about consent. We concluded it was not satisfactory to include a test that would exclude this sort of behaviour from intimate image offences. Further, we noted that it was inconsistent with the majority of sexual offences which were reformed in 2003, removing the previous test of recklessness and introducing a reasonable belief in consent test for offences such as rape and sexual assault.

Reasonable belief in consent

5.17 As noted above, to establish fault most current sexual offences require the prosecution to prove that the defendant did not have a reasonable belief that the victim consented to the act. The upskirting offence also uses this fault requirement (as well as requiring specific intent).[9] Such a test puts an onus on the defendant to have

---

7 *R v G* [2003] UKHL 50, [2004] AC 1034; *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868.

8 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.24.

9 Sexual Offences Act 2003, s 67A(1)(c).

taken some action to ascertain whether there was consent.[10] When considering reform of sexual offences, the Government stated that a reasonable belief in consent element:

> Will make it clear that, where the prosecution can prove that there is reasonable room for uncertainty about whether someone was consenting and that the defendant did not take reasonable action in the circumstances to ensure that the other person was willing to take part in the sexual acts, he will commit an offence.[11]

5.18 This is also echoed in the Crown Prosecution Service ("CPS") guidance. The CPS publish guidance for a number of offences to assist prosecutors when making decisions about individual cases. The guidance for prosecuting rape and sexual offences states that "the defendant (A) has the responsibility to ensure that (B) consents to the sexual activity at the time in question". The CPS guidance also sets out how the test works:

> The test of reasonable belief is a subjective test with an objective element. The best way of dealing with this issue is to ask two questions:
>
> (1) Did the defendant believe the complainant consented? This relates to his or her personal capacity to evaluate consent (the subjective element of the test).
>
> (2) If so, did the defendant reasonably believe it? It will be for the jury to decide if his or her belief was reasonable (the objective element).[12]

The guidance also states:

> It will be important for the police to ask the suspect in interview what steps (s)he took to satisfy him or herself that the complainant consented in order to show his or her state of mind at the time.[13]

5.19 We concluded in the consultation paper that this was appropriate for intimate image offences. It would better address the behaviours of Craig, Bob, and Ted, above, as they would be required to show that they had turned their mind to whether Tania or Sonia consented to their onwards sharing. As we concluded: reasonable belief in consent "better reflects individuals' responsibility to satisfy themselves as to consent".[14] It would also work to address the less culpable behaviour in the first example, of X and Y and the lingerie website. Y had a reasonable belief that X consented to everyone being able to view the images on the website and therefore consented to Y sharing the website.

---

10 See the CPS guidance on consent in rape and sexual offences, described at para 5.18.

11 Home Office, *Protecting the Public* (2002) para 35.

12 Crown Prosecution Service, *Rape and Sexual Offence Prosecution Guidance, Chapter 6: Consent* (21 May 2021) https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent.

13 Crown Prosecution Service, *Rape and Sexual Offence Prosecution Guidance, Chapter 6: Consent* (21 May 2021) https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent.

14 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.34.

5.20 We also noted that the test was well understood by practitioners in the criminal justice system as it has been a key part of sexual offences for nearly 20 years.

5.21 We acknowledged that there is criticism of the reasonable belief in consent test currently used in sexual offences. In the consultation paper we described academic criticism that "reasonableness" risks being interpreted by a male-centric standard and that it reinforces harmful social gender norms. When considering the introduction of this test in the Sexual Offences Act 2003, Professors Jennifer Temkin and Andrew Ashworth argued:

> The Act contains no real challenge to society's norms and stereotypes about either the relationship between men and women or other sexual situations, and leaves open the possibility that those stereotypes will determine assessments of reasonableness.[15]

5.22 This is a valid concern. However, it applies to use of the test in all sexual offences and is not unique to the intimate image abuse context. Therefore, we concluded that it was still appropriate to propose this test for intimate image offences as it best distinguishes the culpable behaviour worthy of criminalisation, and is consistent with the current sexual offences. The concerns with the test are better addressed by a more holistic review of consent in the context of sexual offences, rather than the creation of a separate regime for intimate image offences.

5.23 We brought the two fault requirements together and at Consultation Question 25 asked:

> 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?

Consultation responses and analysis

5.24 A number of consultees[16] noted that a fault requirement was necessary for these offences, and the majority of those who responded to this question agreed with our proposal that it should be no reasonable belief in consent (29 out of 40). Dr Charlotte Bishop warned that without the proposed fault requirement, the offences may be criticised for overcriminalising, or "watering down" the offences and harm caused.

5.25 Advocacy organisation Equality Now suggested that it could be beneficial to have a wider offence with minimal or no fault requirement as it would force self-regulation and:

---

15 Jennifer Temkin and Andrew Ashworth, "The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent" [2004] *Criminal Law Review* 328.

16 Including Dr Charlotte Bishop; Professor Alisdair Gillespie; The Bar Council; and HM Council of District Judges (Magistrates Court) Legal Committee.

> Hopefully deter mindlessly resharing [of] 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.

We consider that a reasonable belief in consent element, that requires the person taking or sharing an intimate image to turn their mind to the issue of consent, satisfactorily addresses "mindless" behaviour.

5.26 We turn now to consultees' comments on the two elements.

Intention

5.27 Only a small number of consultees specifically mentioned the intention element we proposed. The Bar Council, HM Council of District Judges (Magistrates' Courts) Legal Committee, Professor Thomas Crofts and one anonymous consultee[17] all submitted that accidental taking or sharing should not be criminalised. The Bar Council suggested that the "law would fall into disrepute" if accidental or unintended images were criminalised. We are also aware that criminalising mistaken or unintentional taking or sharing has been raised as a concern by stakeholders outside of consultation responses.

5.28 In her consultation response, Sophie Arkette suggested that reckless sharing is a harmful behaviour:

> A conscious disregard of the substantial risks in disclosing sexual content reflects empirical evidence about the harmful and destructive acts highly likely to occur once content is disclosed, especially in [light] of the speed of redistribution across cyberspace.

5.29 Laura Bloomer of Backed Technologies Ltd also suggested that accidental sharing should not be totally excluded from the offences given the harm caused.[18] She argued that a lesser offence should apply where there were steps taken to remedy the accident. We agree that unintentional or accidental taking or sharing can be harmful, however unintentional behaviour is not sufficiently culpable to warrant criminalisation. The ease with which one can take or share an intimate image means that an intent to do so is key for culpability. Anytime one uses a mobile phone on a public beach, for example, could pose a risk that an intimate image would be taken unintentionally. This behaviour does not warrant criminalisation even when one is aware of the risk. There must be more direct intent.

5.30 This intention requirement, as with all elements of the offences, is specific to the act in question. For example, if someone takes a photo in a public changing room thinking they are alone, and realises after taking it that they have captured the reflection of someone who is partially nude, this would not be an intentional taking of an intimate image of another therefore is not an offence. If, however, upon noticing they have captured someone partially nude, they send that image to a friend because they find it

---

17 Anon 5, personal response.

18 In response to Consultation Question 26 about the base offence.

funny, that is intentional sharing of an intimate image without consent and is an offence.

5.31 We conclude that a fault requirement that requires the taking or sharing of an intimate image to have been intended is necessary and appropriate to exclude accidental or unintended behaviour from the offences.

Awareness of lack of consent

Responses

5.32 Dr Bishop and Professor Alisdair Gillespie considered the alternative tests we rejected in the consultation paper: actual knowledge, or recklessness as to lack of consent. They also dismissed them as not suitable. Dr Bishop argued that requiring actual knowledge "would be too restrictive and would only include the most extreme cases". She also rejected recklessness as it would not capture circumstances where the perpetrator does not care or think about the victim's consent.

5.33 Professor Thomas Crofts queried whether the recklessness standard would be more appropriate. He noted that failing to think about whether a person gave consent will "generally" indicate blameworthiness, but in some cases, he argued, it may indicate "ignorance, foolishness, or a lack of [or] diminished capacity" where criminalisation may not be warranted.

5.34 The reasonable belief standard was seen as most appropriate among consultees. Dr Bishop stated that requiring reasonable belief in consent "overcomes" the issues she identified with the two alternatives. A number of consultees agreed that using the reasonable belief standard for these offences would be consistent with other related offences. Dr Bishop stated that this consistency is "important… and clearly signifies that these fall under the umbrella of sexual offences". The CPS noted that this standard "aligns" with the offences under the SOA 2003, and that it is a "well understood" concept for the courts. Similarly, Professor Gillespie stated that it "echoes" the sexual offences and is "familiar". While Professors Clare McGlynn and Erika Rackley disagreed that the law on consent is "well understood", they ultimately supported the proposal because "on balance… a consistent approach is preferable to separate laws on consent".

5.35 Consultees shared the concerns expressed in the consultation paper that a test of "reasonableness" allows patriarchal standards to dominate. Dr Bishop noted that "in a male-dominated society, reasonableness and 'objective' standards are nearly always the male viewpoint but pronounced as 'objective'". Professor Keren-Paz stated that he agreed with our proposal but recommended that "the definition of reasonable belief include a commitment to gender equality".

5.36 Professors McGlynn and Rackley submitted that "the reliance on 'reasonable' beliefs continues to provide an outlet for outdated assumptions and victim-blaming perspectives".[19] Dr Bishop also raised concerns that assessing 'reasonableness' often

[19] Similar concerns were raised with the "reasonable person" test that is used in the definition of "sexual". We discuss this in Chapter 3.

involves scrutinising the victim's behaviour to determine whether they indicated consent. She argued that:

> In a male-dominated society where problematic gender stereotypes abound, stereotypes about male and female behaviour and responsibility will end up determining assessments of whether the belief in consent was reasonable.[20]

5.37 However, as we concluded in the consultation paper,[21] consultees noted that these issues are not unique to the intimate image abuse context. Professors McGlynn and Rackley, and Honza Cervenka flagged the need for a wider review of the law of consent.[22] Dr Bishop and Honza Cervenka ultimately concluded that reasonable belief in consent is the most appropriate standard despite its flaws.

5.38 Women's Aid made the point that consent to one act does not constitute consent to any further act. They submitted that where, for example, a person took the image themselves, this "is not determinative of consent" to any other act being done with that image. Their response suggests that a defendant should not be able to rely on consent to one act, or the victim's involvement in part of the act, as the basis for claiming they had a reasonable belief in their consent to any further act. There are no circumstances which will always give rise to a reasonable belief in consent. Consent to take an image, or to share it in a particular way, does not constitute reasonable belief in consent to share it in any other way as a matter of law. We also discuss this point in Chapter 8.

5.39 A number of consultees responded with concerns about the definition or interpretation of consent beyond the operation of a reasonable belief test. These issues are considered in Chapter 8 which looks specifically at consent.

Application to "remote" offending

5.40 Garden Court Chambers Criminal Law team disagreed with our provisional proposal. They raised concerns with applying the reasonable belief standard to the intimate image abuse context, arguing that since these offences do not involve physical contact, the perpetrator may be too remote from the person depicted in the image to be able to ascertain consent. They suggested that this is why the existing intimate image offences do not use this standard in isolation: they noted that in the current upskirting offence:

> The fault element is a reasonable belief in consent but the offence is limited to the original taker of the image and the offence further requires that the purpose is sexual gratification or humiliation of the victim.

This argument suggests that for an offence without such a specific intent element, a higher threshold would be more appropriate, such as knowledge as to lack of consent.

---

20 These concerns were echoed by lawyer Honza Cervenka.

21 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.38.

22 A number of consultees responding to Consultation Question 23 on consent also suggested a wider review of consent was required. See Chapter 8 for the discussion on this issue.

5.41 Other consultees raised similar concerns (though not all disagreed with the proposal). Professor Crofts argued that "[t]his issue of proximity marks a difference between image based abuse and other sexual offences". He explained that the "threshold of lack of a reasonable belief is easily justified in relation to sexual assault/rape" because there is physical proximity that makes ascertaining consent simple. Where the two people in question are in physical contact, one would simply need to ask the other if they consent. This is relevant in so-called "contact offences", which are sexual offences that require physical contact between the perpetrator and the victim, such as rape or sexual assault.

5.42 Corker Binning raised a similar proximity concern in their response to a question about the base offence. They submitted that, while acts of contact offending:

> …necessarily involve opportunity and requirement for [the defendant] to take proactive steps to ascertain consent before engaging… the same cannot be said for taking photographs or videos.

5.43 In their response to the same question, the CPS submitted:

> We also think that for the 'sharing' element of the offence it is not clear how an offender could demonstrate a reasonable belief in consent where the offender was not involved in the original taking of the photograph, is unaware of the context in which an image was taken and therefore will not know the victims views around onward sharing. This may criminalise a broad range of activity which is currently lawful.

Analysis

5.44 There is support from the majority of consultees for recommending awareness of lack of consent using the reasonable belief in consent formulation.

5.45 We acknowledge, as per Professor Crofts' criticism, that there may be reasons why a perpetrator did not turn their mind to the question of consent. This may include "ignorance, foolishness, or a lack of [or] diminished capacity (particularly with the young or those with mental health issues)".[23] We are not persuaded that a recklessness test better addresses these issues. As we described in the consultation paper, we were advised by a CPS prosecutor that the reasonable belief in consent test is more appropriate "when faced with difficult cases involving young people where they reasonably thought there was consent".[24] Ignorance and foolishness do not mean that the behaviour was not criminally culpable. For the reasons explored in the consultation paper, a recklessness test does not capture all culpable behaviour and would be inconsistent with the current law on sexual offences. Consultees generally supported this view.

---

[23] Thomas Crofts, Consultation Response, quoting their article "Criminalization of Voyeurism and 'Upskirt Photography' in Hong Kong: The Need for a Coherent Approach to Image Based Abuse" (2020) *Chinese Journal of Comparative Law*.

[24] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.39.

5.46 We agree that there are concerns with the way that tests of reasonableness can reinforce harmful gender norms, but think such concerns are better addressed more holistically rather than creating a separate regime for intimate image offences.

5.47 There is validity in the concerns raised by consultees that reasonable belief in consent operates differently in an intimate image abuse context. In many cases, particularly of sharing, the victim and perpetrator will be remote from each other, indeed they may not be known to each other at all. We acknowledge that this raises different, and sometimes difficult questions, for the enquiry into reasonable belief in consent when there is such remoteness. As Garden Court Chambers Criminal Law Team submitted, a perpetrator who is "several steps removed from the original taking" might be captured by the offence". Consider an example: A takes a photograph of themselves topless and shares it with their current boyfriend B. B shares it on a Facebook page for his university's sports society. Many of those in the society shared a link to the Facebook page with friends in other sports societies at universities across the country. These latest recipients of the image do not know A or B. There is no information about A on the Facebook page. If they were to forward the image on again, it is difficult to see what steps they could take to ascertain whether A consented to them doing so. Currently resharing this image is not criminalised. It could be criminalised under our recommended base offence if the prosecution can prove there was no reasonable belief in consent. It is likely a very common behaviour, and is arguably less culpable behaviour than B's, or those in the Facebook page group who know B. We will now consider the issues this presents.

5.48 First, we acknowledge that the current intimate image offences do not utilise reasonable belief in consent, either at all, or in isolation. However, we are addressing a wider range of behaviours than the current offences. Given the broader type of conduct we seek to address, we conclude that the narrower fault requirements are inappropriate.

5.49 Secondly, we consider that this concern is limited to cases where there is a real remoteness between the person depicted and the person sharing the image. (Taking behaviours usually involve physical proximity between the person taking and the person depicted so the same issues do not arise. They are more akin to contact sexual offences.) When sharing an image of someone where there is a connection, even if somewhat remote, between the person sharing and the person depicted, it is right that the person sharing should take steps to ascertain consent. The reasonable belief in consent formulation is entirely appropriate in these circumstances, for all the reasons explored here and in the consultation paper.

5.50 Where there is no such connection, we consider that other mechanisms we recommend in this report will effectively address the concerns raised by consultees, including the example raised by the CPS at paragraph 5.43 above, and our example posed at paragraph 5.47 above. In Chapter 4, we explain why sharing offences should be limited in cases of secondary sharing. Sharing a link to an image that has already been made available to the recipients by another person will not be included in our recommended sharing offence. Further, the public element test would carve out from the offences sharing images that have previously been shared in public with the consent of the person depicted or where the person sharing reasonably believed that the person depicted consented to the original sharing.

Burden of proof

5.51 One final point from the consultation responses warrants attention: the burden of proof for the awareness of lack of consent.

5.52 Ordinarily, the prosecution will bear the legal burden of proof and will be required to prove each element of an offence to the required criminal standard of proof: beyond reasonable doubt. Only occasionally will a defendant be required to meet a burden of proof.

> [Such a] 'reverse burden' exists where the burden of proof is on a defendant to show or prove some matter in criminal proceedings (usually giving rise to a defence). Where the burden is a legal (or persuasive) burden, this normally requires the defendant to satisfy the court on the balance of probabilities.[25] Where the burden is an evidential burden, it is enough for the defendant to adduce sufficient evidence to make it an issue, and then the burden is on the prosecution to disprove it to the criminal standard.[26]

5.53 HM Council of District Judges (Magistrates' Court) Legal Committee submitted that it would be appropriate for there to be "an evidential burden on the defendant to show a reasonable belief in consent". In such instances, the prosecution would not have to prove beyond reasonable doubt that the defendant lacked a reasonable belief in consent unless the defendant could first meet the evidential burden.

5.54 Reasonable belief in consent is a central element of the offence; as a matter of principle it is therefore appropriate that the burden to prove it to the required standard is on the prosecution. We did not hear evidence from prosecutors that this would cause them concern. Placing such a burden on the defendant would also be inconsistent with other sexual offences. In practice we note that if reasonable belief in consent were in issue, the defendant would likely seek to adduce evidence as to their belief even where the legal burden of proof is on the prosecution.

CONCLUSION

5.55 The fault component of the offence should comprise two elements and both must be established with regard to each act of taking or sharing that has been charged:

(1) The defendant intentionally took or shared an intimate image.

(2) The defendant did not reasonably believe that the victim consented to the taking or sharing.

5.56 The burden of proving the fault requirements should fall on the prosecution.

---

[25] For example, insanity. *Woolmington v DPP* [1935] AC 462, 481.

[26] Law Commission, Corporate criminal liability: an options paper (2022), para xi; See also paras 8.73 to 8.79, in which we discuss *Sheldrake v DPP* [2004] UKHL 37 and *R v DPP ex parte Kebeline and Others* [2000] 2 AC 326, in which the House of Lords considered the compatibility of reverse burdens of proof with the European Convention on Human Rights.

Chapter 6: Fault: additional intent requirements

INTRODUCTION

6.1 In the previous chapter we addressed the minimum fault requirements for criminal culpability. We concluded that there should be two fault requirements, which were connected to the conduct and circumstance elements of the offence: the taking or sharing must be intentional; and the taking or sharing must have been without reasonable belief in consent.

6.2 This chapter now considers in more depth the level of intent that should be associated with intimate image offences, moving beyond the mere intention to do the act. We examine two matters. First, we look at whether a base offence should have a higher threshold for intent, requiring some additional intent. We conclude that it should not; an intent to do the act is the appropriate threshold for the base offence, and no additional intent should be required. Secondly, we consider whether there should be additional, more serious offences where the defendant intended a particular result over and above the taking or sharing of the intimate image. On this point we conclude that there should be two additional, more serious offences where an image was taken or shared without consent and the defendant acted with:

(1) intention to cause humiliation, alarm or distress to the person depicted; or

(2) intention to obtain sexual gratification.

6.3 We also consider additional offences where there was intent to make a gain, or to control or coerce the person depicted, but conclude that separate offences for these are not justified.

6.4 We make recommendations to the above effect in this chapter. In the next chapter we consider the tiered structure of offences that would be created, and the implications for prosecution and sentencing.

A BASE OFFENCE WITH NO ADDITIONAL INTENT REQUIREMENT

The proposed base offence

6.5 In the consultation paper, we provisionally concluded that the act of taking or sharing without consent is sufficiently wrongful to be a criminal offence, regardless of the motivation or purpose of the perpetrator. Therefore, we proposed a base offence with no additional intent requirement. We explained the rationale for this was two-fold:

(1) that taking or sharing an intimate image without consent is sufficiently harmful;

(2) that a defendant with no reasonable belief in consent is sufficiently culpable.[1]

[1] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.41.

6.6 A base offence would focus on the lack of consent and the intentional act of taking or sharing, rather than any motive. We noted in the consultation paper that this is an approach taken in Australian jurisdictions; there is no additional intent requirement in the recording and distribution offences in New South Wales,[2] and the distribution offences in Western Australia[3] and Victoria.[4] We concluded that:

> The core wrongdoing of this behaviour is serious: it is a violation of a victim's bodily privacy, bodily autonomy and sexual autonomy; this behaviour has the potential to cause significant harm, regardless of the motive of the perpetrator.[5]

6.7 In pre-consultation stakeholder engagement, we heard strong arguments that the additional intent elements of the current intimate image offences are too limiting. The current disclosure offence only criminalises sharing with the intent of causing distress to the person depicted. In Chapters 2 and 4 of our consultation paper, we described the many different motivations people may have for sharing an intimate image including: as a joke; to humiliate someone; for financial gain; for bravado; or to gain social status amongst a group. There may have been no intent other than to take or share the image. We explained in Chapter 5 of the consultation paper that taking or sharing for any of these reasons, or for no reason at all, can cause as much harm as sharing with an intent to cause distress or for sexual gratification. The type and level of harm caused by intimate image abuse does not always correlate with the intent of the perpetrator.

6.8 In addition, there are also issues with proving a specific intent. The intent of the perpetrator may not always be obvious from their actions, there may be very limited evidence that demonstrates what their intent was. Without such evidence, a prosecution cannot be successful where there is a requirement to prove intent.

6.9 In the consultation paper, we summarised stakeholders' concerns with the way the current intent elements limit the criminal law, and how this has negatively impacted victims:

> Many stakeholders in pre-consultation engagement told us that the intent to cause distress requirement in the disclosure offence did not cover some acts of distribution which were similarly harmful. Senior District Judge (Chief Magistrate) Emma Arbuthnot and District Judge Mike Fanning described the intent element of this offence as "far too narrow". Both Women's Aid and the Revenge Porn Helpline described the intent element of this offence as a "barrier" to providing victims with

---

2 The Crimes Amendment (Intimate Images) Act 2017 introduced s 91Q into the Crimes Act 1900 – distribution of intimate images without consent. It is an offence intentionally to distribute, without the victim's consent, if the defendant knows the person depicted did not consent to the distribution (or is reckless as to such).

3 The Criminal Law Amendment (Intimate Images) Act 2019 amended the Criminal Code to include an offence of distribution of an intimate image as s 221BD. There is also no mental element as to consent in this offence; it is an offence to distribute the image when the victim does not consent to the distribution.

4 The Summary Offences Act 1966 (Vic), s 41DA creates an offence where "(a) A intentionally distributes an intimate image of another person (B) to a person other than B; and (b) the distribution of the image is contrary to community standards of acceptable conduct".

5 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.57.

sufficient protection from behaviour that should be criminalised. Carrie-Ann Myers and Hollie Powell-Jones said that "the need to prove intent is failing victims". Baroness Thornton raised similar concerns in the House of Lords about the potential limitations of "distress" during deliberations of the Criminal Justice and Courts Bill.[6] Baroness Kennedy highlighted the importance of drafting "widely without specifying the nature of the motivation" because of the difficulties of "pinning down" a specific motivation.[7]

6.10 Similar arguments apply when the required intent is to obtain sexual gratification. Further, it is not a satisfactory solution simply to include additional specific intent elements. The upskirting offence, which includes both the purpose of causing humiliation, alarm or distress or the purpose of obtaining sexual gratification, has received similar criticisms for being too narrow still. We described in the consultation paper that in the Parliamentary debates when the upskirting offence was being introduced, MPs argued that including a specific intent requirement sends the wrong message: that upskirting someone for a joke is OK.[8]

As Dame Vera Baird QC, then Police and Crime Commissioner for Northumbria, raised in her written evidence regarding the Bill and Wera Hobhouse MP emphasised in the House of Commons' debate, this excludes upskirting images taken for other purposes such as "financial gain, non-sexual enjoyment or 'having a bit of a laugh'".[9]

6.11 Requiring proof of a specific intent excludes harmful and sufficiently culpable behaviours from the intimate image offences. Stakeholders and consultees have repeatedly told us that victims are harmed when perpetrators are motivated, for example, by humour, financial gain or higher social standing; motivations that would not satisfy the intent elements in the current offences.

6.12 We concluded that a base offence was needed. At Consultation Question 26 we asked:

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?

---

6 *Hansard* (HL), 20 October 2014, vol 756, col 522.

7 *Hansard* (HL), 21 July 2014, vol 755, col 973. Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.47.

8 Including Maria Miller MP; Sir Mike Penning MP *Hansard* (HC), 5 September 2018, vol 646, col 272. Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 10.50 to 10.53.

9 *Hansard* (HL), 5 September 2018, vol 646, col 27; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 3.128.

At Summary Consultation Question 1 we asked:

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

6.13 We acknowledged that a base offence has the potential to be broad and cover a wide range of behaviours that are currently legal. We limited the scope of the base offence by proposing a reasonable excuse defence (see Chapter 11), and public element tests (see Chapter 10). At Consultation Question 26 we also asked:

> 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.

We now consider the responses to the first part of Consultation Question 26. The examples provided in response to the second part are considered below from paragraph 6.31.

Consultation responses: the proposed base offence

6.14 The majority of consultees who responded to this question agreed with the proposed base offence (301 out of 333). Consultees' comments largely echoed discussions in the consultation paper. 44 consultees commented that acting without consent is sufficiently wrongful behaviour to justify a criminal offence. Consultees also submitted that: motive is irrelevant; the harm caused to victims can be the same regardless of intent; and the intent provisions of the current offences cause difficulties with evidencing and prosecuting criminal behaviour. These include lawyer Honza Cervenka who agreed with the proposal, adding that he has "long criticised the anomalously narrow definition of intent in the current sharing offence". Professors McGlynn and Rackley also agreed: "we agree that there should be a 'base' offence which focuses on the key wrong of non-consent, rather than perpetrators' motives".

6.15 The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) submitted:

> We agree with the points made that requiring the offence to be committed with specific purposes in mind misses the point of the offence – it is to criminalise deliberate instances of this harmful behaviour, and the behaviour is harmful no matter what the motive.

6.16 Dr Charlotte Bishop argued:

> This base offence is important as there will be times that ulterior/additional intent or the motivation of D cannot be evidenced (or indeed does not exist). The harm is sufficient to warrant criminalisation. Most other sexual offences are committed where D does the act intentionally, V does not consent, and D lacks reasonable belief in V's consent, so this makes it consistent.

6.17 Consultees commented on the gaps and limitations caused by the current offences, and noted how the proposed base offence would address them. For example, in their joint response, the North Yorkshire Police, Fire and Crime Commissioner and North Yorkshire Police noted the discrepancies caused by the intent requirement of the existing offences, stating "this additional evidential hurdle takes focus from the basic

act of knowingly sharing personal, sexual images without consent, and the clear danger of the negative impact on the victim". They gave an example of "top trumps" type collector behaviour that currently would not meet the intent requirements.[10] Dr Ksenia Bakina commented that the current law potentially excludes groups of perpetrators: "intention to cause distress places a focus on offenders who are known to victims and can inadvertently [exclude] hackers or those who come across images on a lost or stolen mobile phone". The Women's Equality Party agreed with removing the current intent to cause distress element of the disclosure offence. They suggested it is damaging, contributes to low conviction rates, and is not an effective deterrent as behaviour can be "excused" by not intending harm. B5 Consultancy shared the experiences of their colleague Leigh Nicol, a professional footballer whose intimate images were stolen and shared widely online without her consent. They noted that the motivation for sharing, by someone unknown to Leigh, was difficult to establish. They suggested that a base offence would have provided Leigh more recourse under criminal law. Dame Maria Miller MP also welcomed the proposals stating they address the identified gaps in the current law.

6.18 Additionally, consultees commented on the importance of an offence without specific intent. Campaign organisation My Image My Choice shared a range of motivations that would be addressed by a base offence with no intent. They stated "it's important for the offence to be broad because there are a whole range of contexts (like sharing for a laugh, financial gain, humiliation, control)". Bumble conducted an opt-in survey in April and May 2021 of 1,011 Bumble app users. The survey responses provided details of the full range of motivations experienced that are not currently criminalised:

> Women who had an intimate image taken and/or shared without their consent either don't know what motivated the perpetrator (34%) or ascribed a malicious motivation, such as an ego-boost (50%), revenge, or blackmail. Only 1% of women said it was an accident or a mistake.

6.19 Some consultees suggested that a base offence with the focus on consent can help drive cultural change. Equity Women's Committee argued that there need to be "laws that clearly focus on the lack of consent, to drive education and cultural change". Muslim Women's Network UK suggested the base offence is an opportunity to "change attitudes within society as a whole and encourage healthy, consensual interactions and relationships". However, the Centre for Information Rights argued that any new offence:

> Could only be effective when combined with additional societal measures, namely – developing awareness of the new offence by public education campaigns, and training and increased resources for the police and CPS.

6.20 Since publication of the consultation paper, we have been made aware of a number of incidents that reflect the challenges of the current intimate image offences that would be addressed by a base offence. In one example, we were contacted by NHS Safeguarding who were working on an upsetting case that was frustrated by a lack of

[10] "Top trumps" is in reference to card games where cards, usually containing an image, are swapped and collected, with some images having more value than others. This may be seen with intimate images as part of collector culture, where intimate images of women are "traded" between groups of men as a way of gaining social status.

appropriate offences. Patient X was a vulnerable male in hospital, he had many conditions that affected his behaviour and capacity to make decisions, including alcohol related dementia. The NHS Trust provided us the following description of the incident during an episode of escalating behaviour:

> [Patient X] got out of bed & sat on the floor and was evidently in a distressed state. A Nursing Assistant went into his room and proceeded to video the patient. The video showed the patient sitting on the floor, hitting out at the Nursing Assistant's legs. The patient's hospital gown position was up around his waist, exposing his genitalia in the video. This video was then shown to two other Nursing Assistants on duty on the ward at the time, and shared via Snap Chat to one other staff member not on shift, and a friend of the Nursing Assistants, who had no healthcare association.

6.21 A student nurse was also shown the video who then reported it to the relevant authority. Patient X's sister was informed, and a report was made to the police. No prosecutions were brought; NHS Safeguarding were told by police this was because there is no law to prevent "indecent image sharing" for adults over 18 years who lack the capacity to consent to the sharing. They were also advised that the conduct did not meet the criteria for harassment or domestic abuse offences. While the conduct could be considered an offence of ill-treatment or wilful neglect under section 44 of the Mental Capacity Act 2005, the police felt this would be too difficult to prove as the required physical care was provided.

6.22 The patient's sister, and other staff at the hospital, were very upset by the incident. The patient's dignity was violated by people who he should have been able to trust to provide respectful care. The video is clearly an intimate image shared without consent for reasons that were not related to the patient's care. A base offence would apply in these circumstances.

6.23 Some consultees supported only a base offence, rejecting the need for more serious, specific intent, offences. The individual objections for these will be discussed further in the relevant following questions. The support for the base offence only is a reflection that the "core wrong" is the lack of consent.

Concerns with a base offence

6.24 Concerns were raised by some consultees, although many ultimately agreed with the proposal despite these concerns. The most prominent concern was the potential breadth of an offence without a specific intent element, and the risk of overcriminalisation that poses. The issue was raised most commonly in respect of children. The concern is that children are more likely to take and share intimate images without intent, and do so with some regularity.[11] This suggests that children are disproportionately at risk of being criminalised by a base offence. The way the offences apply to children requires holistic consideration. We address these concerns in Chapter 14. We will now consider the responses that raised other concerns about the breadth of the offence.

---

[11] Although there is no consensus on the frequency of non-consensual image taking and sharing amongst children – see Chapter 14 for further discussion of this issue.

6.25 Some consultees either responded neutrally, or qualified their support for the base offence, subject to the definitions of various elements such as the acts, fault requirements, or "intimate".[12] While these issues are all considered separately at relevant chapters in this report, it is worth noting the concerns here. It is important that, for many, support for a base offence is contingent on all elements of the offence being appropriately defined and clear. The Crown Prosecution Service ("CPS") listed the definition of intimate as their main concern in response to the base offence. They reiterated that careful consideration is needed when drafting to ensure there is sufficient certainty for members of the public knowing what acts are criminal. We address their concerns at the relevant sections in Chapter 3 but note the general concern here that with a broad offence, it is crucial that each element is clear and well defined to mitigate the risk of disproportionate application.

6.26 Two consultees considered the potential risk of overcriminalisation, but did not consider it fatal. Dr Kelly Johnson explained that there is little evidence of overcriminalisation of sexual violence, and suggested that the risk should not be a determinative factor when considering the benefits of a base offence. Muslim Women's Network UK "fully appreciate[d] the concerns around over-criminalisation" but concluded that:

> Intimate image based abuse is a very serious form of abuse that can have devastating consequences for victims and therefore (without of course inadvertently criminalising otherwise innocent situations) it is important to place the voices of victims at the heart of the proposals and consider the best way to support and protect them.

6.27 A small number of consultees disagreed with a base offence, including Garden Court Chambers Criminal Law Team and Corker Binning. Garden Court Chambers expressed "particular" concern about the base offence in light of a broad definition of "intimate image". They provided some examples of behaviour that caused them concern: sharing a partially-nude image taken in a changing room for a joke; a photograph of a woman breastfeeding not taken intentionally but later shared intentionally; a photo taken from above of a crowded dancefloor which captures down women's tops; CCTV video of a man who is involuntarily exposed in public uploaded and shared. They submitted that:

> In all these examples, the basic offence could be committed. The basic offence proposed is, so far as we are aware, wider than that in effect in any other jurisdiction and in our view too wide. It would capture not just the malicious, but the misjudged, the naïve and the innocent. The various additional intents proposed further on in the paper serve a vital function in limiting the offence to that which may be properly considered criminal.

6.28 These are useful examples to illustrate the grey areas of culpability in which the offence has to operate. First, the dancefloor example would not necessarily be an offence; we have removed the requirement that an image be taken "down" a top so this act alone does not render the conduct criminal. If the resultant image was only of

[12] For example, Kingsley Napley LLP agreed with a base offence, subject to their concerns about the definition of nude and semi-nude being too wide. West London Magistrates Bench also qualified their support by requiring further consideration of the definition of intimate and the acts.

cleavage of a kind ordinarily seen on a public street, it will not meet the definition of intimate; if the image shows more of the breast than this, it might be (see Chapter 3 for discussion of downblousing images). Secondly, in the remaining examples, we acknowledge that the culpability may be lower than in some other examples of intimate image abuse, but there is still sufficient culpability to warrant criminalisation. In our consultation paper we described at length the harm caused by such behaviours.[13] The consultation responses to this question support those views.

6.29 It is also worth mentioning here that taking and sharing are considered separate acts. The base offence would be committed if an image is taken, or shared. If it is both taken and shared, two separate offences may have been committed. In the breastfeeding and CCTV examples above, the taking of such images may not be an offence,[14] but the subsequent intentional sharing would be .

6.30 Corker Binning disagreed with a base offence and supported specific intent offences only. They acknowledged that there are significant gaps in the current offences but suggested that instead of a base offence:

> New laws should seek to encapsulate all combinations of actus reus and mens rea so as not to leave gaping holes in the range of offences. Where parallel offences already exist, very specific care should be taken to align new laws with old in order to not create discrepancies. It should not create a new trawler net, which captures innocently taken intimate images as well.

They also suggested that a narrower definition of "intimate image" should apply to a base offence.

Examples of behaviours which would be captured by this provisionally proposed offence, which should not be criminalised

Consultation responses

6.31 Thirteen consultees provided an example or comment in response to the second part of Consultation Question 26. Some consultees, including the South West Grid for Learning and #NotYourPorn, wrote to confirm that the scope of the base offence is appropriate. The Centre for Women's Justice suggested there may be times when the lower culpability of an offender, such as a young child, means it is not appropriate to criminalise in certain cases. However, they were satisfied that the CPS' obligation not to prosecute a case where it would not be in the public interest to do so would appropriately divert such cases.[15]

6.32 A small number of consultees provided examples of behaviour that should be excluded from the base offence. These included: images of young children taken and

---

13 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, Chapter 5.

14 The breastfeeding image was not taken intentionally so would not be an offence. The CCTV image was also not taken intentionally; because CCTV streams images constantly, only where someone uses CCTV intentionally to take an intimate image would it come within the scope of intimate image offences. See Chapter 4 for further discussion of CCTV images.

15 Crown Prosecution Service, *The Code for Crown Prosecutors* (26 October 2018) available at https://www.cps.gov.uk/publication/code-crown-prosecutors.

shared by family; images taken or shared accidentally; and images shared with the person depicted to alert them to the fact their image has been shared. For each of these examples, our recommendations would exclude such behaviour where appropriate. The reasonable excuse defence could exclude conduct where images are shared with the victim to alert them (see Chapter 11 for further discussion of this defence and how it might apply to such examples). In that chapter, we also recommend a specific exclusion that would mean images of young children taken and shared by family and friends (such as bathing photos or of children playing in a garden naked) would not be a criminal offence. Our definition of intimate excludes images of nudity or partial nudity that are of a kind ordinarily seen in public. This excludes, for example, images of a prepubertal child's chest area. Our recommended reasonable excuse defence would also exclude most taking or sharing in such a harmless context. We describe in Chapter 5 how the intention element of the offences would exclude accidental or unintentional taking or sharing behaviour.

Analysis

6.33 The responses demonstrated significant and persuasive support for a base offence. For many consultees, introducing such an offence is key to addressing the issues identified with the current law and is integral to any new framework. Outside of our consultation, calls to address the limitations of the current intent elements continue. For example, the Victims' Commissioner has recently published a report on online abuse, and supports an offence of "general" rather than specific intent.[16]

6.34 The vast majority of consultees agreed with the arguments set out in the consultation paper; that taking or sharing intimate images without consent is sufficiently harmful to justify criminalisation regardless of motivation, and that an offence without a specific intent requirement addresses some of the significant limitations of the current intimate image offences. The concerning example provided by NHS Safeguarding above clearly demonstrates the value that a base offence can have. We are grateful for their time in bringing this to our attention.

6.35 We have also considered hypothetical, but realistic, examples that would fall outside specific intent offences that we believe demonstrate the need for a base offence. First, we consider university students:

> A is in a casual sexual relationship with B. A sends B nude, sexual images of herself. B is in a sports club at university; as part of a bonding session they all share images of their sexual partners with each other on a WhatsApp chat. The "rules" are that it is for "banter", not to be shared outside their group, and the member deemed to have the most attractive partner wins free drinks that evening. B sends the image of A as part of 20 images shared between the group.

6.36 There is arguably no intent to humiliate, alarm or distress the multiple victims, despite the sharing being inherently humiliating. First, they were not meant to find out.

---

[16] Dr Madeleine Storry and Dr Sarah Poppleton, "The Impact of Online Abuse: Hearing the Victims' Voice" (1 June 2022) Office of the Victims Commissioner, p 12.

Secondly, the sharing was (at least purportedly) for the purpose of admiring and judging the young women depicted. The images were not intended to be looked at for the purpose of obtaining sexual gratification, but rather to rate the victims against each other. This is extremely harmful behaviour that would not fall within offences which include a specific intent element. This type of behaviour should be criminalised. Such conduct would be caught by a base offence.

6.37 Another example involves victims unknown to the perpetrator. For example, where a mobile phone is lost, stolen or hacked and nude images are retrieved and then posted on the internet for a "laugh". It would be extremely difficult to prove intent to humiliate, alarm or distress when the perpetrator does not know and never makes contact with the victim. One consultee, Leigh Nicol, shared her personal experience as a victim of intimate image abuse. She is a professional footballer whose intimate images were shared without her consent online after her phone was hacked. We were told that, even though the sharing was clearly non-consensual, using words like "hacked" and "leaked" when posting online, the motivation of someone unknown to her was difficult to establish. A base offence would have offered her more protection than the current offences.

6.38 There are two main themes that arise consistently in the arguments for a base offence. First, there is seriously wrongful and harmful behaviour that warrants criminalisation that does not satisfy the requirement of the current or even proposed specific intent offences of intending to cause humiliation, alarm or distress, or acting with the intent that someone will view the image to obtain sexual gratification. This is either because there was a different motivation, or no motivation at all. Secondly, even if it could be argued that the harmful behaviour was to humiliate, alarm or distress, or for sexual gratification, there are evidential difficulties in proving such an intent. That means, without a base offence, no prosecution can be brought even if the person admitted to the act.

6.39 Further, acting with a defined, specific intent is not the only culpable intimate image abuse conduct. While the specific intent elements recommended (and in the current offences) operate to capture behaviour that is more culpable, they will not capture all criminally culpable behaviour. In the consultation paper we summarised:

> Many stakeholders we spoke to – including victim support organisations, lawyers and Julia Mulligan, Joint Association of Police and Crime Commissioners Victims' [Portfolio Lead and the Police, Fire and Crime Commissioner for North Yorkshire] – were of the view that an intent element focused on the perpetrator's purpose, rather than the non-consensual nature of the acts, is too limiting and makes it very difficult to prosecute non-consensual taking, making or sharing of intimate images...[17]

6.40 We acknowledge that a base offence has the potential to be broad, and with that comes a risk of overcriminalisation. The weight of evidence from consultees suggests that the best way to mitigate this is to recommend a base offence which is suitably limited by clear and appropriately narrow definitions, a flexible reasonable excuse defence and elements that exclude less culpable behaviour. Limiting intimate image

[17] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 3.129.

offences only to behaviours where a specific intent can be proven leaves victims of very harmful intimate image abuse without the protection of the criminal law.

6.41 The concerns raised by consultees are largely addressed by specific elements of the offence. The base offence is limited by:

(1) An objective definition of intimate that focuses on images that show the person depicted intimately (and not images that are only made intimate by context such as comments by the sharer or place it is taken or shared, see Chapter 3).

(2) A limited definition of "sharing" that excludes some secondary sharing by sending information to access an image that has already been made available to the recipient by another (for example sending a link to a news story with images from a "leaked" sex tape, see Chapter 4).

(3) Public element tests that exclude some images that are taken in public or have been previously shared in public (see Chapter 10).

(4) An intention requirement that excludes accidental or non-intentional taking or sharing of intimate images (see Chapter 5).

(5) A reasonable excuse defence (see Chapter 11).

(6) An exclusion for the taking or sharing of intimate images of young children of a kind usually taken or shared by family and friends (see Chapter 11).

(7) An exclusion for the taking or sharing of intimate images of children for a genuine medical purpose, where the child lacks capacity to consent and there is valid parental consent (see Chapter 11).

6.42 As with all offences, the prosecuting authorities will also have discretion over what cases to charge and prosecute. The public interest test will assess whether it is appropriate to prosecute cases that involve, for example, very borderline criminal culpability. In addition, criminal investigation, charges, and prosecutions will only happen in cases that come to the attention of the police and prosecutors. We do not expect that all cases of intimate image abuse will be prosecuted, or even reported. In low level cases, not reporting the abuse may be appropriate where the issue is satisfactorily resolved between parties without needing to notify the police. However, it is important that the base offence is available for the wide range of cases that merit a criminal justice response.

6.43 The examples described in this section show how the different elements of the offences work together to appropriately limit its application to criminally culpable behaviour that can cause significant harm. While this is beneficial, we acknowledge that an offence with so many necessary elements can be complex. The Bar Council have raised concerns about complexity with us. We agree that clarity in law is important. People need to understand when their behaviour may be illegal, police need to understand how to respond to reports of offending, and the court process works best when all elements of offences are understood and are capable of being evidenced appropriately. In such a complex area with so many different factors affecting culpability and criminality, we are of the view that all of the recommended

elements of the offence are necessary. The way that any new intimate image offences are drafted, implemented, taught, and spoken about, can help to alleviate some of the complexity concerns.

6.44 We therefore recommend an offence of intentionally taking or sharing an intimate image without consent, and where there is no reasonable belief in consent.

Recommendation 23.

6.45 We recommend that it should be an offence for a person D intentionally to take or share a sexual, nude, partially-nude or toileting image of V if —

(a) V does not consent to the taking or sharing; and

(b) D does not reasonably believe that V consents.

MORE SERIOUS OFFENCES WITH ADDITIONAL INTENT REQUIREMENTS

An intention to cause humiliation, alarm or distress to the person depicted

6.46 A number of existing intimate image offences require the perpetrator to have intended to cause the victim distress of some kind. In the current disclosure offence the defendant must have made a disclosure "with the intention of causing that individual distress".[18] In the upskirting and breastfeeding voyeurism offences, the defendant must have acted with the intent that the upskirting image would be looked at for either sexual gratification or "humiliating, alarming or distressing" the person depicted.[19] The disclosure offence in Scotland similarly requires that the defendant "intends to cause [the person depicted] fear, alarm or distress".[20]

6.47 The disclosure offence was intended to address so-called revenge porn; a specific, malicious type of sharing that was understood to have the purpose of causing distress to the victim.[21] It is understandable, therefore, that law makers sought to reflect this in the elements of the offence. We provisionally concluded that this motive does warrant more serious treatment than acting without such intent. It demonstrates a higher level of culpability which it is appropriate to reflect in a more serious offence.

6.48 The current offences in England and Wales use different formulations of this fault element. The disclosure offence only refers to the intention of causing distress whereas the upskirting and breastfeeding voyeurism offences refer to the purpose of humiliating, alarming, or distressing, with distress being the most serious of those three.[22] We proposed using the same formulation as the upskirting offence: while humiliation and alarm may be less serious than distress, we concluded that intending

---

18 Criminal Justice and Courts Act 2015, s 33(1)(b).

19 Sexual Offences Act 2003, s 67A.

20 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2.

21 Rt Hon Baroness Williams of Trafford *Hansard* (HL), 16 November 2016, Vol 776, Col 1443.

22 *Southard v DPP* [2006] EWHC 3449 (Admin) at [23].

to cause any such outcome is suitably malicious and wrongful to warrant a more serious criminal offence.

6.49 Finally, we noted that an offence with such a specific intent did not need to include a "no reasonable belief in consent" limb. This is because such a reasonable belief is incompatible with an intention to cause humiliation, alarm or distress. If A intends to cause B distress by taking or sharing a picture of them without their consent, it is very unlikely A would reasonably believe that B consented to that act, otherwise it would not cause B the distress intended. The disclosure offence, for example, does not include a "no reasonable belief in consent" limb.

6.50 At Consultation Question 27 and Summary Consultation Question 2 we asked:

> 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?

Consultation responses

6.51 The majority of consultees who responded to this question agreed with our proposal (279 out of 318). Many submitted that the additional malicious intent made the behaviour appropriate to criminalise more severely.

6.52 Ann Olivarius shared her experience from legal practice:

> I have seen instances of image abuse intended by the perpetrator to cause maximal harm to the victim: to have her fired from her job, to have her family and community banish her, to destroy her reputation regarding future employment, to harm her chances in child custody disputes, to cause psychologically acute anxiety, and more. I think these instances go beyond just the failure to obtain consent.

6.53 Victims of Image Crime (VOIC) shared the experience of an anonymous "experiencer/victim" to illustrate the impact of such an offence:

> As a victim of this current crime the sharing of a sexual [image] with the explicit intention of causing harm, shame and humiliation to the person is one of the most serious acts an individual can commit. I cannot begin to describe, as will all the other victims of this crime, the life changing consequences this has on the victim. The extent and ramifications of this act are far reaching and timeless. It is simply devastating, destroying the person's life, their family's lives, compromises friends/friendships and professional standing.

6.54 Professor Thomas Crofts submitted that "[defendants who act with the intent to humiliate, alarm or distress] are more culpable and deserve convicting of a higher level offence". He also noted that "such gradations in seriousness of offence are made

in other areas of law" and gave the examples of assault and assault with intent,[23] murder and manslaughter.[24] A number of other consultees also referred to such examples in criminal law. One anonymous consultee concluded "intent is important when assessing the severity of the offence".[25]

6.55 Professor Gillespie noted the potential for cross over with communications offences (both the current offences and that recommended by the Law Commission),[26] and the different ancillary orders that apply under each regime. We note that, in some cases, sharing an intimate image with the intention of causing humiliation, alarm or distress to the person depicted may also satisfy the elements of the recommended, or current, communications offences. This is also true of the current intimate image offences. However, the offences are different and, where both are available, the CPS have discretion to charge the offence that is most appropriate considering the nature of the behaviour, and the ancillary orders available.

6.56 Some consultees submitted that an intention to cause humiliation, alarm or distress warranted a more severe sentence than an offence without such intent. The West London Magistrates Bench argued "such intent aggravates the offence such that different, more punitive sentences would be appropriate for such an offence". Many consultees simply suggested that such an intent should be reflected in the sentencing. Some referred to intent being an "aggravating factor". Some consultees disagreed that a separate offence was required and that the intention to cause humiliation, alarm or distress could in fact be dealt with at sentencing of a single offence without intent. The Office of the Police and Crime Commissioner for Northumbria, in their joint response with four local organisations,[27] acknowledged that there are issues with that approach. In particular, they raised the fact that so few cases may reach the sentencing stage.

6.57 Only one consultee mentioned our proposal that "reasonable belief in consent" should not be an element of such an offence. Professor Gillespie noted that it would be at odds with the intention to cause humiliation, alarm, or distress. We have further considered the impact this may have on prosecutions. If the base offence is charged in the alternative, it does mean that the prosecution would have to prove no reasonable belief in consent for this additional charge. It is slightly less straightforward to manage such alternative charges than if all the same elements applied, with just an additional intent for the more serious offence. However, in practice it is not likely to make much difference. The evidence that would support a lack of reasonable belief in

---

23 For example, the Offences Against the Person Act 1861 has a number of assault offences . An assault causing grievous bodily harm is an offence under section 20 with a maximum sentence of five years imprisonment. Where that same level harm is inflicted and the defendant had an intent to cause that level of harm, there is a more serious offence under section 18 with a higher maximum sentence of life imprisonment.

24 There are a range of homicide offence, including murder and manslaughter. For an offence of murder, there must have been an intent to kill or cause grievous bodily harm to the victim. Where there is no such intent, involuntary manslaughter would be charged instead. All other elements of the offences are the same. See: *Crown Prosecution Service*, Homicide: Murder and Manslaughter (13 January 2021) available at https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter.

25 Anon 62, personal response.

26 See Chapter 2 for more details.

27 The Angelou Centre, Victims First Northumbria, the Young Women's Outreach Project, and one partner who wishes to remain anonymous.

consent is likely to be the same evidence that supports an intention to cause humiliation, alarm, or distress.

6.58 The majority of consultees who responded negatively (including a number of victim support group stakeholders) or neutrally had objections to *any* specific intent offence, or to creating a "hierarchy" of offences. Generally these responses did not address concerns relating to an intention to cause humiliation, alarm or distress specifically, and therefore will be considered when we address the structure of the offence in Chapter 7. Concerns that were raised for consideration with this question include difficulty in proving intent, that the identified intents may become outdated and not reflect the most prevalent harmful behaviours (such as collector culture),[28] and that it was more appropriate to deal with motivation at sentencing (discussed at paragraph 6.56 above):

(1) Some consultees were concerned that an offence with a specific intent would inherit the same issues that were identified with the current offences. The South West Grid for Learning supported the offence but noted that the current disclosure offence with a similar intent element has proven to be difficult to prosecute and "easy to defend". They were concerned that if similar issues arise, the lower level base offence would be used instead even when the behaviour is more serious. Lawyer Honza Cervenka, however, noted that our proposed intent of humiliation, alarm or distress, is wider than the current disclosure offence of "causing distress", therefore it may be less challenging to prosecute.

(2) Professors McGlynn and Rackley suggested that identifying specific motivations risks becoming outdated. They referred to the rapid rise of "collector culture", as an example of a specific intent that is growing and has harmful effects on society, that is not currently included in the proposed additional offences.

(3) A few consultees objected on the basis that requiring a specific intent would exclude some harmful behaviours from the criminal law, either because they have a different motivation or a motive cannot be proven. These concerns would be met by the inclusion of the base offence alongside specific intent offences.

6.59 The Angelou Centre and Imkaan were concerned that the experiences of Black and minoritised victims may fall outside this specific intent where the intent of the perpetrator is to "destroy that victim-survivors position within their community and social context as a clear motivation, in order to leave them at risk of so-called 'honour-based' violence". We are aware that the criminal justice system does not always demonstrate sufficient understanding of the needs of these communities, and of the presentation and risks of honour-based abuse.[29] Education, training and good resourcing will assist police and prosecutors and improve understanding of how

---

[28] The "trading" of intimate images of women without consent between groups of men as a way of gaining social status. See para 6.168 below.

[29] Muslim Women's Network UK also urged us "to ensure that the provisions include consideration of the intersectionality of experiences and take into account the cultural factors which can exacerbate the harms for victims who are from Muslim and other minoritized communities".

different communities experience crime. This is not exclusive to the intimate image abuse context. We consider that the behaviour described by The Angelou Centre and Imkaan could fall within an additional intent offence requiring proof of intention to cause humiliation, alarm or distress. There is an intent to cause the victim humiliation, alarm or distress by exposing them to the risk of abuse or ostracisation. In Chapter 3 we further consider intimate image abuse that exposes someone to a risk of serious harm. Further, we do not recommend including a proof of harm element in these offences. This will remove some barriers faced by minoritised groups who may respond differently to intimate image abuse.

Harm

6.60 A number of consultees commented on the potential for harm that taking or sharing with an intention to cause humiliation, alarm, or distress can cause.[30] It is important to be clear that there is not always a direct correlation between intent to cause harm and actual harm. Although the justification for more serious additional intent offences is increased culpability rather than increased harm, it is important to note the potential for harm caused by such behaviour.

6.61 A small number of consultees submitted that the impact on the victim should be an element of the offence. For example, one consultee[31] suggested that where the intent cannot be evidenced, the effect on the victim who experienced humiliation, alarm or distress should suffice. On the contrary, Ann Olivarius submitted that proof of harm was not necessary. She submitted "I do not think that this new offence should include any quasi-quantifiable amount of distress to qualify". Similarly, West London Magistrates Bench submitted "we also believe that it should not depend on proving whether the defendant actually succeeded in such humiliation, alarm or distress, rather that that was the intention". We agree, and have concluded, in Chapter 9, that it is not appropriate to require proof of harm in intimate image offences.

Analysis

6.62 There is significant support for recommending an offence of taking or sharing an intimate image with the intention to cause humiliation, alarm, or distress. We are satisfied that it is appropriate to omit a "reasonable belief in consent" from this offence as it is incompatible with the intention.

6.63 In particular, we note the support for reflecting more culpable behaviour with an offence that has a higher sentence range than an offence where there is no specific intent. We have considered whether such intent could instead be addressed only at sentencing (of a single offence with no intent requirement). However, we think that the necessary breadth of the base offence does not justify a sentence range that is capable of reflecting the seriousness of taking or sharing with the intention to cause humiliation, alarm or distress. It is, therefore, more appropriate to have two separate offences. We discuss the structure of the offences, and sentencing ranges, below.

---

30 For example: "this could cause serious trauma and long-term mental health issues" (Anon 22, Consultation Response); and "yes because of the greater harm caused to the victim" (Mr Lee Elms, Consultation Response).

31 Gregory Gomberg, personal response.

6.64 We acknowledge that any specific intent offence will introduce some limitations and evidential difficulties. However, the full extent of our recommendations seeks to minimise undesirable limitations or difficulties. First, we recommend a more encompassing formulation of harm than the current disclosure offence. Secondly, the specific intent offences are in addition to a base offence. This ensures that there is still an option for prosecuting behaviour where there is no such intent, or the intent cannot be proven, which is not currently the case. An offence of taking or sharing with an intention to cause humiliation, alarm, or distress provides the option of charging a more serious offence when the culpability of the perpetrator justifies it. We again reiterate that it is the culpability of the offender that justifies a more serious offence, and not the harm caused to the victim which can be equally serious as taking or sharing with a different motivation, or no motivation at all. As we discuss in Chapter 9, there are opportunities during the criminal justice process for the harm caused to victims to be considered by courts and prosecutors.

6.65 We note the concern raised by Professors McGlynn and Rackley that an intention to cause humiliation, alarm or distress may not be the most prevalent motivation for taking or sharing intimate images without consent and therefore such an offence will not reflect the most common harmful behaviours. Motivations and patterns of behaviour will constantly fluctuate. We do not base our recommendations on the prevalence of this intention, but rather on the increased culpability associated with it. We consider in the rest of this chapter other motivations that consultees raised with us that could also justify a more serious offence.

6.66 We recommend an offence of intentionally taking or sharing an intimate image without consent with the intent of causing humiliation, alarm or distress to the person depicted.

Recommendation 24.

6.67 We recommend that it should be an offence for a person D intentionally to take or share a sexual, nude, partially-nude or toileting image of V if —

(a) V does not consent; and

(b) D does so with the intention of causing V humiliation, alarm or distress or with the intention that D or another person will look at the image for the purpose of causing V humiliation, alarm or distress.

An intent to obtain sexual gratification

6.68 The intimate image offences currently in the Sexual Offences Act 2003 include intent to obtain sexual gratification. For the voyeurism offence the defendant must record another doing a private act with the intent that they, or a third person, will, for the purpose of obtaining sexual gratification, look at the image.[32] For the upskirting and breastfeeding voyeurism offences, the taking of a relevant image is an offence if it was

[32] Sexual Offences Act 2003, s 67(3).

with the intent that someone will look at the image for the purpose of either obtaining sexual gratification or humiliating, alarming or distressing the victim.[33]

6.69 In the voyeurism offences, the requirement to prove that one of the purposes of the voyeuristic conduct was to obtain sexual gratification targets specific sexual offending. The sexual element of these offences means that, where appropriate, ancillary orders designed to address sexual offending are applied. This includes notification requirements under Schedule 3 of the Sexual Offences Act 2003 (often known as the sex offenders' register) and Sexual Harm Prevention Orders. We discuss these orders further in Chapter 13. In the consultation paper we noted that the conviction rates for these offences demonstrate that the behaviour remains a concern and should continue to be criminalised.

6.70 The three offences with a sexual gratification intent element are all taking offences. The current sharing offence does not include a sexual motivation. In the consultation paper we noted that we had not heard examples of sharing for the purpose of obtaining sexual gratification from stakeholders. However, we observed that websites exist for the purpose of sharing non-consensual intimate images so that people can look at them for the purpose of obtaining sexual gratification. We concluded this was a sufficient evidence base to justify provisionally proposing more serious offences of taking and sharing for the purpose of obtaining sexual gratification, and invited evidence of these behaviours from consultees.

6.71 At Consultation Question 28 and Summary Consultation Question 3 we asked:

> 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?

6.72 At Consultation Question 28 Part 2 we asked for evidence:

> 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).

Consultation responses

6.73 The majority of consultees who responded to these questions agreed with our proposal (243 out of 300). Consultees likened this behaviour to sexual assault.

---

[33] Sexual Offences Act 2003, s 67A(3).

Comments included: "this is sexual exploitation and a form of sexual abuse. The impact of this on victims is immeasurable";[34] and "this is akin to sexual assault".[35]

6.74 Some consultees addressed the practical benefits of such a separate offence. The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) ultimately agreed with the proposal, despite "misgivings" about the tiered structure, because the sexual element of the behaviour requires a separate offence given the consequences of charges for sexual offences and ancillary orders available. Dr Bishop similarly noted:

> It is important to have this offence as well so that additional protections can be put in place based on the sexual nature of the offence and the likelihood of future harm of this kind.

6.75 One consultee suggested that it is important to separate out such intent as it enables categorisation of offences which in turn helps with understanding prevalence and management.[36] This is a useful consideration; understanding prevalence and managing such harmful behaviour is important. We note though that crime recording can reflect elements even if they are not included as part of the offence, therefore an intent element is not the only way to collect such data.

6.76 As with the negative responses to the previous question, the majority of those who responded negatively to this question did so on the basis that they would not support any specific intent offence, or that they objected to a tiered structure. Many consultees who responded negatively (including a number of victim support groups) or neutrally raised the same concerns as in response to the previous question. These included; difficulty proving intent; that intent is irrelevant; and that motivation is better reflected as an aggravating factor. These were not specific to the issues raised by an intent to obtain sexual gratification, therefore we consider the responses in the context of the structure of the offences in Chapter 7. The consideration of these issues apply equally to any specific intent.

6.77 Specific to this question, Professors McGlynn and Rackley submitted that "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'".[37] While this is important to note, we did not propose this offence on the basis that the harm caused by such behaviour was always more severe. As we discuss above, harm does not always correlate to intent. Serious harm can be caused by taking or sharing with any intent; less serious harm can also be caused by the full range of intimate image abuse. However, where the perpetrator acts not just without consent, but violates the sexual autonomy and bodily privacy of another for their own or another's sexual gratification, they have higher culpability which should be reflected in the offence with which they are charged.

---

34 Sarah Wade-Vuletic, personal response.

35 Tina Meldon, personal response.

36 Michael Rozdoba, personal response.

37 This was supported by Equality Now's consultation response; the joint response from the End Violence Against Women Coalition; and the Faith and VAWG Coalition.

6.78 The Online Safety Bill will introduce an offence of cyberflashing. This will give effect to the recommended cyberflashing offence in the Law Commission's recent review of the communications offences. In that review, we recommended an offence of cyberflashing (intentionally sending an image or video recording of any person's genitals to another person) with two alternative fault requirements:

(1) the sender intends to cause alarm, distress or humiliation; or

(2) the sender's purpose in sending the image or video recording is to obtain sexual gratification and the sender is reckless as to whether alarm, distress or humiliation are caused.[38]

6.79 We explained the need for the second of these fault elements as follows:

> A number of consultees noted that obtaining sexual gratification was frequently one of the purposes underlying cyberflashing. While we have no reason to doubt this – indeed, it almost seems self-evidently true – it cannot just be tagged on to the list of "intentions". Obtaining sexual gratification differs from the malicious intentions (causing alarm, distress, and humiliation) in this context because sending a person an image of genitals for one's own sexual gratification is, on its own, not wrong. Indeed, it may be welcome. The harmful outcome is not embedded within the intent. However, in the right circumstances, an offence that criminalises cyberflashing for a sexual purpose can better recognise the harm inflicted by the invasion of a victim's autonomy. For this reason, we believe a different fault element is appropriate in certain circumstances where the defendant is acting for the purpose of obtaining sexual gratification.
>
> In our view it is appropriate to criminalise cyberflashing where an individual sends an image for a sexual purpose, reckless as to an adverse, harmful consequence (ie distress, alarm or humiliation). Recklessness requires proof of an awareness of the risk of a result coupled with the risk being unreasonable to take. Importantly, this would cover the paradigmatic cases where a stranger on public transport sends a relevant image; few adults would be unaware of the risk of harmful consequences when sending genital images to strangers, and it would seem highly unlikely that a defendant could run successfully an argument that it was nonetheless reasonable to take such a risk. It would likely also avoid criminalising those instances where someone sent a message uncertain of whether there was consent but where they genuinely believed that no harm would result (such as a loving relationship) or where, through lack of maturity, they were entirely unaware of such a risk (such as, perhaps, with youths).[39]

6.80 This fault requirement is not necessary to distinguish criminally culpable behaviour in the intimate image offences. Whereas sharing an image that contains genitalia is not inherently and invariably harmful, the same cannot be said of taking or sharing an intimate image of a person without their consent. The lack of consent to the use of the victim's own image makes the conduct sufficiently harmful, and thus sufficiently wrongful, regardless of the purpose of the perpetrator. For the reasons explained

---

38 Modernising Communications Offences: A final report (2021) Law Com No 399, para 6.120.

39 Modernising Communications Offences: A final report (2021) Law Com No 399, paras 6.116-6.117.

above, acting without consent, combined with an intention to obtain sexual gratification makes the behaviour more highly culpable, because it prioritises the sexual gratification of another over the victim's bodily privacy and sexual autonomy.

Request for evidence of sharing with an intent to obtain sexual gratification

6.81 In response to the second part of the consultation question, we were not provided with significant evidence of the prevalence of sharing an image with the intent that someone will look at the image to obtain sexual gratification. Nine consultees provided a comment or example in response to our request for evidence. The majority of those responses did not include an example or evidence of sharing behaviour. Muslim Women's Network UK provided a case study which involved image taking for the purpose of sexual gratification, and noted such motivation can often lead to ongoing abuse including sexual assault and exploitation. South West Grid for Learning suggested that semen images[40] or "sexually violated images" are shared for sexual gratification.[41]

6.82 The Law Society shared our observation in the consultation paper that there is less evidence that sharing is conducted for the purpose of obtaining sexual gratification.[42] One anonymous consultee supported such an offence as "material used within a pornographic [film or image] should have the consent of those included within it".[43] This is a reminder that there is a large amount of material shared for the purpose of sexual gratification. It is hoped the majority of this is consensual, but it will not always be so. Where a non-consensual image is shared on a pornographic site, rather than a site specifically for non-consensual images such as a so-called revenge porn site, it is perhaps easier to argue such sharing must have been for the purpose of another person seeing the images to obtain sexual gratification. It may not always be clear what the primary intent of the sharer was, but there is a clear sexualised component to this type of sharing.

6.83 Some consultees described comments submitted when, or after, an image is shared as evidence of an intent to obtain sexual gratification. Such comments could evidence the intent to share for the purpose of sexual gratification where they can be connected back to the sharer, or the purpose of the place in which the image was shared. However, unsolicited comments from people who have seen the images will not always be evidence of a perpetrator's intent.

Sexual gratification, power, and control

6.84 Responses to this proposal raised questions as to whether sexual gratification is the appropriate way to characterise this behaviour. The South West Grid for Learning explained from their professional experience that harm experienced by victims does

---

40 Also called "tributing", where semen is visible on an image of the victim to suggest that the sender has masturbated over the image.

41 Only images where the original image of the victim is "intimate" as per our recommended definition will be included in intimate image offences. The presence of semen, or sexual comments, from another person on an image does not render it in an intimate image of the victim.

42 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.77.

43 Anon 79, personal response.

not always correlate to an intent to obtain sexual gratification. They described responses to such behaviours as "more complex" and include "embarrassment and shame at the exposure, violation and breach of privacy; sense of betrayal and trust". While we did not base our proposal on the type or severity of harm experienced by victims, this is an important observation. There is an interplay between sexual gratification, power, control and sexualisation. Intimate image abuse is not alone in this. Sexual offences are now better understood as behaviours that are motivated not just, or in some cases at all, by sexual gratification, but also by power, control and intention to humiliate the victim.[44]

6.85 Ann Olivarius submitted that in her experience:

> Perpetrators who capture and disseminate intimate images for so-called sexual gratification derive that gratification from wielding power over the victim, which sometimes translates into actual or attempted physical violence.

She queried whether "sexual gratification" really reflected the full "spectrum of motivation", in particular the way it reflects the harm experienced. The response from Queen Mary Legal Advice Centre also touched on this. They considered it "sensible" to include such an offence but noted:

> We do not see many cases where sexual gratification is the motivation. Control, as part of a pattern of domestic abuse is a far more common motivation for offending.

6.86 Suzy Lamplugh Trust objected to this proposed offence as they argued that sexual gratification is "very rarely the main intention". They suggested instead that power and control are what really motivates perpetrators. They agree that there is a sexual component to the behaviour, for example of uploading an intimate image without consent to a porn site, but the intent may have been to exercise power and control over the victim. They acknowledged that those accessing such images may indeed obtain sexual gratification. An anonymous consultee suggested that all intimate image abuse is for the purpose of sexual gratification, or for control which then provides the gratification.[45] Julia Slupska submitted that sexual gratification is only one of many motivations and that they are often not "clear cut".[46]

6.87 Some consultees suggested recognition of this interplay. One suggested that "sexual gratification through humiliation" should be an additional offence, but "sexual gratification as the only intention" should be reflected at sentencing instead.[47]

6.88 Other consultees noted the importance of the sexual element of such intimate image abuse. My Image My Choice stated their belief that "sexual gratification underpins

---

44 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 14.49.

45 Anon 125, personal response.

46 In the consultation paper at paras 2.127 and 4.25, we cited Julia Slupska as suggesting that the "usual" motivation for perpetrators who engage in sextortion is their own sexual gratification. Julia Slupska has since clarified that there is not enough data to identify the most common motivation in such circumstances, as there can be many.

47 Natalie O'Connor, personal response.

most instances of this behaviour". Maria Miller MP noted that "victims report that it is the non-consensual behaviour of this offence and its highly sexualised nature that cause the harm".

Analysis

6.89 Consultees in the majority supported an offence of taking or sharing intimate images without consent with an intent that someone will look at the image to obtain sexual gratification. The arguments are strongest in relation to taking intimate images with such an intent. This conduct is currently criminalised by the voyeurism, upskirting and breastfeeding voyeurism offences. The (relatively recent) implementation of these offences show that a criminal offence to address such behaviour is considered justified, and by extending the remit of ancillary orders in the sexual offences regime, that it is appropriate in some cases to apply ancillary orders for the management of such sexual offending. The ongoing prosecutions for the offences suggest that the behaviour is still happening and is capable of being prosecuted.

6.90 Two key issues stand out from the consultation responses specific to intent to obtain sexual gratification:

(1) whether "sexual gratification" appropriately addresses the complex relationship between sexual offending, sexual motivations, power and control; and

(2) whether it is appropriate to include a more serious offence of sharing for the purpose of obtaining sexual gratification.

6.91 In relation to the first issue, we agree that the motive underlying non-consensual sexual behaviour is not simply a matter of obtaining sexual gratification. The implications of the growing awareness of the motivations of power and control as part of sexual offending should be considered as part of a holistic review of sexual offences, rather than in isolation in relation to intimate image abuse. What is clear from the consultation responses is that some intimate image abuse is conducted for the same reasons as sexual offences and is experienced by victims in a similar way. We conclude that when intimate image abuse can be described as a sexual offence, ancillary orders designed to manage sexual offending should be available. At present, for offences that do not involve sexual contact, proving that the defendant had a purpose of obtaining sexual gratification is used to distinguish behaviour that should be subject to notification requirements and for which other ancillary orders should be available. We consider the operation of notification requirements, and other relevant ancillary orders in Chapter 13. In that chapter, we discuss the options for making such orders available in the relevant cases. Ultimately, we conclude that it is necessary that the sexual element is part of the offence charged.

6.92 In relation to the second issue, we were not provided with significant evidence as to the prevalence of sharing with the intent that someone will look at the image to obtain sexual gratification. We are aware, as we explained in the consultation paper, that intimate images are shared without consent on websites that people visit to view images for sexual gratification. This suggests a significant sexual component to the sharing behaviour. Sharing an intimate image on such a website may be to humiliate the victim, to cause them distress, to gain social stature or for a joke. These objectives are achieved by the image being available in a place where people can view it for the

purpose of obtaining sexual gratification. In *Chandler v DPP*,[48] it was determined that a perpetrator can have more than one purpose when doing an act, but they must have contemplated the purpose relevant to the offence and must have known that it would probably be achieved by their act, regardless of their desired outcome. This would apply in the circumstances in which the defendant makes an image available for others to view for the purpose of obtaining sexual gratification, intending that they do so, even if the defendant also has other objectives in mind.

6.93 However, we recognise that some behaviour may be less culpable, and have a limited non-consensual sexual component but still be captured by this more serious offence. Consider an example:

> F shares an image of their friend G toileting on a commercial porn website channel specifically for toileting images, for a joke amongst their friendship group. F knows G does not consent but thinks they will find it funny. The image does not show G's genitals, buttocks or breasts but otherwise meets the definition of toileting for these offences. By placing it on a porn website, F intends that people will see the image and obtain sexual gratification from it. If this is considered in court to satisfy the intent element of a more serious offence of sharing with intent to obtain sexual gratification, F has committed a sexual offence.

6.94 We acknowledge that F's behaviour may not be sexually motivated in a way that requires management with notification requirements. As we explain in Chapter 13, notification requirements would apply automatically to sexual offences of relevant seriousness. There may be concern that someone like F would be at risk of notification requirements in such circumstances. The operation of the notification requirement regime is out of the scope of this project and is a matter for the Home Office. In recognition of the above, we would support a relatively high threshold of seriousness before notification requirements automatically apply for people who take or share an intimate image without consent and with an intent to obtain sexual gratification.

6.95 We have considered whether to limit the more serious offence to taking with the intent that someone will look at the image to obtain sexual gratification, and not sharing. However, we do not think it is appropriate to do so. There will be examples of sharing with an intent someone will look at the image to obtain sexual gratification that require notification requirements to manage serious sexual offending. We considered the following example:

---

[48] [1964] AC 763; [1962] 3 WLR 694. The appellants participated in a demonstration at a 'prohibited' place under the Official Secrets Act 1911. They were convicted of conspiring to commit an offence under section 1 of that Act (which makes it an offence for a person to do certain acts for a "purpose prejudicial to the safety or interests of the State…"). The House of Lords considered whether the appellants' purpose fell within the meaning of s 1. The appellants argued that their ultimate purpose was to prevent a nuclear war, but that their more immediate purpose was to raise awareness of the facts about nuclear warfare via a campaign of non-violent civil disobedience. The House of Lords upheld their conviction on the basis that their relevant – or immediate – purpose was not to get rid of nuclear weapons (albeit that that was their objective), but rather to obstruct aircraft.

P sets up a covert camera in a public toilet to capture images of women using the toilet for their own sexual gratification. P shares the images with their friend C who also views such images for their sexual gratification. C is a member of an online forum for people who watch covert recordings of toileting for sexual gratification. C shares all the images that P recorded with the forum. In return P is sent a number of images a third person recorded in a different location.

6.96 C has engaged in significant sexual offending. Courts and prosecutors should have the full range of offences, and ancillary orders, to manage C's behaviour. It would not be appropriate to be able to charge P with a sexual motivation offence but not C. We conclude there should be an offence of sharing an intimate image without consent for the purpose of obtaining sexual gratification.

Other issues

6.97 One consultee suggested that the consent element of this offence should be consent to the taking or sharing for the purpose of obtaining sexual gratification.[49] In order for consent to be valid, the person providing it must be informed as to the nature and purpose of the act to which they were consenting.[50] We discuss this further in Chapter 8.

6.98 The Centre for Information Rights suggested that the proposed intent element should be widened to include all forms of gratification, including financial and personal fulfilment. They suggest this would address any gaps left by the additional intent offences. We consider financial gain in the next section of this chapter as a separate intent. The base offence would apply where an intimate image is taken or shared for reasons of personal fulfilment. We have not heard evidence that suggests personal fulfilment justifies a more serious offence than the base offence.

6.99 We therefore recommend an offence of taking or sharing an intimate image without consent with the intention for the defendant or a third party to view the image for the purpose of obtaining sexual gratification.

---

49 Gregory Gomberg, personal response.

50 See, for example, Sexual Offences Act 2003, s 76(2)(a).

Recommendation 25.

6.100 We recommend that it should be an offence for a person D intentionally to take or share a sexual, nude, partially-nude or toileting 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.

An intent to make a gain

6.101 The offence of blackmail in section 21 of the Theft Act 1968 criminalises threats made with a view to make a gain. The gain must be a form of property.[51] Often it is financial gain, but images, including intimate images, can be considered property. Some threats involving intimate images may therefore be criminalised under the blackmail offence (see Chapter 12 for further discussion of blackmail and threats involving intimate image abuse). However, there is no offence that currently criminalises taking or sharing with a view to make a gain, where there was no threat.

6.102 In the consultation paper we noted that the parliamentary debates on the upskirting offence considered this behaviour. The upskirting offence includes two specific intent elements, criminalising taking of intimate images underneath clothing where it was with an intent that someone will look at the images either to gain sexual gratification, or to cause humiliation, alarm or distress to the person depicted. Sarah Champion MP noted that upskirting was often for financial gain, therefore it would be a "grave omission" if that behaviour was not included in the offence.[52] In both the House of Lords and the House of Commons, parliamentarians discussed how an intent to make financial gain was often linked to sharing for the purpose of another obtaining sexual gratification – for example sharing on commercial porn websites for a fee – and how this should be addressed in the upskirting offence. Lord Marks of Henley on Thames suggested that if sharing for financial gain needed to be in scope of the upskirting offence, there should be specific provision rather than relying on the sexual gratification limb.[53]

---

51 *R v Bevans* [1988] 87 Cr App R 64.

52 *Hansard* (HC), 5 September 2018, vol 646, col 265.

53 *Hansard* (HL), 23 October 2018, vol 793, col 796.

6.103 We also noted that:

> In some cases where the defendant's primary purpose was financial gain, the jury may nonetheless infer that they intended to cause distress because they foresaw distress as a virtual certain consequence of their conduct.[54]

6.104 We concluded that we did not have sufficient evidence to make a provisional proposal about taking or sharing where there was a sole or primary purpose of making a gain, we therefore invited consultees' views at Consultation Question 29:

> We invite consultees' views as to whether there should be an additional offence where the intent is to make a gain.

Consultation responses

6.105 The responses to this question were more mixed than previous questions in this chapter. Still, a majority of consultees who responded to this question provided answers that were supportive of including an additional offence where the intent is to make a gain (21 out of 39). 11 consultees provided views that were opposed.

6.106 Consultees in support suggested that sharing an intimate image of another to make a financial gain for oneself is a highly culpable behaviour. Honza Cervenka submitted:

> I believe this should be another offence… I believe it follows naturally from the logic of the report that non-consensual sharing of intimate images with the intent to make a gain is harmful to the victim. Not only is the content available to the public, but the perpetrator is also making money off it. This is clearly re-victimising and akin to sex trafficking.

6.107 Many consultees referred to the commercial porn industry. For example, Professor Gillespie submitted:

> I believe there should be additional recognition where the intention is for D to make (financial) gain. Pornography remains a valuable industry, and there are rewards for new material, including real amateur footage. It is important that offences recognise the rationale of the defendant.

Dr Ksenia Bakina gave the example of Hunter Moore, "the creator of the first 'revenge porn' website", who in interview stated, "he was a businessman who saw a way of monetising people's naked images". Ann Olivarius noted that in her experience "most perpetrators are not motivated by money" but that "the owners of websites that feature non-consensual images are motivated by financial gain".

6.108 We also received submissions on the prevalence of the behaviour, and potential for it to grow. The South West Grid for Learning stated that they "regularly see cases where content has been sold on for financial gain". At the time of their submission they were supporting the National Crime Agency in a case involving "a large amount of

---

[54] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.85. See *Woollin* [1999] 1 AC 82; [1998] 4 All ER 103. In proving such foresight, the prosecution may not rely "merely" on the fact that distress "was a natural and probable consequence" of the defendant's conduct. CJCA 2015, s 33(8).

content… shared for financial gain of dozens of young women". The London Mayor's Office for Policing and Crime suggested that "it is reasonable [to] expect to see more of this given the financial and economic climate, alongside the popularisation of 'OnlyFans' type websites".

6.109 Consultees considered whether an intent to make a gain should be an aggravating factor rather than a separate offence. Many submitted that it could be recognised either as a separate offence or as an aggravating factor, where the severity of the behaviour could be reflected in sentencing.[55] Consultees including the British Transport Police, HM Council of District Judges (Magistrates' Courts) Legal Committee, and Senior District Judge (Chief Magistrate) Goldspring suggested it should be an aggravating factor instead of an additional offence.

6.110 Some of the consultees who responded negatively opposed the introduction of any additional specific intent offence as described in the sections above, and below. Professors McGlynn and Rackley submitted, as with the previous question, that there is no evidence that victims suffer more serious harm when the defendant acts with the specific intent "to cause distress, for sexual gratification or for financial gain".[56] Conversely, a consultee who was in support of such an offence submitted that the harm caused was relevant: "financial gain should increase the severity of the offence, because it increases the objectification of the victim & exacerbates the harm".[57] Although the justification for more serious additional intent offences is increased culpability rather than increased harm, it is important to note the potential for harm caused by such behaviour.

6.111 Other consultees who did not agree with the need for such an offence suggested that the behaviour would already be caught, either by the provisionally proposed intimate image offences or other criminal offences. The British Transport Police suggested a separate offence is not necessary as "the extra element 'to make a gain' would already be captured". The Law Society argued that:

> If it is alleged that the taking or sharing of an intimate image is being used for financial gain, then this can be caught under other criminal legislation, such as blackmail in the Theft Act 1968.

6.112 Similarly, the CPS submitted that:

> Where a threat to share an image is made for the purpose of financial gain, we believe that prosecutors should be considering the more serious offence of blackmail as this appropriately reflects the extent of the offending behaviour.

6.113 The Centre for Women's Justice suggested that the behaviour would likely be caught by the proposed offences, but did "see advantages in introducing such an offence in order to recognise that someone who profits from the taking or sharing of an intimate image has a higher degree of culpability". They also queried whether such an offence

---

55 Including: Dr Ksenia Bakina; Professor Alisdair Gillespie; and South West Grid for Learning.

56 This was supported in the joint response from End Violence Against Women Coalition and the Faith and VAWG Coalition.

57 Ian Berle, personal response.

with a financial aspect would make it more likely that compensation orders were made upon conviction. We have not specifically considered compensation orders. A compensation order may be made in cases where the victim suffered loss, damage or personal injury (including psychological harm) as a result of their intimate image being taken or shared without their consent. It could be a relevant factor for consideration by the sentencing judge or magistrates if the perpetrator made a financial gain while causing such harm.

6.114 In their responses, most consultees simply referred to "money" or "financial" gain. Two consultees submitted that a wider definition of gain should be used. Kingsley Napley LLP suggested that "gain should continue to include non-pecuniary gains or other advantages. It should also include where the mischief is to cause a loss eg of privacy, family or relationship". The Muslim Women's Network UK stressed that there are many forms of gain. They mentioned reputational gains, financial gain through sexual exploitation, and gains by forcing a victim to remain in or enter a marriage which could facilitate British citizenship. They asked that the "definition of gain is kept broad to encompass all possible scenarios". The CPS submitted that if a financial gain element is included, the definition of financial gain should be the same as the definition in section 5 of the Fraud Act 2006 "in order to ensure clarity". Under section 5, "gain" extends only to gain in money or other property, whether temporary or permanent,[58] and includes a gain by keeping what one has, as well as a gain by getting what one does not have.[59]

6.115 We do not think that gain in cases of intimate image abuse should be limited to financial gain and note the blackmail offence is not so limited.

Analysis

6.116 Responses from consultees support the view that taking or sharing an image for financial gain can be highly culpable behaviour.

6.117 We acknowledge the support for introducing a separate offence to address the behaviour. However a number of consultees also submitted that it would be as, or more, appropriate to include an intent to make a gain as an aggravating factor at sentencing. We are conscious that the appropriate starting point is not to recommend a criminal offence unless it is needed to address the behaviour concerned. We have in mind the significant feedback from stakeholders who oppose the introduction of any additional intent offence because of the complexities and limitations they can present. Therefore, every additional intent offence must be justified, necessary, and proportionate.

6.118 Many of the responses to this question recognised the overlap between intent to make a gain and to obtain sexual gratification for others. The examples we heard included sharing on websites where sexual images or behaviours are commercialised. In these cases an image is shared with the intent that others will look at it to obtain sexual gratification; the sharer is motivated by making a financial gain from this. In short, victims are sexually exploited for the financial gain of the defendant. There is a significant sexual component to this behaviour; we concluded above at paragraph

---

58 Fraud Act 2006, s 5(2).

59 Fraud Act 2006, s 5(3).

6.92 that such behaviour, where appropriate, would be caught by an additional offence with an intent of obtaining sexual gratification. It is appropriate that sexual offending management orders are available in some of these cases, provided that there is a high threshold for the automatic application of notification requirements for intimate image offences with a relevant sexual component.

6.119 The other significant context mentioned by consultees involves blackmail or other threatening behaviours. Where a threat has been made, the recommended threat offence should apply.[60] Where the threatening behaviour involves making a gain or causing a loss, the blackmail offence would apply, as the CPS observed. Blackmail carries a significantly higher sentence than any intimate image offence (with a maximum penalty of 14 years' imprisonment). In cases of sextortion where the perpetrator intends to make money from their victims, the blackmail offence may be appropriate as it reflects the defendant's financial motivation.

6.120 This discussion suggests that much of the more culpable and harmful behaviours where there is an intent to make a gain would be caught by our other recommended offences, including threats to share and taking or sharing with an intent to obtain sexual gratification. We also note that the recommended base offence would apply in cases where there was an intent to make a gain. The base offence is not an insignificant option, it is a criminal offence which would have the option of a sentence of imprisonment (we discuss the sentencing ranges in Chapter 7). In the parliamentary debates discussed in the consultation paper, the question before Parliament was whether upskirting with an intent to make a gain was criminalised by a specific intent offence, or not criminalised at all. The recommended base offence obviates the need to choose between these two possibilities.

6.121 Based on the above analysis, we are not convinced that a separate offence of acting with the intention to make a gain is needed. We considered the alternative suggested by consultees; recognising where the intent to make a gain raises an individual's culpability as an aggravating factor at sentencing. Where a specific intent or motivation for criminal conduct is listed as an aggravating factor for sentencing, once found guilty of the underlying offence, the court can consider whether the defendant should receive a more serious sentence than they would have received in the absence of that particular motivation or intent. Aggravating factors are considered in the full context of the circumstances of the conduct and the defendant; they will be weighed against any mitigating factors when arriving at a suitable sentence. Evidence of the motivation is not required as part of the substantive trial and will not be determinative of whether a defendant is guilty of the offence or not. Where instead the intent or motivation is an element of the offence, the substantive trial will determine whether the defendant had that intent, and if not, the defendant will be found not guilty of the offence. It is noted that "commission of the offence for financial gain (where this is not inherent in the offence itself)" is listed as an aggravating factor in the Sentencing Council's Overarching Principles.[61] Aggravating factors for sentencing are a matter for the Sentencing Council. We can conclude that the responses and discussion above

---

60 See Chapter 12.

61 Sentencing Council, *General guideline: overarching principles* (1 October 2019) https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/#Step%202%20Aggravating%20and%20mitigating%20factors

demonstrate that intimate image abuse can be perpetrated with an intent to make a gain, and that intent can make the perpetrator more culpable. We note that an intent to make a gain can be the perpetrator's sole intent, or it may exist alongside any other intent. We therefore consider that such an aggravating factor could reasonably apply to the full range of intimate image offences. This would include the threats offence. As the CPS noted, a threat to share can be made with an intent to make a gain. Some such cases would satisfy the elements of the blackmail offence with the significantly higher maximum penalty, but not all will. This would allow the sentence to reflect the increased culpability when someone acts for their own gain, while violating the bodily privacy and sexual autonomy of another.

6.122 In the final point relevant to gaining from intimate image abuse, we acknowledge that much responsibility sits with platforms that allow people to make money from intimate images taken and shared without consent of the person depicted. We discuss in Chapter 14 the reforms to platform liability being implemented in the Online Safety Bill.

6.123 We therefore conclude that an additional offence of taking or sharing an intimate image without consent with an intent to make a gain is not necessary or justified. Taking or sharing without consent to make a gain will be covered by the base offence, and that intent to make a gain could be considered as an aggravating factor at sentencing. The examples of conduct described above, where the intent to make a gain demonstrates higher culpability, would likely be captured by the more serious threat offence, sexual gratification offence, or blackmail. We do not recommend an additional offence of taking or sharing an intimate image without consent with an intent to make a gain.

An intent to control or coerce the person depicted

6.124 The final additional intent offence that we considered in the consultation paper was taking or sharing an intimate image without consent with the intent to control or coerce the person depicted. We suggested this would predominantly address two types of known behaviour:

(1) Sextortion: where an intimate image is taken or shared to extort something from the victim, usually either money or more intimate images.

(2) In the context of an abusive relationship: where intimate image abuse is used to exert control over, or to coerce a victim.

6.125 Intimate image abuse is often perpetrated in the context of abusive relationships. Chapter 2 of the consultation paper described the evidence we heard from stakeholders about the devastating impact this abuse can have. It is now better recognised that abusive relationships can manifest in many forms and are not limited to physical abuse. One consequence of such recognition is the offence of controlling or coercive behaviour in an intimate or family relationship under section 76 of the Serious Crime Act ("SCA") 2015. We discuss the scope and limitations of this offence in Chapter 2. We stated in the consultation paper that:

It was made clear to us from stakeholders that perpetrators take, share or threaten to share intimate images without consent with [the motive of controlling or coercing the victim], both inside and outside domestic relationships.[62]

6.126 We considered the extent to which the offence of controlling or coercive behaviour could be used to prosecute intimate image abuse. We noted two key limitations:

(1) The offence of controlling or coercive behaviour only applies where the perpetrator "repeatedly or continuously engages" in the type of behaviour. It may not be used where there was only a single instance of intimate image abuse.

(2) The offence of controlling or coercive behaviour only applies where there is an intimate or family relationship. The Government has committed to extending the offence post-separation in recognition that abuse can continue after a relationship breakdown.[63] However, it would still not apply where the victim is not known to the perpetrator, or is an acquaintance or friend rather than a partner or family member.

6.127 We considered that an additional offence with an intent of controlling or coercing the person depicted could be used in cases of sextortion, and in abusive relationship contexts where the offence of controlling or coercive behaviour would not apply. We were not sure whether such an offence would be substantially different from an offence where the intent is to humiliate, alarm or distress the victim. We sought views from consultees at Consultation Question 30:

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.

Consultation responses

6.128 The majority of consultees who responded to this question provided views in support of an additional offence with an intent to control or coerce the person depicted (25 out of 39). 13 consultees provided views that disagreed. Those who responded negatively to such an offence included consultees who did not support any specific intent offence.[64]

6.129 The British Transport Police submitted: "while it is captured in base offences, this scenario would be considered more harmful". Slateford Law suggested that recognition of such behaviour "is in line with the Istanbul Convention – such an offence is welcomed".

---

62 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.88.

63 By amending the definition of "personally connected" in s 76 of the Serious Crime Act 2015 under s 68 of the Domestic Abuse Act 2021, see https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/amendment-to-the-controlling-or-coercive-behaviour-offence. This has not yet been implemented.

64 Including Women's Aid; Refuge; End Violence Against Women Coalition and the Faith and VAWG Coalition; Equality Now; Professors Clare McGlynn and Erika Rackley; and Aanika Virani, personal response.

6.130 Ann Olivarius strongly agreed with creating such an offence and provided evidence of prevalence: “my case files are filled with horrifically anguishing reports by victims of perpetrators who aimed to use the images to control their behaviour”.

6.131 Professor Keren-Paz explained his rationale for supporting such an offence:

> First, the behaviour is more culpable. Secondly, the harm is likely to be more significant since the victim might be controlled and coerced or fear them. Thirdly, the offence will respond to a lived experience in which many women are controlled and coerced by men and men attempt to exert such control, using among other things society’s double standard about women’s sexuality. Finally, as at the basis of criminalising intimate image abuse lies [in the] victim’s autonomy, it makes sense to have an aggravating offence where the perpetrator’s motive and often the effect of his behaviour is further and serious curtailment [of] the victim’s autonomy – the essence of controlling and coercive behaviour.

6.132 Consultees generally acknowledged the links between controlling and coercive behaviour and the two contexts identified in the consultation paper: abusive relationships and sextortion. For example, Bumble suggested that “the existence of the intent to control or coerce the person depicted is abuse (and in many cases domestic abuse) and should be treated as such”. Many responses showed how those contexts are also interlinked.

Blackmail and threats

6.133 A number of consultees referred to threats and blackmail in the context of coercive control. Blackmail and threats are behaviours designed to induce a desired outcome; this is one way of understanding coercion and control. This can be quite distinct behaviour from the abusive personal relationship context targeted by the controlling and coercive behaviour offences in the SCA 2015.

6.134 Laura Bloomer of Backed Technologies Ltd stated in response to this question: “this is blackmail”. The Rt Hon Baroness Morgan of Cotes suggested that threats can be used to control or coerce. The Mayor’s Office for Policing and Crime (London Mayor) referred to blackmail as part of coercive behaviour: “there should be an additional offence, due to the extent of coercive behaviour and its increase seen in statistics during the pandemic (blackmail etc)”.

6.135 Ann Olivarius also provided examples of threats from her practice at law firm McAllister Olivarius:

> Perpetrators have used images and the threat of dissemination to control victims’ jobs and where they live, and also, most commonly, to force the victim to engage in erotic acts before a webcam for the amusement of the perpetrator.

6.136 Honza Cervenka considered that “it is important to have some instances of sextortion (that would not be covered by threats-related offences) covered by this offence”. He gave an example of sharing an intimate image with the intent to coerce someone to resign from their position, such as a teacher or politician. Perhaps where an intimate image is so prolifically shared with, for example, parents at a school where the person depicted is a teacher, the victim may feel like they have no option but to withdraw from

that space and resign their position. Sometimes coercion may be achieved by actually sharing an image, rather than threatening to share an image.

6.137 Blackmail and threats involving images can be made to control or coerce a victim, to make a gain (either financial or non-financial as we discussed above), or a combination of both. First, this demonstrates the complexities in identifying a single motivation. Secondly, it highlights the need for consistency when addressing this behaviour.

Coercive control and the offence of controlling or coercive behaviour

6.138 A number of consultees referred to the existing offence of controlling or coercive behaviour under section 76 of the SCA 2015 and provided views on how intimate image offences could interact with it.

6.139 The Queen Mary Legal Advice Centre[65] noted the prevalence of intimate image abuse in this context, advising that "the main motivation for offending that we see, is as part of a pattern of controlling and coercive behaviour".

6.140 Dr Bishop, in both her response and forthcoming article,[66] explored the interaction between intimate image abuse and the offence of controlling or coercive behaviour. She highlighted gaps that a separate offence could cover. For example, the behaviour may occur before parties are in an established "intimate relationship" which she noted "happens a lot with teen and young adult relationships, where there are less clear boundaries around when a couple is dating/not dating". She also noted the requirement under section 76 that the behaviour be repeated or continuous, yet "there may only be one occasion of images shared with intention to control or coerce". This reflects the discussion in the consultation paper.[67]

6.141 Professor Gillespie suggested that any new offence of intimate image abuse for the purposes of controlling and coercing would be better situated within the section 76 framework. He submitted:

> Controlling and coercive behaviour is a vile act, and one that the legislature and courts have begun to tackle. It is easy to see how this behaviour could form part of controlling and coercive behaviour but it is important that this work is not displaced. It should be expressly linked to the coercive behaviour framework.

6.142 Muslim Women's Network UK recognised the existing controlling and coercive behaviour offences but argued that often criminal justice agencies struggle to identify what offences may apply, leaving victims in limbo and disempowered. They submitted that:

> We feel there is merit to ensuring that the new laws have a clear provision in place which covers instances where images are taken or shared for the purposes of

---

65 In their response to the summary consultation paper.

66 Charlotte Bishop, "The impact of proposed intimate image abuse offences on domestic violence and abuse", *Northern Ireland Legal Quarterly*, forthcoming.

67 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 10.90.

controlling or coercing the victim; rather than having them jump between different legal provisions.

6.143 Dr Kelly Johnson[68] welcomed the "recognition that control (including coercive control) is a significant motivation for perpetrators of image-based sexual abuse" but warned against "further confusion or dilution" of the concept of coercive control. She explained how coercive control originated as a therapeutic and academic concept which has advanced the understanding of:

> A particular and pernicious dynamic of ongoing, multifarious and cumulative domestic abuse experienced by victim-survivors in the context of (previously-) intimate partnerships.

Dr Johnson then explained how its translation into the criminal justice system has diluted the original concept. She suggested this has "undermined public understanding and awareness" of the concept of coercive control. As a result, she submitted if we are to recommend specific intent offences, we should reflect the difference between acts that coerce and control between those who are not in an intimate relationship, and the concept of coercive control as intimate partner abuse.

Need for a separate offence

6.144 While there was general recognition of the use of intimate image abuse to control and coerce victims, consultees had differing views on whether a separate offence was required to address the behaviour.

6.145 Dr Bishop supported the creation of a separate offence, or as a secondary position, including "control or coerce" in the intention to cause humiliation, alarm or distress offence. We explore this option further below. Dr Bishop argued that the behaviour is more culpable and warrants a harsher penalty than the base offence. In a forthcoming article,[69] she explores the impact of identifying the behaviour in an offence, separate from whether and how it would ultimately be used. In her consultation response, she argued that "naming coercion and control in this context is important so that those investigating know to look for it, and it also raises awareness".[70]

6.146 Baroness Morgan suggested that, if a separate offence is not recommended, the "intent to control or coerce and/or the forced change in actions or behaviour by the victim of the intimate image abuse" could be considered as an aggravating factor.

6.147 Some consultees suggested that the behaviour is adequately covered by existing offences or would be covered by our provisionally proposed offences. Kingsley Napley LLP considered that the behaviour "is sufficiently covered by the existing offence of controlling and coercive behaviour". The CPS argued that the existing and proposed offences are more appropriate than a separate offence:

---

68 Who opposed any additional intent offence.

69 Charlotte Bishop, "The impact of proposed intimate image abuse offences on domestic violence and abuse", *Northern Ireland Legal Quarterly*, forthcoming.

70 Dr Charlotte Bishop, Consultation Response.

> We consider that an additional offence of intentionally taking or sharing an intimate image with intent to control is not necessary. Where this behaviour forms part of a pattern of controlling and coercive behaviour then section 76 of the Serious Crime Act 2015 is the most appropriate offence. We consider that this behaviour is unlikely to occur in isolation. Where the incident is an isolated incident, and the offence of controlling and coercive behaviour is not made out, then we consider that the behaviour will be covered by the taking or sharing offence with intention to cause humiliation, alarm or distress. Therefore, creation of a standalone offence will risk the creation of overlapping offences which may cause unnecessary complexity and confusion.

6.148 Similarly, the Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) were "uneasy" about creating a separate offence. They suggested that where intimate image abuse is used to control and coerce, it is unlikely to be the only incident of coercive behaviour. Therefore it would be more "accurate" to charge the offence of controlling or coercive behaviour with an additional charge of taking or sharing without consent. They conclude that that approach "is more likely to expose the true offending behaviour".

6.149 The Centre for Women's Justice did not "have a strong view either way" about whether a separate offence was required. They suggested that the behaviour would already be captured by other offences, but also argued that a separate offence would "recognis[e] the higher culpability" of such offending and apply more widely than the offence of controlling or coercive behaviour in an intimate or family relationship. They also suggested it would be an advantage to have an offence that could apply to a single incident within a coercive context where urgent prosecution was needed, or where evidencing the wider pattern was proving difficult.

6.150 Some consultees considered that an intent to coerce or control could be included in, or is already included in, an offence requiring proof of an intention to humiliate, alarm or distress. The Bar Council suggested that such an additional intent offence could be used to capture controlling and coercive behaviour. The Law Society suggested that controlling and coercive behaviour exploiting intimate images would involve an intention to cause harm similar to humiliation, alarm or distress. They said:

> It is now clearly accepted in law that individuals can seek to coerce or control a sexual partner or friend, and this amounts to abusive conduct. It is self-evidently a possibility that such a person would resort to the use of such an image if it would cause harm, distress or embarrassment.

6.151 The Queen Mary Legal Advice Centre suggested clarifying in the intention to cause humiliation, alarm or distress offence that "this could be a single offence or as part of a pattern of controlling coercive behaviour".

6.152 Other consultees disagreed that the intents were the same. Baroness Morgan of Cotes described the difference between intention to control and coerce and intention to cause humiliation, alarm or distress:

> While working with Refuge on the amendment to the [Domestic Abuse] Act 2021 it was clear that victims are often compelled to change their behaviour – including, for example, allowing an abuser to have contact with children or failing to give evidence

> in court about an abuser – and it seems to me that this [is] sufficiently different from intending to cause harm or distress to the victim.

6.153 The South West Grid for Learning provided evidence from their work with victims, arguing that the intent to control goes beyond an intention to cause humiliation, alarm or distress:

> We see cases where the images are used specifically to control someone else; to keep them in the relationship; for sex etc. Cases where partners use images to stop someone leaving; to influence a divorce proceeding or court process; to abuse within the relationship; to coerce sex.

6.154 Dr Bishop described how in her view, controlling and coercive behaviour is "substantially different" from intending to humiliate, alarm or distress. She argued that controlling and coercive "better encapsulates the nature of the harm inflicted on [the victim] and what [the defendant] is trying to do". She explained that "coercion and control is very subtle and so if police and prosecutors don't know what they are looking for it can be missed".

6.155 Some consultees, such as HM Council of District Judges (Magistrates' Courts) Legal Committee and Dr Bishop[71], suggested including "control or coercion" within the intention to cause humiliation, alarm, or distress offence so it would be "an intention to cause humiliation, alarm, or distress or to control or coerce the victim".

Analysis

6.156 There is clear evidence that intimate image abuse is used to control or coerce victims, and that it is culpable behaviour that should be properly addressed in the criminal law. There are many offences that can be used against much of the behaviour that we have heard about in relation to sextortion, threats to coerce an outcome, and in the context of abusive relationships.

6.157 We first consider coercion by way of threats. Threats to share an intimate image may be used to attempt to coerce someone. In such cases, the threatening to share an intimate image offence appropriately addresses the behaviour. We consider the context of coercive behaviour by use of threats in the analysis of our proposed threats offence in Chapter 12. Dr Bishop asked whether a threat offence for the intent to control or coerce is appropriate, suggesting that a threat made with such an intent is more culpable conduct. The threat offence that we recommend is a more serious offence than the base offence; we recommend that it has a higher maximum sentence equivalent to the additional intent offences we recommend. The blackmail offence can also be used in cases of sextortion, as described above at paragraph 6.119.

6.158 Next, we consider the necessity of an additional intent offence in the context of controlling and coercive abusive relationships. We are satisfied that existing offences,[72] and the other intimate image offences[73] will satisfactorily cover a large

---

71 As her secondary position. She first recommends a separate offence.

72 Including the offence of controlling or coercive behaviour and other domestic abuse offences.

73 The base offence, threat offence and additional intent offences where there is intent to obtain sexual gratification, or to humiliate, alarm or distress the person depicted.

range of culpable intimate image abuse conducted to control or coerce the person depicted. The CPS submission is compelling in this regard. We further considered the gaps left by the offence of controlling or coercive behaviour. While it cannot be used to prosecute a single incident of intimate image abuse, it does not prevent a single incident being part of the course of conduct that is capable of being charged under the offence. As the CPS noted, where intimate image abuse is perpetrated in a coercive controlling context, it is unlikely to be the only criminal conduct occurring. The purpose of the offence of controlling or coercive behaviour is to recognise that the context is the criminal offending, not just the individual acts that make up that context. Where intimate image abuse is part of that wider context, we agree that the offence of controlling or coercive behaviour is the more appropriate way of recognising that. Outside of an intimate or family relationship, the recommended intimate image offences will apply. This project is not best placed to consider consultees' arguments that the context of controlling and coercive behaviour (rather than single incidents with such an intent) should apply more widely than the offence of controlling or coercive behaviour currently does.

6.159 The Muslim Women's Network UK argued that a separate offence with an intent to control or coerce would "ensure that there are no legal loopholes" pointing to the multiplicity of intimate image abuse and range of impact and motivations. The base offence achieves this more effectively than any specific intent offence could. Similarly, the Centre for Women's Justice's suggestion that it would be beneficial to have an offence to charge for single incidents of controlling coercive behaviour involving intimate images would be met by the base offence. A more serious intimate image offence with an intent to control or coerce may add complexity without improving the protection for victims. As such an offence would overlap with the intention to cause humiliation, alarm or distress offence, the threatening to share offence, and the offence of controlling or coercive behaviour, police and prosecutors would be faced with a difficult charging decision. A key aim of this project is to simplify the law, creating too many offences with overlapping conduct and motivation elements will not achieve this.

6.160 Dr Bishop has argued persuasively that formal recognition that intimate image abuse occurs in the context of controlling and coercive relationships would have significant benefits. She argued that creating a new offence that directly makes that link has declaratory benefits that make it worthwhile, separate from any benefit or use in actual prosecutions. For the reasons given in the paragraph above, we do not agree that an offence with only declaratory benefits is justified. We do, however, agree that it is important for victims, police, prosecutors, and society to understand how intimate image abuse can occur in the context of abusive relationships.

6.161 Dr Johnson's submission about the risk of further diluting the concept of coercive control in intimate relationships is powerful. As we explain in this section, an offence with an intent to control or coerce would not be limited to intimate relationships and could also apply in cases of threats and sextortion where the victim is unknown to the perpetrator. This would further expand the notion of controlling and coercive behaviour, even if phrased in a different way to the current offence of controlling or coercive behaviour in an intimate or family relationship. In that offence, the controlling or coercive behaviour is the relevant conduct, whereas for an offence of taking or sharing with an intent to control and coerce, it would be a fault element. The words

"coercion" and "control" have ordinary meanings and are used in a variety of contexts, which may be distinct from the original concept of "coercive control" in abusive relationships. We identify sextortion, for example, as a coercive behaviour but it can occur between two people online who have no previous or ongoing relationship at all. We have considered both the concerns about expanding the original concept beyond usefulness, and the benefits of linking intimate image abuse to the criminal justice system's growing understanding of coercive control.

6.162 We agree that there is substantial benefit in improving understanding of the links between intimate image abuse and coercive control. We do not think that this benefit alone justifies an additional offence. Instead, we think this can be better achieved by clear, effective intimate image offences that are implemented with appropriate training and education for both professionals working in the area, and wider society. More specifically, we consider that guidance could assist. The sentencing guidelines for domestic abuse[74] and the statutory guidance for the offence of controlling or coercive behaviour[75] could be updated to reflect the intimate image offences. We note, for example, that the statutory guidance for the controlling or coercive behaviour offence includes a non-exhaustive list of the behaviours that are associated with coercion or control.[76] This list currently includes some behaviours that may also exist in intimate image abuse, including monitoring a person online using spyware, and threats to publish personal information. A more explicit reference to intimate image abuse may better reflect the link between the behaviours. We recommend that the Government and Sentencing Council consider reviewing their guidance in light of the recommendations in this report, and the evidence of intimate image abuse perpetrated in the context of abusive relationships in this report and the consultation paper.

6.163 We have considered the suggestion to include "or to control or coerce" as a limb of our recommended offence of intending to cause humiliation, alarm, or distress. It would read "an intent to cause humiliation, alarm, or distress or to control or coerce", instead of creating a separate offence. Ultimately this would have the same practical effect as recommending a separate intent offence, and therefore it would have to be justified in the same way as a separate offence. For the reasons explained above, we do not think it can be.

6.164 We note that we have also considered coercive behaviour in Chapter 4. Consultees brought to our attention examples where a victim was coerced to consent to the defendant taking an intimate image of them or was coerced to take an intimate image of themselves or a third party and share it with the perpetrator. Such coerced taking and sharing is distinct from taking and sharing *with the intent* to control or coerce, although both may occur in the same relationship dynamic. Where someone coerces

---

74 Sentencing Council, *Overarching principles: domestic abuse* (24 May 2018) https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/domestic-abuse/.

75 Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework* (December 2015) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf.

76 Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework* (December 2015) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf, para 12.

another to take or share an intimate image, the wrongful conduct is the coercion itself; it invalidates consent.[77] In Chapter 4 we discuss how coerced taking would be addressed by our recommended offence, and elsewhere in the criminal law. We also discuss coercion and its impact on consent in Chapter 8.

6.165 We ultimately conclude that the existing offences are better placed to address the behaviour concerned. The existing offences include domestic abuse provisions and the offence of controlling or coercive behaviour, and our other recommended offences including the threats offence and taking or sharing with an intention to cause humiliation, alarm or distress. We therefore do not think it is necessary to recommend a separate offence with this particular intent. We do not recommend an additional offence of taking or sharing an intimate image without consent with an intent to control or coerce the person depicted. We do think it is important to make clear the link between intimate image abuse and controlling or coercive behaviour, to ensure it is appropriately recognised and addressed within the criminal justice framework.

Recommendation 26.

6.166 We recommend that the Government consider reviewing the statutory guidance for the offence of controlling or coercive behaviour in light of the recommendations in this report, and the evidence of intimate image abuse perpetrated in the context of abusive relationships in this report and the consultation paper.

Recommendation 27.

6.167 We recommend that the Sentencing Council consider reviewing the sentencing guidelines for domestic abuse offences in light of the recommendations in this report, and the evidence of intimate image abuse perpetrated in the context of abusive relationships in this report and the consultation paper.

"Collector culture"

6.168 A final issue to consider from the responses on additional intent offences is "collector culture". In their consultation response, Professors McGlynn and Rackley submitted that "collector culture" is a prevalent, harmful behaviour that would not be covered by the additional intent offences we had provisionally proposed in the consultation paper. They described it as a "growing phenomenon" that is "allied to the practices of sharing intimate images to boost the masculinity/status of perpetrators".[78] They reported that

---

77 See Sexual Offences Act 2003, ss 74, 75(2)(a),(b),(c).

78 They provided links to examples in recent news stories including: https://news.sky.com/story/teens-using-bait-out-groups-to-share-revenge-porn-11158653 and https://www.theguardian.com/us-news/2017/mar/06/us-military-investigates-secret-distasteful-facebook-page-of-naked-female-marines. See also the BBC investigation "Stolen naked images traded in cities around the world". The issue has been in the news more recently, see Anna Moore "'I have moments of shame I can't control': the lives ruined by

the Revenge Porn Helpline have also "identified this 'collector culture' as a worrying and growing trend". In their written evidence to the Public Bill Committee on the Voyeurism Bill (that would eventually lead to the upskirting offence), they submitted that this type of "group bonding" conduct was excluded from the legal framework.[79] They submitted that the failure of our provisionally proposed offences to cover this behaviour demonstrates their limitations, and shows how easily they become outdated.

6.169 Taking or sharing intimate images without consent as part of "collector culture" would be captured by the base offence. As we explain throughout this chapter, the additional intent offences are aimed at behaviour with a higher level of culpability and are not based on the level or type of harm caused, or prevalence of the behaviour. Intimate image abuse "collector culture" is extremely problematic. It intersects with issues of misogyny, peer pressure, sexualisation of women and girls, harmful male bonding and what is considered a "joke". Dr Bishop, in a forthcoming article, describes the harm caused to society by permitting the sharing of intimate images for a "laugh" as an "acceptable form of male bonding".[80] The routine dehumanising of (mostly) women enables the perpetuation of harmful gender hierarchies. Such conduct is a prime example of behaviour that benefits from a base offence where the prosecution will not need to try and unpick these complicated motivations.

CONCLUSION

6.170 We have considered two matters in this chapter.

6.171 First, we considered whether a base offence with no additional intent requirements was necessary and justified. We concluded that it was and therefore recommended a base offence: it should be an offence for a person D to take or share an intimate image of V if V does not consent to the taking or sharing, and D does not reasonably believe that V consents.

6.172 Second, we considered whether there should be more serious offences created where D also had an additional intent. We concluded that there should be and recommended that there should be two additional intent offences: where D acted with intention to cause humiliation, alarm or distress to the person depicted, and where D acted with intention to obtain sexual gratification.

6.173 Our recommendations create a two-tiered structure. In the next chapter we explore the implications of this structure for prosecution and sentencing.

---

explicit 'collector culture'" (6 January 2022) *The Guardian*, https://www.theguardian.com/world/2022/jan/06/i-have-moments-of-shame-i-cant-control-the-lives-ruined-by-explicit-collector-culture.

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

80 Charlotte Bishop, "Assessing culpability where intimate images are shared without consent 'for a laugh' or as a form of 'harmless' banter", forthcoming.

Chapter 7: A tiered structure and sentencing

INTRODUCTION

7.1 In the previous chapter we recommended offences in a two-tier structure, with the tiers distinguished by the intent requirements. First is the base offence, where the defendant must intend to take or share an intimate image without consent. Next, the more serious additional intent offences, where the defendant must either: (1) act with intention to cause humiliation, alarm or distress to the person depicted in the intimate image, or (2) act with intention to obtain sexual gratification. The additional intent renders the behaviour more culpable.

7.2 In Chapter 12, we consider an offence of threatening to share an intimate image. Although threatening someone is a type of specific intent, we have separated the threat offence as it necessarily involves different elements than a taking or sharing offence. However, we note here that, because it is a type of specific intent, it is therefore more serious than the base offence.

7.3 In this chapter we consider the potential effects and challenges of a two-tier structure, particularly with an eye to any problems in relation to prosecution, wider effects and sentencing. We conclude that it is necessary to create a two-tier structure. We do not consider that the structure would disproportionately impede effective prosecutions. We note that the tiered structure reflects higher culpability rather than greater harm caused to victims.[1] Finally, we recommend a sentence range for each tier, with a higher sentence maximum for the additional intent offences to reflect the more culpable behaviour.

PROSECUTION

The provisional proposals

7.4 In the consultation paper we considered the need for each of the offences individually, and provisionally proposed those offences that were sufficiently justified based on the evidence available. The result was a tiered structure, as set out above. We suggested that the tiered structure appropriately reflected higher culpability of specific intent offences, which warranted higher maximum sentences than the base offence.

7.5 We were alert to the fact that having more than one offence relating to similar conduct can present difficulties. Police and prosecutors would have a range of offences available when a report of intimate image abuse is made and would need to decide which offence is most appropriate to charge. We therefore asked whether having a base offence plus additional intent offences could impact on the ability to prosecute intimate image offences effectively, and if so, how.

7.6 We invited consultees' views on this at Consultation Question 31:

---

[1] In Chapter 9 we discuss why an actual harm element should not be included in intimate image abuse offences.

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.

Consultation responses and analysis

7.7 There was a mixed response to this issue from consultees. We asked a question that focussed on potential impact on effective prosecution, but consultees provided views in their responses that concerned the structure more generally. We bring all of those responses and issues together for consideration here.

7.8 Seventeen consultees provided views that support a tiered structure of offences. 20 consultees provided views that did not support a tiered structure, including a group of consultees who opposed it on the basis that it creates a "hierarchy". 12 consultees provided views that neither supported nor opposed the tiered structure.

Impact on prosecutions

7.9 Consultees considered the impact on prosecutions, many concluding that it would not cause serious impediment, or that any impediment was justified when considering benefits of the tiered structure.[2] For example, the British Transport Police suggested it would "not impede" prosecutions as the base offence would provide a "safety net" to ensure that cases that cannot be prosecuted under the more serious offences do not escape liability.

7.10 The Crown Prosecution Service ("CPS") submitted that:

> There is value in creating different offences if the seriousness of the additional offences is such that the mode of trial for those offences and the base offence will be different.

7.11 Some consultees argued positively that having a range of options for prosecutors is beneficial. Ann Olivarius submitted that "a wider and more nuanced slate of options for prosecution should not be seen as an impediment but as a more robust system for providing justice to victims". Professor Thomas Crofts also argued that such a structure offers more options for prosecutors, which is a benefit. Muslim Women's Network UK suggested that the structure would be positive for victims: "having the range of different offences will help ensure that victims are empowered and perpetrators are brought to justice".

7.12 The Law Society and NSPCC suggested that a tiered structure would have a beneficial impact on the effective prosecutions of child perpetrators. It was suggested that the tiered structure enables effective differentiation of cases with higher culpability and where a legal response is appropriate.[3] We examine these responses fully in Chapter 14 when considering how the offences should apply to children.

7.13 Consultees raised three potential issues that could impede effective prosecution: first, that a tiered structure adds unnecessary complication; secondly, that more serious

---

2 Including Dr Charlotte Bishop who submitted that it was "a risk worth taking" and Professor Thomas Crofts.

3 An alternative is the use of Outcome 21, an official outcome for offences perpetrated by children where a criminal justice response is not required.

offending will end up being "under charged" and prosecuted under the base offence as it is "easier"; and thirdly, that magistrates' courts are not always able to deliver alternative verdicts. We now turn to each of these concerns.

Hierarchy would make any new law unnecessarily complicated

7.14 Consultees raised concerns that multiple offences will make the law "unnecessarily complex" and that the benefits of a new clear, comprehensive law will be lost if the proposed offences are numerous and complex.[4] The End Violence Against Women Coalition and Faith and VAWG Coalition submitted that a tiered structure:

> Would require more complex understanding from police and prosecutors for a crime at a time when online VAWG already suffers from poor understanding and responses from criminal justice agencies.

7.15 Professor Alisdair Gillespie also described what he considered a "greater risk", that with the proposed offences "there will be multiple offences across other legislation, which could impede effective prosecution". He gave an example of sending an implicit threat to share an intimate image, which could also satisfy the criteria of the communications offences. We are aware that, in particular threats and sharing, offences will sometimes overlap with communications offences. Intimate image offences incorporate a wide range of behaviours, as do the communications offences. It is inevitable that some conduct will have elements of more than one offence.

Risk of "under-charging"

7.16 A number of consultees considered that the structure could lead to prosecutors under-charging and relying disproportionately on the base offence. Dame Maria Miller MP noted "there is a risk that more serious malicious intentions may be prosecuted under a base offence because proving intent can be difficult". Professor Gillespie submitted that "it is important that the CPS does not simply agree to settling on the 'base' offence, and does not seek to prosecute the aggravated forms".

7.17 Dr Kelly Johnson explained how this concern arose from her work identifying the intent elements of the current offences as significant barriers to effective legal response.

7.18 More generally, consultees described the impact of types of complexity other than additional intent elements. Dr Johnson also referred to her research which noted "the significant under-use of laws that are perceived to be more complex to prove or have a higher evidential threshold amongst the police and the CPS" in the context of domestic abuse. Similarly, the Suzy Lamplugh Trust explained that this occurs with the offences of stalking and harassment, where the lesser offence is disproportionately charged "due to the challenges in evidencing the impact on the victim".[5] These submissions show that the issue is clearly not unique to intimate image offences.

---

[4] Including Professors McGlynn and Rackley; the End Violence Against Women and Faith and VAWG Coalition; The Angelou Centre and Imkaan; My Image My Choice; Refuge.

[5] The additional element of the more serious offences in this context requires evidence of impact on the victim, which our proposed offences do not.

7.19 It is inevitable that some cases will be charged as a base offence where it is challenging to prove a specific intent. However, a flat structure of offences does not necessarily prevent the problem. If there are only additional intent offences (as there are currently), where evidence of intent is difficult to obtain, police and prosecutors may decide not to charge any offence at all. The base offence provides an alternative to no charge. If there is only a base offence with motivation reflected at sentencing, there will still be a requirement to provide evidence of motivation for consideration at sentencing. If the same difficulties in gathering evidence as to motivation occur, there is a risk that evidence will be provided only in very extreme cases to ensure a higher sentence and the rest of the conduct will be seen as low-level offending.

7.20 While we acknowledge in some cases this could be a risk, we also know police and prosecutors can and do prosecute specific intent offences, as evidenced by prosecutions and convictions for the existing intimate image offences.

Alternative verdicts

7.21 The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society) noted that magistrates' courts cannot deliver alternative verdicts unless specific provision permits. This means that if an additional intent offence is charged and it is established at trial that an intimate image was taken or shared without consent and without reasonable belief in consent, but the specific motivation was not established, magistrates are unable to deliver a verdict that the base offence was committed instead.

7.22 Senior District Judge (Chief Magistrate) Goldspring suggested this issue could be overcome by "statutory provision for the alternative offence to be found by a magistrates' court without the second charge having been laid". An alternative is for the CPS to charge the base offence as an alternative to additional intent offences.[6] It could be cumbersome to require prosecutors to charge an alternative in all cases. There are separate statutory powers to enable magistrates to deliver alternative verdicts under section 24 of the Road Traffic Act 1988. The Law Commission also recommended such a provision in respect of aggravated hate crime offences.[7]

7.23 In the Crown Court, the power to deliver an alternative verdict is found in section 6(3) of the Criminal Justice Act 1967, which allows the Crown Court to deliver an alternative verdict when the allegations in an indictment for any offence amount to an allegation of another offence within the jurisdiction of the Crown Court. A summary only offence, like the base offence, is not within the jurisdiction of the Crown Court.

7.24 The harassment offences include either way and summary only offences. Section 4 of the Protection from Harassment Act ("PHA") 1997, an either way offence of putting people in fear of violence, includes a provision to enable the Crown Court to deliver an alternative verdict of a summary only harassment or stalking offence (under section 2 PHA 1997):

---

6 Suggested by HM Council of District Judges (Magistrates' Court) Legal Committee.

7 Hate crime laws: the final report (2021) Law Com No 402, para 8.238.

(5) If on the trial on indictment of a person charged with an offence under this section the jury find him not guilty of the offence charged, they may find him guilty of an offence under section 2 or 2A.

(6) The Crown Court has the same powers and duties in relation to a person who is by virtue of subsection (5) convicted before it of an offence under section 2 or 2A as a magistrates' court would have on convicting him of the offence.

7.25 We consider both of these approaches to be suitable to ensure parity between intimate image offence prosecutions in magistrates' and Crown Courts. We recommend similar statutory provisions to enable alternative verdicts of the base offence to be delivered by both a magistrates' court and the Crown Court.

Recommendation 28.

7.26 We recommend that for all additional intent intimate image abuse offences, the magistrates' court and the Crown Court should be empowered to find the defendant guilty of the base offence in the alternative.

Conclusion

7.27 We conclude from the above that, with statutory provision to enable magistrates' courts and Crown Courts to deliver alternative verdicts, prosecutions will not be unduly impeded by the tiered structure. We recognise the risks of overcomplication and under-charging but they are manageable and will not substantially impede prosecutions. A clearly defined set of offences that explicitly address intimate image abuse in all its forms will assist prosecutors to identify and charge the right offences and improve understanding and awareness amongst the public.

WIDER IMPACTS OF A TIERED STRUCTURE

7.28 We now turn to consider wider issues relating to the desirability and impact of a tiered structure with a base offence and additional intent offences.

Responses: Benefits of a tiered structure

7.29 In addition to the positive impact on prosecutions identified above, consultees identified value in a tiered structure with a base and additional intent offences. Some argued that a tiered approach has a declaratory effect in decrying the behaviour and sending a needed message as to its seriousness. Professor Crofts noted that new offences in particular, that are aimed at new and emerging behaviours, are important to send the message to society how serious the behaviours are and how they will be dealt with. Similarly, Dr Charlotte Bishop suggested that having multiple offences would help "raise awareness of how extensive this issue is". Slateford Law submitted that "allowing action for all types of offences shows perpetrators that the UK takes such offences seriously".

7.30 Professor Crofts also submitted that fair labelling "requires that distinctions between offences and their proportionate wrongfulness should be indicated by the label

attached to the offence".[8] He has argued that "a broad offence label or a conviction for an existing offence that is not designed to cover that behaviour can make the victim feel that the harm done to them was not adequately recorded or taken seriously".[9]

7.31 The Centre for Women's Justice noted that the existing offences are "woefully under-investigated and under-prosecuted" and stated that from their work with stakeholders they have learnt that the offences are:

> Often not regarded by the police as sufficiently 'serious' to warrant further investigation or criminal action – even in cases involving wide distribution of images online as a means of 'revenge porn', and/or threats to disclose intimate photographs as a form of domestic abuse.

They argued that a "spectrum" of "clearly defined intimate image-related offences" would help address this lack of understanding and undercriminalisation.

7.32 Consultees argued that a tiered approach is needed to reflect the difference in culpability. Dr Bishop submitted:

> More serious additional intent offences are necessary for both practical and symbolic reasons and it is essential that these acts/crimes are seen for what they are – incredibly harmful and often life-changing – and that there is a range of offences to reflect this and reflect the harm to the victim and the culpability of the perpetrator.

7.33 HM Council of District Judges (Magistrates' Court) Legal Committee suggested that the provisional proposals "cover a range of offences with different considerations in relation to the defendant's motivation while still recognising the impact upon the victims".

Responses: Concerns with a tiered structure

7.34 As we have explained in earlier parts of this chapter, a number of consultees, including a organisations who work with victims of intimate image abuse, objected to any additional intent offences, and the tiered structure that results. These responses generally concluded that there should be one base offence with motivation addressed at sentencing.[10] We now set out the core arguments advanced in support of this position.

A hierarchy sends the wrong message to victim-survivors

7.35 The key concern for consultees who opposed additional intent offences is that they would create a hierarchy of victims which "suggests that some breaches of an

---

8 Citing Thomas Crofts, "Criminalization of Voyeurism and 'Upskirt Photography' in Hong Kong: The Need for a Coherent Approach to Image-Based Abuse" (2020) 8(3) *Chinese Journal of Comparative Law* 505-537, 519.

9 Thomas Crofts, "Criminalization of Voyeurism and 'Upskirt Photography' in Hong Kong: The Need for a Coherent Approach to Image-Based Abuse" (2020) 8(3) *Chinese Journal of Comparative Law* 505-537, 520.

10 Including Professors McGlynn and Rackley; End Violence Against Women Coalition and Faith and VAWG Coalition; My Image My Choice; Equity Women's Committee; Julia Slupska of the Oxford Internet Institute; Refuge; Women's Aid.

individual's sexual autonomy and privacy are more 'serious' than others".[11] They argued that the proposals sustain "a narrative and focus on 'revenge porn'", which would be considered the worst type of case. Dr Johnson described how singling out specific intents as more serious "does not coincide with victim-survivor experiences and does not account for the importance of context and intersectionality for shaping abuse and its impacts". Ruby Compton-Davies suggested that it "could create victim-blaming in the sense that some victims are more 'worthy' of police time than others".

7.36 South West Grid for Learning noted that they "have concerns" that a hierarchy of victims may be created and that there could be a lack of clarity when some offences are seen as more serious than others. However, they also explained that the Revenge Porn Helpline sees a "wide range of behaviours" and they questioned whether it is possible to capture those with just one offence.

7.37 The Angelou Centre and Imkaan argued that Black and minoritised victim-survivors would be disproportionately affected by such a hierarchy as the proposed additional intent offences would not adequately cover their experiences.[12]

7.38 Consultees submitted that victims should never bear the burden of proving intent and doing so adds to victim blaming.[13] Although additional intent would be for the prosecution to prove, we note the more general concern that victims may be expected to provide evidence when reporting a case or during the investigation and prosecution.

7.39 These consultees also submitted that a tiered structure could undermine progress made in educating the public about intimate image abuse, how varied it is and the serious harm it can cause.

It undermines the core wrong of non-consent

7.40 Many consultees[14] submitted that additional intent offences "undermine" what is felt to be the core wrongdoing of the behaviour: the lack of consent.

7.41 Conversely, some consultees raised concerns with the base offence. Law firm Corker Binning supported only the additional intent offences, arguing that the base offence is too broad and risks overcriminalisation. Garden Court Chambers Criminal Law Team submitted that the base offence "draws the focus away from the core wrongdoing the paper intends to tackle, thereby impeding the effective prosecution of intimate image abuse".

---

11 Professors McGlynn and Rackley, Consultation Response.

12 We further discussed this submission in Chapter 6 and similar concerns in Chapter 3.

13 Julia Slupska of the Oxford Internet Institute describing outcomes of a workshop conducted with My Image My Choice and Victims Of Image Crime (VOIC).

14 Including Professors McGlynn and Rackley; End Violence Against Women Coalition and Faith and VAWG Coalition; The Angelou Centre and Imkaan; My Image My Choice; Refuge; Equity Women's Committee; and Anon 4, personal response.

Motives

No evidence of worse harms when perpetrated for particular motives

7.42 As explored in the additional intent offence questions above, consultees submitted that there is "no evidence that victim-survivors experience graver harms when the defendant acts with the specific purposes to cause distress, for sexual gratification or for financial gain".[15] Dr Johnson explained that in her research with Professors McGlynn and Rackley, they:

> [F]ound evidence of victim-survivors experiencing serious harms across a wide range of image-based sexual abuse contexts and motivations, some of which would not be covered by the proposed more serious offence legislation.

7.43 Refuge submitted that their "principal concern is that introducing more serious additional intent offences would create a hierarchy of offences, based on the incorrect assumption that these directly map onto a hierarchy of harms".

7.44 Maria Miller MP agreed that "it is necessary to differentiate between a base offence and 'more culpable acts' that warrant more serious sanctions in the criminal law", but also submitted that the offences should reflect the evidence that "a defendant's motives has little bearing on the harm experienced by the victim".

Motives are rarely clear-cut and easily identifiable

7.45 Consultees submitted that motives are often overlapping and interconnected. Professors McGlynn and Rackley pointed to the evidence in their Shattering Lives report[16] that "there is rarely a single, clearly identifiable motive for perpetrating image-based sexual abuse". They argued that trying to isolate specific motives fails to reflect the reality of the offending and risks "undermining our developing understanding of motives" and the wider context of "inequality and misogyny". They argued that additional intent offences would become outdated as motivations develop and change over time, referring to their example of collector culture.

Motive elements are out of step with other criminal and sexual offences

7.46 Consultees submitted that it was not necessary to include specific intent offences as "there is no general requirement in the criminal law to specify particular motives for criminal offences".[17] It was argued that the criminal law is generally only concerned with intent to commit an act and that motivation is mostly relevant as evidence or for sentencing. Consultees suggested that where there is a "hierarchy" of offences, it is based on level of harm, instead of motivation.

---

15 Professors McGlynn and Rackley, Consultation Response.

16 Clare McGlynn, Erika Rackley, Kelly Johnson and others "Shattering Lives and Myths: A Report on Image-Based Sexual Abuse" (July 2019) Durham University and University of Kent, https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf.

17 Professors McGlynn and Rackley, Consultation Response, supported by End Violence Against Women Coalition and Faith and VAWG Coalition; Equality Now; and Refuge.

7.47 Professors McGlynn and Rackley submitted that most sexual offences do not specify a particular motive.[18]

Culpability can be dealt with during sentencing

7.48 As an alternative to a tiered structure, consultees suggested that culpability and motivation could be considered at sentencing.[19] This would require a single offence to have available sentencing options that can reflect a wide range of seriousness.

7.49 Refuge submitted that:

> It is absolutely critical, however, that appropriate training for police responders and a robust set of sentencing guidelines accompany the new legislation to ensure that seriousness is properly reflected in judicial rulings, and an official monitoring and compliance mechanism must be established in tandem.

Analysis

7.50 The detailed responses received on this issue have been extremely valuable. It is also relevant to note the support from consultees for each of the proposed offences individually. The majority of consultees expressed support for a base offence and additional more serious offences where there is either an intent to cause humiliation, alarm or distress or an intent that someone will look at the image to obtain sexual gratification. Not all consultees responded to the specific question about the impact on prosecutions or commented on a tiered structure more generally. However, this significant support for offences that reflect different levels of culpability and seriousness demonstrates the need for a base offence as well as additional intent offences.

7.51 We recognise the serious concerns raised by consultees who oppose the tiered structure. However, we think the structure is a necessary result of the offences that are required to address intimate image abuse most effectively. Further, we think that the concerns raised by consultees can be addressed.

7.52 First, we accept that there is no evidence that more harm is caused by intimate image abuse with particular motivations. What has become abundantly clear during the life of this project is that intimate image abuse of all kinds can cause a wide range of harms, both in type and scale. We would be very concerned if victims felt that their experience would not be considered serious unless it was a specific type of intimate image abuse, or if they were harmed in a specific way. That is why we have not justified any additional intent offences on the basis of their potential for causing harm, nor have we recommended including an actual harm element in any of our recommended offences. We hope that the full discussion of motivations, harms and impact in our consultation paper demonstrates just how seriously we consider intimate image abuse to be. The base offence we have recommended is not an insignificant offence. It suitably addresses the serious nature of non-consensual conduct. As we explain below, taking or sharing an intimate image without consent, for any reason or

---

[18] However, the voyeurism and upskirting offences, which are forms of intimate image abuse, do specify a particular motive.

[19] Professors McGlynn and Rackley; Dr Johnson; Equality Now; My Image My Choice; Julia Slupska of the Oxford Internet Institute; and Ruby Compton-Davies (personal response).

for no reason at all, will come with a risk of a prison sentence. For the reasons we detail in the relevant sections above, we have concluded that where a perpetrator acts with a specific intent, it makes them more highly culpable. That higher culpability should be reflected in a more serious offence. Recognising greater culpability does not diminish the importance of less serious offending.

7.53 Secondly, we do not agree that additional intent offences are out of step with other criminal offences. Homicide and assault offences are examples, discussed in Chapter 6, where proof that the defendant intended a result increases the seriousness of the conduct. The existing voyeurism and upskirting offences are examples of sexual offences with a specific intent element. While we have identified limitations with the current offences, these are not solely because they require a specific intent.

7.54 Thirdly, a tiered structure is required by the offences we recommend and a single offence is not an appropriate alternative. Throughout this chapter we have carefully considered the need for each of the offences individually. We have explained our rationale for recommending a base offence with no specific intent, and two additional intent offences. In particular we note that an offence with an intent to obtain sexual gratification is required for appropriate operation of notification requirements. Further, we recommend a threat to share offence (further detailed in Chapter 12). Such an offence necessarily has different elements to the taking and sharing offences. It also has a different fault requirement; the "threat" is the criminal act rather than taking or sharing, and a threat has a specific intent to make the victim feel threatened. It cannot be satisfied by a base offence. On this basis alone, a tiered structure is required.

7.55 We have considered the suggestion of a single base offence with flexible sentencing to enable motivation to be taken into account. The CPS identified this key consideration: "whether or not the culpability of the offender and the seriousness of these offences are such to justify standalone offences" or whether they can be "taken into account as an aggravating factor to the base offence on sentence". We have concluded that a single offence is not appropriate. As the South West Grid for Learning submitted, there is such a wide range of behaviours within intimate image abuse that a single offence cannot satisfactorily address them all. Similarly, Dr Bishop submitted that intimate image abuse "is not something that can be captured and dealt with under one simple offence, and recommending/introducing multiple offences will actually help, in my view, to raise awareness of how extensive this issue is". Consultees who supported additional intent offences described the benefits of fair labelling and prosecuting an offence that reflects the nature and seriousness of the behaviour.

7.56 The sentence maximum that would have to apply to be able to address the full range of behaviours and culpabilities would risk serious overcriminalisation of lower level offending. The offences that reflect significantly higher culpability should have higher maximum sentences than is justified for a base offence with such broad application. As noted by Refuge, robust sentencing guidelines can provide a framework that assists with ensuring seriousness and culpability are reflected at sentencing fairly and consistently.[20] We discuss more specific recommendations as to sentencing below,

[20] Sentencing guidelines are developed and published by the Sentencing Council. They provide guidance to those who have to make decisions as to sentence for a range of criminal offences, including the factors to

starting at paragraph 7.59. Further, if motivation had to be proven at sentencing, the same issues of evidence, and "hierarchy", as discussed in paragraph 7.19 above would be present. Sentencing guidelines, while helpful, would not prevent this.

7.57 Evidence of factors that make any particular incidence of the base offence more serious, or of higher culpability, can be considered as aggravating factors at sentencing. This includes any motivation or intent other than to obtain sexual gratification or to cause humiliation, alarm or distress. We note that the extent to which these can be reflected at sentencing is limited by the sentence maximum of the base offence. This is therefore a relevant factor for consideration when deciding, where relevant, whether it is appropriate to charge a specific intent or base offence.

7.58 The majority of consultees supported the individual offences proposed. We have concluded that the benefits of a framework with the full range of recommended offences outweigh the concerns regarding a tiered structure. A clear, coherent set of offences that address intimate image abuse as a whole is the most effective way of improving the criminal justice system responses, support for victims, and understanding of the behaviour and harms amongst the public. Ultimately, we have decided that each individual offence is needed in order to distinguish between different behaviours and levels of culpability and ensure fair labelling. A tiered structure is necessary for these purposes; it is not a hierarchy to differentiate between victims.

SENTENCING

7.59 We turn finally now to sentencing and, specifically, what would be appropriate maximum sentences.

7.60 In the consultation paper we explained that the provisionally proposed additional intent offences would address more serious offending which should be reflected in a more severe sentence. We did not make any provisional proposals regarding maximum sentences. The discussion above highlights the need for further consideration of appropriate sentencing ranges and mode of trial for the different offences.

7.61 Some consultees addressed sentencing in their responses, with many suggesting that more culpable behaviour warranted a higher sentence. For example, Ann Olivarius noted that the punishment for an offence committed with the intention to cause humiliation, alarm or distress should reflect that it is more serious than the base offence. West London Magistrates' Bench submitted "such intent aggravates the offence such that different, more punitive sentences would be appropriate for such an offence". Professor Gillespie suggested that additional offences should have "significantly different sentences" from the base offence.

7.62 Honza Cervenka suggested that the sentencing for the base offence should not be significantly more lenient than for the additional intent offences. He suggested sharing

which they should have regard when reaching those decisions, to help them reach justified decisions as to length and type of sentence given.

done for a joke can cause significant harm and should not be viewed much more leniently.

7.63 We agree that the higher culpability reflected in the additional intent offences warrants a higher maximum sentence than the base offence. It is useful to consider the sentences of the existing intimate image offences and comparable offences:

(1) The current intimate image offences, which all include an additional intent element, are triable either way with a maximum sentence of two years' imprisonment on indictment, or 12 months' imprisonment and/or a fine on summary conviction.[21]

(2) Possession of extreme pornography is triable either way, with a maximum penalty of three years' imprisonment and/or a fine on indictment, and 12 months' imprisonment and/or a fine on summary conviction.

(3) An offence under section 1 of the Malicious Communications Act 1988, which includes an additional intent element, is triable either way, with a maximum penalty of two years' imprisonment and/or a fine on indictment, and 12 months' imprisonment and/or a fine on summary conviction.

(4) An offence under section 127 of the Communications Act 2003 is a summary only offence with a maximum penalty of six months' imprisonment and/or a fine.

(5) An offence involving an indecent photograph of a child under section 1 of the Protection of Children Act 1978 is triable either way, with a maximum penalty of ten years' imprisonment and/or a fine on indictment, and 12 months' imprisonment and/or a fine on summary conviction.[22]

7.64 There is no directly comparable offence for the base offence. However, the section 127 communications offence does not require a specific intent so is a useful starting point. That offence is summary only. We note that the current intimate image offences are triable either way but, unlike the base offence, they have additional intent requirements reflecting more culpable behaviour. The base offence has to cover a broader range of conduct; we consider all the conduct that would fall within scope of the base offence has the potential to be sufficiently culpable to warrant up to six months' imprisonment. We do not think, in light of the modes of trial of the similar offences above, that a base offence with no additional intent element should be triable either way with a potential for a lengthier sentence of imprisonment. We therefore

---

21 Commencement Regulations (SI 2022/500) have brought para 24(2) of sch 22 to the Sentencing Act 2020 and s 282 of the Criminal Justice Act 2003 into force with the effect that the maximum sentence available on summary conviction for an either way offence, including voyeurism, upskirting, breastfeeding voyeurism and the disclosure offence, is now 12 months. For any offence committed before the commencement of para 24(2) or s 282 on 2 May 2022, the previous maximum of six months' imprisonment will apply. See Chapter 2 for further discussion of the recent changes to the maximum sentence available for an either way offence on summary conviction.

22 Section 1 of the Protection of Children Act 1978 is a "relevant enactment" to which s 282 of the Criminal Justice Act 2003 applies; see Chapter 2 for further discussion of the impact of s 282 on maximum sentences.

recommend that the base offence should be a summary only offence with a maximum sentence of six months' imprisonment.

7.65 We recommend that the additional intent offences (including the threats offence) should be triable either way with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction. This is comparable to the existing intimate image offences and the extreme pornography offence which best reflect the culpability and sexual nature of the recommended additional intent intimate image offences. Currently, the maximum sentence on summary conviction of an either way offence is 12 months. We explain in Chapter 2 the recent changes to the sentencing powers of a magistrates' court that has increased this maximum from six to 12 months' imprisonment. In addition, when section 13 of the Judicial Review and Courts Act ("JRCA") 2022 comes in to force it will enable the maximum sentence available to be changed to either six or 12 months by regulation. To achieve this, the maximum sentence on summary conviction will be expressed in future legislation as the "general limit in a magistrates' court". This will refer to the general limit on magistrates' courts' power to impose custodial sentences in section 224 of the Sentencing Code which will be at any time either six or 12 months' imprisonment. We note that, as is currently the case, this means that the specific intent offences when tried summarily have a higher maximum penalty (12 months) than the summary only base offence (six months). This distinction in sentence could assist prosecutors when deciding whether to charge a specific intent offence summarily, or the base offence. Where there is evidence of intent it is appropriate that the specific intent offence be charged.

7.66 We also recommend an offence of installing equipment in order to commit a taking offence. This installing offence can apply to a taking under the base offence, or to one of the specific intent offences, where equipment was installed in order to take an intimate image with intent to cause humiliation, alarm or distress, or with the intent that someone will look at the image to obtain sexual gratification. Therefore, it is appropriate that the mode of trial and maximum sentence available for the installing offence reflect the mode of trial and maximum sentence available for the taking offence the equipment was installed to commit. It should be summary only (with a maximum sentence of six months' imprisonment) if it applies to the base offence, and an either way offence (with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction) if it applies to the specific intent offences.

7.67 We have heard examples of offending where there are multiple victims and multiple instances of taking or sharing. Some of these examples constitute extremely serious offending which should be reflected in sentencing. For example, one recent National Crime Agency case involved a prolific offender who blackmailed and extorted nearly 2,000 victims for intimate images and indecent images of children and shared them for money and to cause distress.[23] This scale of offending can be reflected in the total sentence received. We note that where serious offending includes multiple victims and/or multiple images, each conviction will be sentenced individually, in light of the

[23] BBC News "Abdul Elahi: Sexual blackmailer jailed for 32 years" (10 December 2021), https://www.bbc.co.uk/news/uk-england-birmingham-59614734.

principle of totality.[24] The Sentencing Council provide guidance on how to reflect the scale of offending behaviour in the total sentence given. In their guidance on totality they set out two key principles:

(1) All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.

(2) It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.[25]

Recommendation 29.

7.68 We recommend that the base offence should be summary only with a maximum sentence of six months' imprisonment.

7.69 We recommend that the additional intent and threat offences should be triable either way with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction.

CONCLUSION

7.70 In this chapter we have addressed the potential impact of the tiered structure we recommended in the preceding chapters and considered the sentence range appropriate for each tier.

7.71 We made recommendations to provide for alternative verdicts for our recommended additional intent offences. We also recommended that the base offence be a summary offence, while the additional intent and threat offences be triable either way. Finally, we made recommendations regarding maximum sentences.

7.72 In Chapter 13, we discuss ancillary orders that should be available to sentencing judges and magistrates for intimate image offences.

---

[24] See, *R v Roddis* [2021] EWCA Crim 1583. The defendant, a masseuse, had recorded over images of over 900 female victims from a hidden camera in his treatment room. He had recorded victims in states of undress as they prepared for massages. He pleaded guilty to nine counts of voyeurism. On appeal against his sentence, the Court of Appeal at [14] and [15] confirmed that in cases of multiple offending, consecutive sentences can be appropriate. The defendant received a sentence of three years' imprisonment.

[25] Sentencing Council, *Overarching Guides: Totality* (11 June 2012) https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/totality/.

Chapter 8: Without consent

INTRODUCTION

8.1 In this chapter we explore the way consent should operate in respect of these offences. Our recommended offences are premised on the absence of consent; this is what makes the taking and sharing of intimate images criminally wrongful. We will consider the appropriateness of applying the consent provisions under sections 74 to 76 of the Sexual Offences Act ("SOA") 2003, and the capacity provisions of the Mental Capacity Act ("MCA") 2005 and at common law, to the intimate image offences.

8.2 Firstly, we will outline the current law on consent and our provisional proposal in the consultation paper. We will then examine the main points raised by consultees and subsequently set out our final recommendation. We received a substantial number of responses to this question, most of which agreed with our proposal that sections 74 to 76 of the SOA 2003 should apply to our recommended offences. Some consultees raised concerns about applying these provisions to the intimate image abuse context, but we conclude that they are sufficiently comprehensive and appropriate for our offences.

CURRENT LAW ON CONSENT

8.3 The existing voyeurism, upskirting, and disclosure offences all require the prosecution to prove that the victim did not consent to the taking or sharing of the intimate image. For the purposes of sexual offences, the term consent is defined under sections 74 to 76 of the SOA 2003, which includes several rebuttable and irrebuttable presumptions in relation to the victim's consent. These provisions are complemented by sections 1 to 3 of the MCA 2005 and the development of the definition of consent at common law.

8.4 Under section 74 of the SOA 2003, a person consents if they agree by choice and they have the freedom and capacity to make that choice. The courts have held that capacity should be understood in accordance with sections 2 and 3 of the MCA 2005,[1] which define a lack of capacity to make decisions.[2] Further, section 75(2) of the SOA 2003 sets out particular circumstances in which it is presumed that the victim did not consent to the relevant act, and the defendant did not reasonably believe that the

---

1 *R v GA* [2014] EWCA Crim 299, [2014] 1 WLR 2469; and *IM v LM, AB and Liverpool City Council* [2014] EWCA Civ 37, [2014] 3 WLR 409.

2 The Supreme Court recently considered an appeal regarding declarations sought by a Local Authority under the MCA 2005 as to JB's capacity to consent to sexual relations: *A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor) (AP) (Appellant)* [2021] UKSC 52. It upheld the decision of the Court of Appeal, affirming that: the relevant matter is whether JB had the capacity "to engage in", rather than "consent to", sexual relations; in making this assessment, a judge should consider whether that person can understand that the other person involved must be able to consent and gives and maintains consent; the wording of the capacity test in section 2(1) of the MCA 2005 is "open and flexible"; the court should have regard to reasonably foreseeable adverse consequences with the aim of protecting members of the public, as well as the person who may lack capacity.

victim consented. The defendant can rebut this presumption.[3] These include circumstances where the victim was subjected to the use or threat of violence or unlawful detention, or where they did not have the capacity to consent. Moreover, under section 76(2) of the SOA 2003, there is a conclusive presumption that the victim did not consent, and that the defendant had no reasonable belief in the victim's consent where either:

(1) the victim was intentionally deceived about the nature or purpose of the act; or

(2) the victim was intentionally induced to consent to the relevant act by the defendant impersonating someone known to them.

8.5 The existing intimate image offences apply to victims of any age. The prosecution must prove that the victim did not consent irrespective of their age (although their age will be relevant to whether they had capacity to consent).[4] Where there was valid consent, intimate image offences will not apply. If the person depicted is a child, an offence relating to indecent images of children may nevertheless have been committed.[5] This is because consent is not relevant in the indecent images of children regime.[6] Where absence of consent is an element of a sexual offence, sections 74 to 76 of the SOA 2003 will apply to all victims. However, a child's capacity to consent is assessed differently than that for adults. The MCA 2005 applies to those who are aged 16 or older, hence 16- and 17-year-olds are presumed to have capacity to consent, just as adults are, although this presumption can be rebutted.[7] In respect of those who are under the age of 16, the courts tend to assess capacity according to the definition set out by the House of Lords in *Gillick*[8] but civil courts are increasingly applying the approach set out in the MCA 2005.[9] We will consider in further detail how our intimate image offences should apply in respect of children in Chapter 14. In that chapter we conclude that these offences will apply equally to child victims as they do to adult victims. We therefore consider here how the consent regime will apply to victims of all ages.

---

3 Where the defendant adduces sufficient evidence to raise an issue of whether there was consent, or that they reasonably believed in consent, the prosecution must prove lack of consent and reasonable belief in consent beyond reasonable doubt.

4 See Chapter 14 and Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 8.21 to 8.24.

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

6 For the indecent images of a child offences, the prosecution does not have to prove that the child did not consent to the defendant's conduct, unless the defendant proves that the child was 16 or over and that the defendant and the child were married, in a civil partnership or "lived together as partners in an enduring family relationship": Protection of Children Act 1978, s 1A; Criminal Justice Act 1988, s 160A.

7 MCA 2005, ss 1(2) and 2(5).

8 *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 AC 112, [1985] 3 All ER 402. See for example, *R (Axon) v Secretary of State for Health* [2006] EWHC 37 (Admin), [2006] QB 539 at [152]; *Bell v Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin).

9 See for example, *Re S (A Child) (Child Parent: Adoption Consent)* [2019] 2 Fam 177, [2017] EWHC 2729 (Fam).

Consultation paper

8.6 As discussed in Chapter 4, we recommend that the absence of consent should be an element of our offences in line with the current law. In the consultation paper we considered it appropriate that the definition of consent under sections 74 to 76 of the SOA 2003, alongside the MCA 2005 and common law, should apply to our offences.[10] We provisionally concluded that these provisions should apply to our offences to promote consistency and avoid confusion, given the sexual nature of intimate image abuse.[11] Additionally, we considered that our offences should not distinguish between victims on the basis of age.[12]

8.7 During pre-consultation engagement, stakeholders supported the use of the provisions in the SOA 2003 on the basis that they are well understood and suitable for intimate image abuse offences. The criticisms of sections 74 to 76 of the SOA 2003 are not specific to the context of intimate image abuse and warrant a wider review, which is beyond the scope of this project.[13]

8.8 At Consultation Question 23 and Summary Consultation Question 13 we asked:

> 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?

CONSULTATION RESPONSES AND ANALYSIS

8.9 There was significant support for our proposal. The majority of consultees who responded to this question agreed that the consent provisions in sections 74 to 76 of the SOA 2003 should apply to intimate image offences (190 out of 253).[14]

8.10 Some responses indicated that the framing of Consultation Question 23 and Summary Consultation Question 13 did not make it sufficiently clear that we proposed adopting the consent provisions contained in the SOA 2003 in addition to the MCA 2005 and the common law. This led a number of consultees to understand our proposed consent regime as less comprehensive than intended.

8.11 Consultees raised the following key points in their responses:

(1) applying sections 74 to 76 of the SOA 2003 to our offences is necessary for legislative consistency;

---

10 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 8.26.

11 Above, paras 8.5 to 8.6.

12 Above, para 8.20. This is discussed further in Chapter 14.

13 Above, paras 8.25 to 8.26.

14 Almost half of the consultees who neither agreed nor disagreed with our proposal stated that they were insufficiently familiar with sections 74 to 76 to expand on their response.

(2) these provisions are vague and do not appropriately apply in the intimate image abuse context,[15] and should be expanded or clarified to ensure comprehensive protection for victims; and

(3) there is a need for a wider review into the SOA 2003 and its consent provisions, as we recognised in the consultation paper.[16]

8.12 Consultees also highlighted the importance of ensuring that the consent provisions account for the complex issues and circumstances affecting children and their capacity to consent.[17] As mentioned above, how the offences relate to children will be explored in more depth in Chapter 14.

Consistency and clarity

8.13 A number of stakeholders supported our proposal for the purpose of consistency. Professor Tsachi Keren-Paz, Dr Charlotte Bishop, and Refuge stated that intimate image offences are sexual in nature, and it is therefore appropriate for sections 74 to 76 to apply to ensure a consistent and logical approach to all sexual offences.

8.14 Other consultees raised concerns that adopting a different approach to consent would reduce clarity and cause confusion in this area of law.[18] The Crown Prosecution Service ("CPS") considered that the definition of consent under sections 74 to 76 of the SOA 2003 is:

> Familiar and well understood by practitioners and the courts. The Court of Appeal has provided helpful guidance on how this definition should be applied in different circumstances and use of the same definition will ensure that this caselaw is relevant to intimate image offences. This will ensure that the issue of consent is dealt with consistently.

This is consistent with the initial view of the CPS described in the consultation paper that sections 74 to 76 are readily understood and work well for intimate image abuse offences, as noted in the consultation paper.[19]

8.15 While the Suzy Lamplugh Trust agreed with our proposal, they warned that these consent provisions are not as readily understood as might be suggested by the CPS. Based on their experience with victims of intimate image abuse, they observed that

---

15 For example, Kingsley Napley LLP stated in their consultation response that "consent is written in terms designed to capture two individuals who have physical contact between them" and consequently worried about the application of these provisions to the intimate image abuse context where images can be shared without any contact between the person sharing and the person depicted.

16 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 8.25. These consultees included the Bar Council; Dr Bishop; Honza Cervenka; Muslim Women's Network UK; Stonewall; Corker Binning.

17 Including the Lucy Faithfull Foundation; National Society for the Prevention of Cruelty to Children; Youth Practitioners Association; HM Council of District Judges (Magistrates' Courts) Legal Committee.

18 Including the Magistrates Association; CPS; HM Council of District Judges (Magistrates' Courts) Legal Committee; Muslim Women's Network UK; Stonewall; Suzy Lamplugh Trust; Dr Bishop; Professors McGlynn and Rackley.

19 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 8.26.

"considerably more work is needed to ensure that the notion of consent is more clearly understood by authorities."[20] Slateford Law considered that the law on consent is "too vague and subjective", and Women's Aid suggested it is too narrow.

8.16 Stonewall supported our proposal but were concerned that "the historically low conviction rates and inter-related victim-blaming attitudes that have been institutionalised through the provisions" will be replicated in the intimate image abuse context. Another consultee raised similar concerns and argued that the "opportunity should be taken to introduce new consent provisions that avoid the problems and criticisms that surround those in the [SOA 2003]."[21]

8.17 These responses illustrate that some consultees did not consider sections 74 to 76 to be fit for purpose, and that as such, they should not be applied to our recommended offences.

Capacity

8.18 Some consultees raised concerns about applying the rebuttable presumptions relating to capacity to consent under section 75(2) to our offences.[22] Greg Gomberg, personal response, commented that some are "not really suitable" for the intimate image abuse context, such as the presumption against consent where the complainant was asleep or otherwise unconscious at the time of the relevant act.[23] The consent provisions in the SOA 2003 may not directly map on to the intimate image abuse context in all circumstances. This simply means that some will be more relevant to our offences than others, just as some provisions may currently apply more appropriately to certain sexual offences than others. We note however, that the presumption under section 75(2) can and does currently apply in cases of intimate image abuse where the victim was unconscious or asleep when an intimate image was taken or shared. This was seen in the case of Christopher Killick, who was convicted of voyeurism for filming a woman, Emily Hunt, who was naked and unconscious.[24]

8.19 Some consultees raised concerns about the application of laws surrounding intoxication and consent. Refuge recognised that the presumption against consent where the victim had a substance administered or caused to be taken without their consent would not cover circumstances where the substance was taken consensually. They argued that section 3 of the MCA 2005, which deals with a person's inability to make decisions, should apply in these situations. As we set out in the consultation paper, the tests for capacity found in sections 2 and 3 of the MCA 2005 would indeed apply to such circumstances. Furthermore, Kingsley Napley LLP questioned how to

---

20 Similarly, Backed Technologies Ltd stated in their consultation response that more clarification is needed regarding the definition of consent: "people don't know what consent is and the perimeters around it", such as how it operates once relationships break down.

21 Clive Neil, personal response.

22 Including #NotYourPorn.

23 SOA 2003, s 75(2)(d).

24 See Amber Milne, 'Woman filmed naked and unconscious in London hotel wins five-year legal fight' (7 August 2020) *Reuters*, https://www.reuters.com/article/us-britain-women-laws-trfn/woman-filmed-naked-and-unconscious-in-london-hotel-wins-five-year-legal-fight-idUSKCN2532MH. This case was discussed in further detail in the consultation paper: Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 2.14 to 2.15, and 3.104 to 3.105.

assess "whether somebody is too drunk to consent to the sending of an intimate image, when they are not present at the point at which the image is taken and/or sent." Similar concerns led #NotYourPorn to conclude in their response that:

> The legislation needs to be clear on voluntary intoxication and consent in relation to intimate image abuse, as relying on previous case law on voluntary intoxication and consent may lead to unjust outcomes for victims.

8.20 We recognise that issues relating to intoxication and consent may look different in the intimate image abuse context compared with sexual offences involving physical contact. However, our view in the consultation paper was that the current law – both in statute and at common law – satisfactorily addresses these issues such that a bespoke consent regime for our offences is not warranted.[25] As noted in the previous paragraph, the SOA 2003 and MCA 2005 work together in relation to consent and capacity. Furthermore, the courts have clarified the meaning of consent by interpreting these provisions. For example, in *R v Kamki*,[26] the Court of Appeal confirmed the various elements to be considered when assessing capacity to consent where the complainant was intoxicated at the time of the act.[27] Consequently, as explained in the consultation paper, the absence of rebuttable presumptions for particular circumstances (such as in cases of voluntary intoxication where the victim is not rendered unconscious) does not necessarily mean that the victim had capacity to consent. This is a decision for the jury or magistrate(s), made by considering the abovementioned provisions concerning consent.[28]

8.21 The Health Research Authority considered a person's capacity to consent in the context of medical research.[29] They suggested that the base offence should "apply only in situations where consent would otherwise be required." This would exclude from the scope of the offence legitimate research that can take place without the need for consent (either from the person depicted or a third party) or where a third party can and has provided consent, for example, in cases involving child participants with parental consent or adults lacking capacity where emergency research involving an investigational medicinal product (that is, a drug trial) is to be carried out.

8.22 This approach would require the courts first to consider in each case whether consent was required in the particular circumstances. To widen the consent element in this way may impose an additional burden on victims and the courts. In our view, this is unnecessary because genuine research, where consent was not obtained for any of these reasons, would be excluded by the reasonable excuse defence;[30] indeed, these

---

25 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 8.11.

26 [2013] EWCA Crim 2335.

27 Above, at [18].

28 See for example, *R v GA* [2014] EWCA Crim 299.

29 The Health Research Authority did not specifically respond to Consultation Question 23 or Summary Consultation Question 13, but their comments are relevant to the discussion of consent here.

30 Where there was not capacity to consent and the image was taken or shared for the medical care or treatment of the person depicted, s 5 of the MCS 2005 (for those aged over 16) and our recommended exclusion from the base offence (for those aged under 16) would apply, see Chapter 11 for further discussion.

scenarios were used as examples of a reasonable excuse in the consultation paper.[31] Therefore, we conclude that the cases raised by the Health Research Authority are better addressed by this defence than by significantly amending the consent provisions.

Deception

8.23 The Centre for Information Rights contemplated the way a person may be deceived into consenting in the context of our offences. They worried about circumstances where:

> An image that is taken by a partner during a relationship may have been taken with consent, but following a break-up, there may be an expectation that the image would be deleted and continuing consent to keep the image is revoked. This may currently fall outside the remit of taking [or] sharing, but as consent is a continuing act, this type of situation may lead to difficulties.

This response suggests that, in the context of an intimate relationship, consent can pertain both to the taking and subsequent retention of the image as an ongoing act. This also suggests that retaining an intimate image after a break-up may amount to deceiving the victim as to the "nature or purpose" of the original act of taking (or sharing). If so, this could trigger a conclusive presumption against consent under section 76(2)(a) of the SOA 2003.

8.24 Indeed, conditions such as how long the image will be stored, or what it will be used for, can form part of the "nature or purpose" of the original act of taking or sharing. Consent might therefore be rendered invalid where the perpetrator was deceitful as to these conditions when obtaining consent from the person depicted. However, an "expectation" that the image would be deleted upon separation is not sufficient. It would need to have been a mutually understood feature of the original consensual act of taking in order to form part of the nature or purpose. Further, to render consent invalid, it would need to be proven that at the time of obtaining the consent, the perpetrator intended not to delete the image after separating. If the expectation that it would be deleted arose after the consent was obtained, such as when the relationship broke down, this does not make the original consent invalid.

8.25 These factors are already capable of being considered within the existing framework. The law as it stands satisfactorily deals with the extent to which conditions or deception render consent invalid, which would equally apply to intimate image offences, whether that is under sections 74 to 76 of the SOA 2003 or at common law.[32]

Consent to individual acts

8.26 Lawyer Ann Olivarius discussed the importance of understanding consent as attaching to each single act (of either taking or sharing, for example). Along with

---

31 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 13.84 to 13.99.

32 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 8.13.

several other consultees,[33] she considered it important that the definition of consent accounts for the victim's ability to withdraw consent to further disclosures. We consider the issue of withdrawn consent in Chapters 4 and 10.

8.27 We agree with consultees that consent is transaction-specific. It relates only to the particular act of taking or sharing in question, and not to additional or subsequent acts of sharing. Furthermore, consent to the taking or sharing of an intimate image is not consent to the sharing of an altered version of that image.[34]

Voluntariness and coercion

8.28 Several consultees considered that affirmative consent should be required. Ann Olivarius submitted that this entails "active, voluntary, clearly communicated" consent.

8.29 Slateford Law and Women's Aid argued that the provisions in the SOA 2003 do not go far enough to protect women and victims in abusive relationships as they fail adequately to account for the inability to consent in such circumstances. Consequently, Women's Aid argued in favour of "a wider and more detailed definition of consent, which includes further clarification of coercive control." Refuge emphasised that they "strongly support the inclusion of 'deception' and 'voluntariness' within the test for consent" but did not take issue with applying the existing provisions to this context.

8.30 We recognise consultees' concerns but conclude that the existing law under sections 74 and 75(2) of the SOA 2003 will ensure that consideration is given to whether consent was freely given or coerced. Additionally, the meaning of consent is complemented by other pieces of law, including the Domestic Abuse Act 2021. This Act expands the meaning of domestic abuse to include non-physical behaviour, such as: controlling or coercive behaviour; economic abuse; and psychological, emotional or other abuse.[35] This recognises in statute that abuse comes in various forms, therefore providing a broader understanding of how a person may be coerced or manipulated into consenting to an act. This issue will be considered in further detail when addressing intimate image abuse in controlling and coercive relationships in Chapter 6.

Burden to prove consent on defendant

8.31 Some responses suggested that the absence of consent should be the default position for our offences in some circumstances,[36] and that the burden of proving consent should be placed on the defendant.[37] Academic Marthe Goudsmit compared the way consent is dealt with in offences contained in the SOA 2003 to the Offences Against the Person Act 1861:

---

33 Including Professor Tsachi Keren-Paz; Equality Now; Welsh Women's Aid; and the Lucy Faithfull Foundation.

34 Where the image is still "intimate" as per our recommended definition: see Chapters 4 and 10.

35 Domestic Abuse Act 2021, s 1(3)(c) to (e).

36 Marthe Goudsmit; Rosamunde O'Cleirigh, personal response; Anon 13, personal response.

37 Ann Olivarius.

In sexual offences 'lack of consent' is taken as part of the actus reus, as opposed to presence of consent taken as a lawful excuse. I would want to urge emphasising that the default should be that there is no consent for the disclosure of intimate images, and that the perpetrator could only justifiably disclose if they have consent (which can indeed be drawn from s.74 to 76 SOA 2003).

8.32 In our view, it is not appropriate to make the absence of consent the default for our offences; to do so would effectively place the burden of proving consent on the defendant as the prosecution would not need to prove lack of consent. To place the burden on the defendant to establish consent would set too low a threshold to satisfy our recommended offences, particularly the base offence: the prosecution would only be required to prove that D intentionally took or shared the intimate image.[38]

8.33 The analogy with offences against the person is imperfect in two ways. First, "there is some doubt whether … consent is a defence or … lack of consent is one of the ingredients of [assault or battery]".[39] In 2015, the Law Commission recommended the latter approach, namely that "the definitions of the new offences [against the person] explicitly … require that V does not consent, as this resolves the theoretical doubt about the role of consent in the offences."[40] Secondly, unless the harm is "transient and trifling" or was caused "in the context of certain accepted activities such as sport or surgery",[41] the victim's consent to the harm is legally irrelevant.[42]

8.34 It is the fact that intimate images are taken or shared without consent that makes this conduct harmful and wrongful, it is therefore appropriate that the absence of consent is an element of the offence for the prosecution to prove.

CONCLUSION

8.35 Consultees generally considered sections 74 to 76 of the SOA 2003 to be well understood and familiar within the criminal justice system. Consequently, they deemed these provisions suitable for application to our recommended offences.

8.36 The most common concern raised by consultees was that these consent provisions are not designed for the intimate image abuse context and therefore do not apply appropriately to our recommended offences. We acknowledge the practical differences between sexual offending involving physical contact and intimate image abuse which does not necessarily require any physical contact between the defendant and victim. However, we do not think this means the same consent provisions should not apply. The consent regime comprises sections 74 to 76 of the SOA 2003, sections 1 to 3 of the MCA 2005, and other complementary statutes (such as the Domestic

---

38 Because the presumption of innocence dictates that the defendant cannot be required to disprove an element of the offence, consent would have to constitute an affirmative defence which would require conceiving of the offence as taking or sharing an intimate image. See *Woolmington v DPP* [1935] AC 462, paras 481 to 482.

39 Reform of Offences against the Person (2015) Law Com No 361, para 5.20.

40 Above, para 5.23.

41 Above, para 5.24.

42 *R v Brown* [1993] UKHL 19, [1994] 1 AC 212. This rule was codified in the Domestic Abuse Act 2021, s 71(2) and (6).

Abuse Act 2021). The definition of consent can also continue to expand and adapt to the intimate image abuse context as the case law develops. This results in comprehensive protection that is not limited to physical contact offences.

8.37 Ultimately, we conclude that this consent regime should be applied to our recommended offences. The following key points should be clarified regarding the operation of consent in respect of our offences:

(1) Consent relates only to the particular act of taking or sharing in question; not to additional or subsequent acts of sharing. Further, consent to the taking or sharing of an intimate image is not consent to the sharing of an altered version of that image.

(2) Absence of consent should be an element of these offences and the burden of proving this element should be on the prosecution.

Recommendation 30.

8.38 We recommend that the consent provisions in sections 74 to 76 of the Sexual Offences Act 2003 should apply to intimate image offences.

Chapter 9: Proof of harm

INTRODUCTION

9.1 In this chapter we consider whether our recommended offences should require the prosecution to prove the victim was caused any actual harm. First, we will provide an overview of the current law and our provisional proposals in respect of proof of harm. Second, we will analyse the key arguments arising from consultees' responses. Finally, we will set out our recommendation. A significant number of consultees responded to the relevant consultation questions, and the majority supported our proposal that such an element should not feature in our recommended offences. Noting that consultees' views reaffirmed our provisional conclusions expressed in the consultation paper, we maintain our position and therefore conclude that proof of harm should not be introduced as a requisite element for our recommended offences.

PROOF OF HARM IN THE CURRENT LAW

9.2 Under the existing voyeurism, upskirting, and disclosure offences, there is no requirement to prove that the complainant was actually harmed. In the consultation paper we explained that the inclusion of such an element in New Zealand's harmful digital communications offence[1] has been criticised for making the threshold for prosecution too high and relying on a subjective idea of harm.[2] Similar criticisms were raised by stakeholders during the pre-consultation stage of our review. Stakeholders also suggested that culpability was better reflected in other elements of the offence, and that requiring victims to give evidence of harm can retraumatise victims and perpetuate myths about the "correct" way for victims to respond to such trauma.[3]

9.3 Dr Charlotte Bishop was the only stakeholder who supported a proof of harm element. Dr Bishop argued that a proof of harm element could be used to distinguish more serious offending behaviour which could attract a more serious sentence.[4]

9.4 We provisionally concluded that our offences should not include a requirement to prove harm to the complainant:

> We agree that a proof of actual harm element would act as an unnecessary barrier to prosecution. Culpability can be demonstrated through other elements of the offence which reduces the risk of causing unnecessary distress to the victim.[5]

9.5 At Consultation Question 24 and Summary Consultation Question 14 we asked the following:

---

1 Harmful Digital Communications Act 2015, s 22 (New Zealand).

2 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 9.5.

3 Above, paras 9.6 to 9.9.

4 Above, para 9.10.

5 Above, para 9.11.

We provisionally propose that proof of actual harm should not be an element of intimate image offences. Do consultees agree?

CONSULTATION RESPONSES AND ANALYSIS

9.6 There was overwhelming support for our proposal. The majority of consultees who responded to this question agreed that our offences should not include a proof of harm element (261 out of 298).

9.7 Consultees commonly raised the following issues:

(1) there are difficulties in defining and proving actual harm;

(2) proving harm can involve utilising and perpetuating damaging victim narratives;

(3) it can re-traumatise complainants to evidence the harm in proceedings; and

(4) harm could be considered at alternative stages in proceedings, rather than as an element of the offence.

Difficulties defining and establishing harm

9.8 A significant number of consultees argued that defining harm is too difficult as it is a subjective concept, particularly in the context of intimate image abuse where the harm is likely to be non-physical and therefore more challenging to evidence. Dr Bishop explained in her consultation response that "the harm of intimate image abuse is not yet commonly accepted in the way that the harm of rape and sexual assaults, for example, are."

9.9 Greg Gomberg, personal response, expressed concern that "the actual harm, being non-physical, will be open to dispute" between the prosecution and defence. Others argued that harm in these circumstances is "too hard"[6] to prove. In their joint response, the End Violence Against Women Coalition and the Faith and VAWG Coalition noted that this may inappropriately have the effect of precluding prosecution "on the basis that a particular victim-survivor did not suffer specific harms… while many others would have done so."

9.10 Some responses recognised the barriers to demonstrating harm that may arise where victims are manipulated by the perpetrator or face structural disadvantage. The Northumbria Police and Crime Commissioner, who provided a joint response with four local organisations,[7] recognised that "[p]roof of actual harm can be difficult to provide in coercive relationships, particularly those in which [the victim] has experienced trauma and may appear to acquiesce as part of a traumatic response". Further, the Angelou Centre and Imkaan highlighted that harm can be difficult to show where "a victim-survivor faces inequitable access to support due to intersecting forms of exclusion based on an individual's race, sex, ability, sexuality and immigration status alongside other intersecting identities". We note for example, some victims may have

6 South West Grid for Learning, Consultation Response.

7 The Angelou Centre, Victims First Northumbria, the Young Women's Outreach Project, and one anonymous partner.

access to counsellors who can evidence the harm caused, while others will not have this privilege. This illustrates that requiring proof of harm may have a particularly damaging effect on some of the most vulnerable groups of victims.

9.11 Consultees also suggested that requiring proof of harm could prevent prosecutions where the victim is not identified, is unaware of the images of them, or is unwilling or unable to be involved in the prosecution.[8] This would exclude, for example, victims who feel unable to provide evidence against the perpetrator because of a history of abuse.

Victim narratives

9.12 Several consultees reiterated the concern raised by stakeholders in the pre-consultation stage that a proof of harm requirement may perpetuate a stereotype of how victims are expected to respond to intimate image abuse.[9] B5 Consultancy recognised that "[t]here is no correct way to respond to being a victim of this kind of invasive crime". Refuge argued that requiring proof of harm "risks perpetuating 'victim narratives' in which victim-survivors are required to behave in a certain way, or to exhibit certain outward displays of distress in order to be believed and taken seriously when reporting to the police."[10]

9.13 Stonewall noted that fears of being stereotyped and judged often deter victims in the LGBTQ+ community from reporting abuse and harassment.[11] ManKind similarly recognised the way male victims can be penalised and disregarded because of gender stereotypes. They also explained how this has been internalised:

> Some men themselves to avoid the emasculation that intimate image sharing brings will try and publicly downplay the harm, as a way of saving face, whilst privately it will have caused them great psychological damage which they will never admit to.

9.14 Moreover, a proof of harm requirement would also impose victim narratives that do not account for cases "where harm manifests at a later date."[12] Clive Neil, personal response, recognised this as a particular issue in the context of intimate image abuse:

> Even if no actual harm occurs at the time such images are released/circulated the potential for harm is likely to remain for many years. [Victims] should not be expected to live their lives under a cloud or have to wait for many years for actual harm to arise in order to be able to make a complaint and obtain justice.

---

8 Including Marthe Goudsmit; Corker Binning; Queen Mary Legal Advice Centre.

9 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 9.9.

10 Refuge, Consultation Response.

11 In their consultation response, Stonewall stated that only one in five LGBTQ+ victims of hate crime report the incident, "many because they fear they will not be taken seriously": see Stonewall, *LGBT in Britain: Hate Crime and Discrimination* (2017), https://www.stonewall.org.uk/system/files/lgbt_in_britain_hate_crime.pdf . Additionally, Stonewall highlighted that less than one in ten LGBTQ+ victims of abuse report it to police, in part due to "fears of being judged about the context in which the abuse took place": see Galop, *Online Hate Crime Report* (2020), https://galop.org.uk/wp-content/uploads/2021/06/Online-Crime-2020_0.pdf .

12 End Violence Against Women Coalition and the Faith and VAWG Coalition, Consultation Response.

Victims may not suffer harm at the time, or soon after the offence is committed. Rather, the harm might arise at a later stage. For example, a victim's future employer might view the image circulating online years later. Where proof of harm is an element of the offence, prosecution would be unsuccessful if the harm has not yet manifested.

Retraumatising victims

9.15 Consultees commonly raised the concern that requiring complainants to prove harm would retraumatise them. Refuge worried that such a requirement:

> Would engender a situation in which victim-survivors of intimate image abuse are repeatedly required to give evidence as to how, and the extent to which, they have been harmed. This risks retraumatizing them and could contribute to victim attrition from the prosecution process.

Women's Aid similarly argued that "[t]he re-traumatising impact of survivors having to re-tell their experiences is… well-evidenced, and this is something [the organisation] continues to regularly hear from women". Indeed, as highlighted by Professors Clare McGlynn and Erika Rackley, New Zealand's approach is criticised because of the "re-traumatising effects of victim-survivors having to give evidence". These responses indicate that requiring proof of harm may exacerbate the complainant's existing distress.[13]

9.16 According to consultees, this could create "further barriers for survivors to disclosing their experiences and reporting to the police,"[14] reducing their willingness to do so.[15] Agnes E Venema warned that it may "constitute an insurmountable obstacle" for complainants.

Considering harm before prosecution or at sentencing

9.17 A number of consultees argued that the harm caused to complainants should be considered at other points in the legal process, rather than as an element of the offence: Kingsley Napley LLP stated that actual harm should be "a feature of the Public Interest considerations by the Crown Prosecution Service"; and others argued that it should be considered at sentencing as an aggravating factor.[16]

9.18 ManKind suggested that male experiences of domestic abuse are often neglected by magistrates, and therefore may not appropriately be accounted for in sentencing. As discussed at paragraphs 9.12 to 9.14 above, we recognise that victim narratives and stereotypes can pose significant challenges to complainants throughout the legal

---

13 Many responses also recognised that including a proof of harm element in our offences would impose a heavy burden on complainants: CPS; West London Magistrates' Bench; End Violence Against Women Coalition and the Faith and VAWG Coalition; My Image My Choice; Marthe Goudsmit.

14 Women's Aid, Consultation Response.

15 Including End Violence Against Women Coalition and the Faith and VAWG Coalition; CPS; Northumbria Police and Crime Commissioner (joint response with the Angelou Centre, Victims First Northumbria, the Young Women's Outreach Project, and one anonymous partner).

16 Including Professor Tsachi Keren-Paz; Ann Olivarius; Professor Alisdair A Gillespie; Senior District Judge (Chief Magistrate) Goldspring; Kingsley Napley LLP; Magistrates Association; West London Magistrates' Bench; HM Council of District Judges (Magistrates' Courts) Legal Committee; Corker Binning; personal responses from John Page, Dr Brian J. B. Wood, Greg Gomberg, and Clive Neil.

process. However, the issue of male victims' wider experiences of domestic abuse prosecutions is beyond the scope of this project.

9.19 Harm is already a factor considered by the Crown Prosecution Service ("CPS") when deciding whether to charge. A person should not be charged with an offence unless the case has passed both stages of the Full Code Test: the evidential stage, and the public interest stage.[17] The latter stage involves determining whether the public interest reasons against prosecution outweigh those in favour, during which prosecutors should consider the harm caused to the victim. This includes consideration of the victim's views about the impact the offence had on them.[18]

9.20 Furthermore, harm is also considered by the courts at sentencing: the Sentencing Council highlights that "the court will always look at each victim as an individual and try to ensure that the harm that they have experienced is reflected in the sentence as far as possible."[19] The Sentencing Council also emphasises the importance of a full measure of harm, which includes recognition of harm that continues or manifests after the offence has been committed.[20] At sentencing, harm (in addition to culpability) is first considered by the court when determining the seriousness of the offence.[21] The sentencing guideline for each offence sets out the factors to be considered by the court in making this determination. The guideline for the disclosure offence states that these factors are: the level of distress and psychological harm caused to the victim; and the extent to which the offence had a practical impact on the victim.[22] Additionally, the court may also consider harm to the victim when identifying any aggravating or mitigating factors. Aggravating factors that indicate a "more than usually serious degree of harm" include where there was an especially serious physical or psychological effect on the victim, even if unintended.[23]

9.21 Victims of Image Crime shared the view of an anonymous experiencer/victim who insisted that "the victim must be allowed [to] evidence the exten[t] of their life changing experiences to demonstrate the impact" of the offence. As shown in the analysis

---

17 Note that there is an exception where the Threshold Test applies.

18 Crown Prosecution Service, *The Code for Crown Prosecutors* (October 2018), https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf. See also Crown Prosecution Service, *Director's Guidance on Charging: Sixth edition* (2020), https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Directors-Guidance-on-Charging-6th-Edition.pdf.

19 Sentencing Council, *How sentencing guidelines recognise the impact of crime on victims*, (10 January 2022), https://www.sentencingcouncil.org.uk/news/item/how-sentencing-guidelines-recognise-the-impact-of-crime-on-victims/.

20 Sentencing Council, *How sentencing guidelines recognise the impact of crime on victims*, (10 January 2022), https://www.sentencingcouncil.org.uk/news/item/how-sentencing-guidelines-recognise-the-impact-of-crime-on-victims/.

21 Sentencing Council, *General guideline: overarching principles* (October 2019), https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/.

22 Sentencing Council, *Intimidatory Offences: Definitive Guideline* (2018), https://www.sentencingcouncil.org.uk/wp-content/uploads/Intimidatory-Offences-Guideline_WEB.pdf.

23 Sentencing Council, *Explanatory Materials: Aggravating and mitigating factors*, https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/.

above, victims could still provide evidence of the harm that they suffered in proceedings if proof of harm were not an element of the offence. Indeed, to assist the court in assessing the level of harm, victims are given the opportunity to make a Victim Personal Statement ("VPS"). This allows victims to express the impact the offence has had on them and helps the court to make an informed decision about sentencing.[24] We have been advised that judges do indeed take VPSs into account when determining sentences. As recognised by the Centre for Information Rights, it could also be helpful for victims to explain the harm that they have suffered to evidence the defendant's intention, for example (but a lack of such proof should not prevent prosecution).[25]

9.22 The extent to which harm is taken into account when determining the seriousness of the offence may be limited however, by the factors to be considered by the court as listed in the relevant sentencing guideline.[26] In contrast to the guideline for the disclosure offence, the only factors indicating raised harm in the guideline for the voyeurism offence are: image(s) available to be viewed by others; and victim observed or recorded in their own home or residence.[27] This provides for a more restricted assessment of harm to the victim, illustrating that the scope for the consideration of harm at sentencing may depend on the specific offence.

9.23 In limited circumstances the court may be able to consider harm at the sentencing stage, where it is not a factor listed in the relevant guideline, via a *Newton*[28] hearing. The court may require a *Newton* hearing to make a finding in respect of an issue that is "material to sentence [but] was not properly canvassed during the trial because it was not relevant to guilt".[29] In principle, this could include the harm caused to the victim as a result of the offence. However, such a hearing is only appropriate where a finding of fact is required concerning a substantial dispute between the prosecution and defence cases for sentencing purposes, and where the impact of the dispute on the ultimate sentencing decision is not minimal.[30] It may be rare that the circumstances in which a dispute concerning harm suffered by the victim would sufficiently impact sentencing to warrant such a hearing. Consequently, while *Newton* hearings may provide an opportunity for the court to make a finding in respect of harm for consideration at sentencing, this will rarely be appropriate.

---

24 Crown Prosecution Service, *Victims & Witnesses*, available at: https://www.cps.gov.uk/victims-witnesses.

25 Consultation Response.

26 Sentencing Council, *Using the MCSG: Using Sentencing Council guidelines*, https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/using-the-mcsg/using-sentencing-council-guidelines/.

27 Sentencing Council, *Sentencing Guidelines: Voyeurism* (April 2014), https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/voyeurism/.

28 *R v Newton* (1983) 77 Cr App R 13.

29 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), para D20.33.

30 *R v Underwood* [2004] EWCA Crim 2256.

Other responses

9.24 Some consultees considered that intimate image abuse is harmful "given that it is perpetrated without consent",[31] because it is a violation of privacy and autonomy,[32] and detrimentally impacts complainants' mental health.[33] Some consultees highlighted that the wrong is in the act of non-consensual taking or sharing, and not the harm caused.[34] Professors McGlynn and Rackley argued that:

> Where the law does require proof of harm, such as in New Zealand, it has given rise to considerable criticism due to… the breach of victim-survivor's privacy and the recognition that non-consensual activity is per se harmful, without needing proof of specific harms.[35]

9.25 Many consultees, including Muslim Women's Network UK and Slateford Law, argued that it should be assumed that harm has occurred in cases of intimate image abuse. Professor Tsachi Keren-Paz stated that "[i]n such dignitary offences, the harm is both ingrained in the act itself and could to a large extent be presumed to exist (to a different degree) in the overwhelming majority of cases". Consultees who disagreed with our proposal also suggested that it was "obvious" that harm would be caused by intimate image abuse.[36]

9.26 This position was also reflected in data from an opt-in survey conducted by Bumble of users of its application in April and May 2021, which produced 1011 responses: 86% of women surveyed believed that non-consensual sharing of intimate images is always harmful.[37] These views led consultees to deem it unnecessary and an onerous hurdle to require complainants to prove harm.[38]

9.27 Dr Bishop—the only stakeholder to support the inclusion of a proof of harm element in our offences in the pre-consultation discussions—agreed with our proposal during consultation. In the consultation paper we explained her argument that sentencing for intimate image abuse could most effectively reflect the harm caused to victims if two different offences with different maximum sentences were recommended: a more

---

31 Refuge, Consultation Response. Similar responses were provided by The Northumbria Police and Crime Commissioner (in a joint response with the Angelou Centre, Victims First Northumbria, the Young Women's Outreach Project, and one anonymous partner); Victims of Image Crime (on behalf of an anonymous experiencer/victim); Anon 44, personal response.

32 Women's Aid; Professors McGlynn and Rackley; Lauren White, personal response.

33 Women's Aid; Lauren White, personal response; Anon 102, personal response.

34 Including Refuge; Dr Aislinn O'Connell; Ann Olivarius; and personal responses from Mr David George Summers, Karen Chegwidden, Anon 57, and Anon 68.

35 New Zealand's harmful digital communications offence requires that "posting the communication causes harm to the victim": Harmful Digital Communications Act 2015, s 22(1)(c). Note that Professors McGlynn and Rackley's research and views were also endorsed by Equality Now and Marthe Goudsmit in their written responses.

36 Including Sarah Loughlin and Anon 102, personal responses. Consultees who disagreed did not provide reasons for why this harm should be reflected in a proof of harm element.

37 Note that Bumble did not respond to this question.

38 Including Muslim Women's Network UK; Slateford Law; B5 Consultancy; Northumbria Police and Crime Commissioner (joint response with the Angelou Centre, Victims First Northumbria, the Young Women's Outreach Project, and one anonymous partner); Anon 15, personal response; Anon 62, personal response.

serious offence with a proof of harm element, and a lesser offence without. Dr Bishop was concerned that the serious harm that can be caused by intimate image abuse would not be reflected in the sentencing that would be available if there were only a base offence (which was being discussed by stakeholders at the time). In her consultation response, Dr Bishop further stated that she no longer considers it necessary to recommend the additional offence, in particular she stated that:

> Given that the framework of offences proposed by the Law Commission provides for different levels of culpability through the inclusion of a [base] offence, two additional intent offences, and a threats offence, it seems that the need for a harm-based approach is obsolete.

Describing the importance of an offence structure that allows for appropriate sentencing, Dr Bishop submitted:

> It is really important that the range of tariffs across all gender-based violence offences reflects the extent of the harm. When this is not the case it undermines the symbolic role of the legislation as it reinforces perceptions that this behaviour is less harmful than physical violence.

CONCLUSION

9.28 The positive response to this proposal from consultees confirmed our provisional conclusion that intimate image offences should not include a proof of harm element. Such an element would introduce significant evidential issues, negatively impact victims, and ultimately serve as a barrier to successful prosecutions. We have recommended offences that distinguish more serious cases on the basis of culpability, which we conclude is a preferable approach. Harm can be considered at other stages in proceedings where the offence does not include a proof of harm element, such as at sentencing. There are opportunities for victims to share with the court the harm they have suffered and the impact the offending has had on their lives, for example in a Victim Personal Statement.

Recommendation 31.

9.29 We recommend that proof of actual harm should not be an element of intimate image offences.

Chapter 10: Public element tests

INTRODUCTION

10.1 Intimate image abuse violates victims' sexual autonomy, bodily privacy, and dignity. Invasion of privacy is a key feature of the abuse and the offences aimed at addressing it; violation of privacy can give rise to significant harm. Knowingly violating someone's privacy can be highly culpable behaviour.

10.2 We explained in the consultation paper that:

> In practice, there is a private element to most intimate images, often they are taken or shared between identified individuals in a private context. When consensual, they are often taken in bedrooms or studios, during intimate moments. They are shared privately between friends or partners.[1]

Where there is a public element present in incidents of taking or sharing an intimate image without consent, we asked whether autonomy and privacy are violated in the same way. We concluded that in some cases a public element means the taking or sharing of an intimate image without consent is less wrongful and should not give rise to a criminal offence. We explored two contexts where a public element should exclude some behaviour from intimate image offences:

(1) Where an intimate image is taken in public; and

(2) Where an intimate image has previously been shared in public.

We provisionally proposed two tests that would appropriately carve out the relevant behaviour and asked consultees for their views.

10.3 In this chapter we will recommend that the tests provisionally proposed in the consultation should apply to taking and sharing intimate image offences. First, we will explain the rationale for our proposed tests, then explore the consultation responses and finally set out our justification for reaching this decision. We start with intimate images taken in public and then consider intimate images previously shared in public.

INTIMATE IMAGES TAKEN IN PUBLIC

The need for a more limited approach to intimate images taken in public

10.4 In current intimate image offences, the fact that an image shows something intimate and was taken or shared without consent is not sufficient to establish criminal liability. The voyeurism offence in England and Wales requires that the victim be "in a place which, in the circumstances, would reasonably be expected to provide privacy".[2] There are similar requirements in voyeurism offences in every jurisdiction considered in the consultation paper. This is commonly referred to as a "reasonable expectation

---

1 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.2.

2 Sexual Offences Act 2003, s 68(1).

of privacy" test. In the consultation paper we explored whether such a test should apply to any new intimate image offences. The offences we recommend apply to an intimate image taken in any place whether public or private, as long as it shows something "intimate". Intimate images can be taken in a place where we would not always expect privacy such as a public park, a beach, a school, or museum. We considered whether there are circumstances in which intimate images taken in less private places should still be included in intimate image offences. When someone is nude, partially nude, engaged in a sexual act or toileting in public, we distinguished between examples where they can and cannot reasonably expect that an image will not be taken of them without consent. In the latter case we provisionally proposed that it should not be an offence to take an intimate image without consent. In the former case we provisionally proposed that it should be.

Examples where it should not be an offence to take an intimate image in public without consent

10.5 Someone streaking at a public event (for example at a football game), a naked protestor, or a naked rambler in a heavily populated place are all willingly nude in a public place. They know members of the public will see them, and that they will attract attention because of their nudity. An image taken of them in such circumstances would fall under the definition of intimate for any new intimate image offences. However, we concluded in the consultation paper that taking, or subsequent sharing, of such images should not be criminalised. Further, there are no factors that would make the taking or sharing sufficiently wrongful to warrant criminalisation; it should not be a criminal offence regardless of the intent when taking or subsequently sharing the image, or whether it was known that the person depicted did not consent.

10.6 We took this view primarily because it is not sufficiently wrongful or harmful behaviour. The person depicted has not had their bodily privacy or dignity violated in the same way as with other types of intimate images. Additionally, we did not hear any evidence from stakeholders that taking or sharing such images without consent causes significant harm to those depicted. We accept that in some circumstances it may cause some harm, but we are not persuaded that the harm is serious enough to justify making this behaviour a criminal offence. Naked protestors, streakers and ramblers in heavily populated places have consented to being observed nude. Arguably, they have invited observation. We acknowledge there is a difference between observation and taking an image. The latter is more permanent, it can show much more detail, can be zoomed in, and can be shared to a much wider audience than was present at the time. All of these factors can make taking an image more harmful than observation. However, we consider that they do not make it sufficiently harmful to warrant criminalisation. In the consultation paper we described a scale: at one end is consent to being recorded, followed by consent to prolonged observation, to consent to fleeting observation, ultimately ending at no consent to any observation. In these circumstances, the person depicted has consented to prolonged observation. The gap between prolonged observation and being recorded is not wide enough to justify criminalisation on this basis.

10.7 Secondly, the balance of Article 8 and Article 10 rights does not require blanket criminalisation. Article 8 of the ECHR states: "everyone has the right to respect for his private and family life, his home and his correspondence". Article 10 of the ECHR states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Both Articles are qualified rights. Qualified rights are those which can be interfered with in certain specified circumstances, including to protect the rights of others.[3] Therefore when both are engaged, a balancing exercise is required. We explained in the consultation paper that in cases where an intimate image is taken or shared without consent, it is unlikely that a perpetrator could or would advance a strong argument on the basis of their Article 10 right to express themselves freely, especially when weighed against the violation of the victim's right to privacy under Article 8.[4] In the case of a naked rambler, streaker or protestor, their right to privacy is weakened by the fact they were willingly nude in a place to which people could observe and take images of them. It could be argued that their right to privacy in such circumstances is so weakened that it does not need to be balanced against the Article 10 right of someone taking their image. However, if it were, it is likely that those same circumstances would strengthen the Article 10 rights of someone taking the intimate image. Such images are arguably imparting information and ideas in a way that images taken in private are not. For example: a naked protestor or streaker might be advancing a cause. Taking and sharing images of that can be promoting or disagreeing with that cause, informing others about it, or generating conversation.

10.8 Based on these two arguments, we concluded that people in such circumstances do not have a reasonable expectation of privacy in relation to an image being taken of them without consent. These are examples of behaviour that should be excluded from intimate image offences.

Examples where it should be an offence to take an intimate image in public without consent

10.9 We also considered five examples of intimate images taken in public which should be included in intimate image offences: upskirting and downblousing; sexual assaults; someone nude or partially nude in public against their will; being nude or partially nude in public changing areas; and breastfeeding. These may be taken in settings which are fully public, or semi-public (where access is limited in some way such as by membership or payment of a fee). There are different justifications for including each category in intimate image offences.

10.10 Upskirting is already a criminal offence,[5] and in Chapter 3 we recommend a definition of "intimate image" that would incorporate downblousing images. These images are extremely violating; they are often taken in a public space and when the person depicted is clothed. The images capture something that they did not consent to being exposed in public.

---

3 European Convention on Human Rights, Art 8(2) and Art 10(2).

4 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 1.80 to 1.81.

5 Sexual Offences Act 2003, s67A. To be caught by the current "upskirting" offence, the perpetrator must have intended either to obtain sexual gratification (either for themselves or another) or to humiliate, alarm or distress the victim.

10.11 Images of a sexual assault in public, or of someone who is nude or partially nude against their will in public can be deeply harmful. Such images depict an act which in itself is a serious violation of the victim's sexual autonomy, bodily privacy, and dignity, and in many cases, their bodily integrity. Recording such an act can add significantly to the harm experienced by the victim. Sadly, this is not a hypothetical situation. The Court of Appeal case *R v Costanzo*[6] concerned two individuals who were convicted of raping a victim in the maintenance room of a nightclub. One filmed the assault on their mobile phone; they both watched the recording later while still in the nightclub and showed it to another individual.

10.12 In public, or semi-public changing rooms, there may be moments where someone is nude or partially nude as they change. It is a necessary function of the space. While fleeting glances may be tolerated, although not invited, any prolonged observation would cause significant discomfort or upset. It is not acceptable behaviour. This distinction was made in the case of *R v Bassett*.[7] It also relates back to the scale mentioned at paragraph 10.6 above. Taking an image in such circumstances is a significant departure from consent to fleeting glances. We concluded therefore that it is wrongful behaviour that does justify criminalisation.

10.13 Breastfeeding images, where a breast is pictured bare, covered by underwear, or as exposed as if covered by underwear, are included in our definition of intimate. Breastfeeding often occurs in public out of choice, necessity, or a combination of both. In Chapter 3 we explain why such images should be protected by intimate image offences. There has been a recent successful campaign to amend the voyeurism offences to criminalise the act of taking images of someone breastfeeding. In Chapter 2 we discuss this amendment in more detail. The support for that campaign demonstrates the need to ensure adequate protection for people who breastfeed from intrusive acts of others.[8] Intimate images of breastfeeding should not be excluded simply because the breastfeeding may take place in public. In fact, the campaign mentioned above was started by campaigner Julia Cooper, following her own experience of being photographed while breastfeeding in a public park. In the consultation paper we described how it can be similar to changing in public; fleeting glances may be tolerated but prolonged observation would not. We also explained that breastfeeding *can* be an inherently private act, in a similar way as changing one's clothes can be. Finally we considered the strong public policy reasons for including intimate breastfeeding images:

> Women are already protected from being discriminated against because they are breastfeeding. Under section 17 of the Equality Act 2010, it is unlawful for a trader or service provider to treat a woman "unfavourably" because she is breastfeeding, regardless of the age of the child.[9]

---

6 [2021] EWCA Crim 615.

7 [2008] EWCA Crim 1174, [2009] WLR 1032.

8 Campaigner Julia Cooper started a petition on Change.org to gather support for a change in the law. The online petition received 29,143 signatories. See https://www.change.org/p/a-stranger-photographed-me-breastfeeding-my-baby-let-s-make-this-disturbing-act-illegal.

9 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.42.

10.14 Based on these arguments, breastfeeding in public or who are using a public or semi-public changing room do have a reasonable expectation of privacy in relation to an image being taken of them without consent. We also concluded that victims of upskirting or downblousing always have a reasonable expectation of privacy in relation to such an image being taken. Upskirting and downblousing involves recording something more intimate than what is voluntarily exposed. Victims of this behaviour are not nude or partially nude in public. Finally, we concluded that prosecutors should not have to prove that victims of sexual assaults in public, or who are nude or partially nude against their will in public, had a reasonable expectation of privacy in order to retain the protection of the criminal law. The taking and sharing of images showing such conduct is inherently violating and harmful regardless of the place where it occurred.

A reasonable expectation of privacy test

10.15 Based on the above examples we acknowledged the need for some sort of reasonable expectation of privacy test to help carve out the less wrongful taking in public behaviour, while ensuring adequate protection from the more wrongful taking in public behaviour. In the consultation paper we suggested:

> Incorporating into the offences a test so that where an intimate image is (or was) taken in a place to which members of the public had access, the prosecution must prove that the victim had a reasonable expectation of privacy in relation to the taking of the image. Such a test that includes a reasonable expectation of privacy element would satisfactorily distinguish between those images taken in a public place that we consider should and should not be criminalised.[10]

10.16 We explored how the examples above would be addressed by the current intimate image offences in England and Wales, with additional consideration of the intimate image offences in Scotland and Australia. Ultimately, we concluded that the current offences do not adequately address the situations we considered and that an amended reasonable expectation of privacy test is required to do so satisfactorily. To be within the scope of the intimate image offences, the taking must be done without consent. Therefore in all the circumstances we consider below, there is no consent, and no reasonable belief in consent to the taking. The relevant question for criminality at this stage is whether, in the circumstances, the person depicted had a reasonable expectation of privacy that an image would not be taken of them.

Intimate images taken in public

10.17 The voyeurism offence applies to images of another person doing a "private act". This is defined in section 68 of the Sexual Offences Act ("SOA") 2003:

> For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and —

[10] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.85.

(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,

(b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

10.18 The focus is on the place the depicted person is in when the image was taken. This was necessary to address the chief concern at the time of drafting the offence. Paul Goggins MP explained in the House of Commons Standing Committee on the Sexual Offences Bill:

> We want to restrict criminality for that offence to those who go to considerable lengths to spy on others who are engaged in private acts, rather than people who ... just stumble across people while they are out and about.[11]

10.19 We considered the relevant case law including *R v Richards*.[12] Richards had consensual sex with two sex workers and filmed their sexual encounter without their consent. He argued this was not voyeurism as the victims had no reasonable expectation of privacy as they were engaged in sexual activity (the private act) with him. The Court of Appeal held that the test was whether the victims had a reasonable expectation of privacy in relation to the private act being filmed. This case demonstrates that the test has reasonable flexibility to consider the circumstances in which an image was taken. However, where the person depicted is not in a place which could reasonably be expected to provide privacy (such as a public park), this test would not be met. This is a matter of fact for the court to determine. It is unlikely therefore that images of a sexual assault, involuntary nudity or breastfeeding in a public place such as a park would be protected by the voyeurism offence. The Scottish voyeurism offence uses the same test.[13]

10.20 Upskirting is also excluded from the voyeurism offence in England and Wales because of this test. Such images are often taken in public places where the person depicted would not have a reasonable expectation of privacy, for example on public transport or at a festival. A separate offence was therefore created.[14] The upskirting offence criminalises the recording of genitals or buttocks (whether covered by underwear or not) "in circumstances where the genitals, buttocks or underwear would not otherwise be visible". This was designed to apply in both public and private spaces. It is deliberately narrow to address a particular behaviour.

10.21 The disclosure offence does not require consideration of the circumstances in which an image was taken, it requires that the image be private and sexual.[15] "Private" refers

---

11 *Hansard* (HC) Standing Committee B (8th Sitting), 18 September 2003, col 306.

12 [2020] EWCA Crim 95, [2020] 1 WLR 3344.

13 Sexual Offences (Scotland) Act 2009, s 9.

14 Sexual Offences Act 2003, s 67A. The Sexual Offences (Scotland) Act 2009, s9(4A) and (4B) also creates a specific "upskirting" voyeurism offence.

15 It also requires that the disclosure was done with the intent of causing the depicted person distress which limits its applicability more generally as well as within these specific examples.

to something that is not ordinarily seen in public. This is explored in further detail in Chapters 2 and 3. For current purposes, it is sufficient to note that this can apply to images taken in public or private, as long as what is depicted is not ordinarily seen in public. Images of sexual acts or nudity (whether voluntary or not) would be caught by the offence as they are not ordinarily seen in public. While this means that images of a sexual assault would be included in the offence which we do think is appropriate, it could also include images of a streaker or naked protestor which we do not think is appropriate.

10.22 The Scottish disclosure offence under section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 includes a defence where the depicted person was voluntarily nude or engaging in a sexual act in a public place, and members of the public were present.[16] We noted that the "voluntary" element of this defence would helpfully distinguish images of sexual assault or involuntary nudity, and was in fact the purpose of introducing this element.[17] However, the defence would exclude images we concluded should be protected such as images of someone changing in a public changing room or breastfeeding in public, where there was a member of the public present. We also noted that a number of Australian jurisdictions use a form of reasonable expectation of privacy test in either their taking[18] or sharing[19] offences, or for both.[20]

10.23 A reasonable expectation of privacy test is a familiar test in criminal law. It is a question for either a jury or magistrate to determine on the facts in individual cases. It is therefore flexible enough to accommodate a wide variety of factual scenarios. It could be argued that in a public space there is no reasonable expectation of privacy; the real question is whether it was appropriate to take a photo in the circumstances.

---

16 In the consultation paper at para 11.101 we suggested that the disclosure offence under s 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act excludes upskirting images, which are only explicitly included in the Scottish "taking" offence. It is noted that the discussion at Stage 3 proceedings for the Abusive Behaviour and Sexual Harm (Scotland) Bill on 22 March 2016 suggests that some MSPs intended upskirting images to be included in the disclosure offence and considered that they would be so included by the amendment providing that the proposed "public place" defence would not apply when victims are the "subject of an intimate film or photograph" as a result of a deliberate act of another to which the victim did not agree. (See per Elaine Murray MSP, Elaine Murray MSP at the Stage 3 proceedings for the Abusive Behaviour and Sexual Harm (Scotland) Bill on 22 March 2016; SP OR 22 March 2016, cols 79-80, available at https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=10445&mode=pdf). Professors McGlynn and Rackley in their consultation response argued that upskirting images are included in the Scottish disclosure offence. The wording of the offence is not clear on this point. It is an offence to take an image of a person in an intimate situation. Section 3 provides that a person is in an intimate situation if "the person's genitals, buttocks or breasts are exposed or covered only with underwear". This reads as if it is the person who must be in the intimate situation, rather than that the image shows something intimate. With upskirting, as we referenced in the consultation paper, the genitals or buttocks of the person depicted were covered with more than just underwear in real life; it is only in the image that they were exposed or covered with underwear. Section 2(5) provides a defence if the person depicted was in the "intimate situation shown in the photograph" in public not by the deliberate act of another to which they did not agree. This differs slightly from the discussion at Stage 3 referred to above. As far as we are aware there are no reported cases on this issue.

17 Elaine Murray MSP at the Stage 3 proceedings for the Abusive Behaviour and Sexual Harm (Scotland) Bill on 22 March 2016; SP OR 22 March 2016, cols 79-80.

18 Queensland and Australian Capital Territory.

19 Western Australia.

20 New South Wales and South Australia.

The Court of Appeal in *Richards* considered this point and held that there can be a reasonable expectation of privacy in relation to an image being taken.

10.24 We concluded that a reasonable expectation of privacy test is required, but with some limitations to ensure it best addresses all the points considered so far. Such a test would mean that the prosecution would have to prove, in some circumstances, that the person depicted had a reasonable expectation of privacy in relation to the taking of an image of them. There are circumstances in which it should not have to be proven that a victim had such a reasonable expectation of privacy. Victims of a sexual assault in public, or who were nude or partially nude in public against their will, have had their bodily privacy, sexual autonomy, and dignity, and in many cases their bodily integrity, violated by the act itself. We referred to these circumstances for the purpose of this test as non-voluntary. As we concluded in the consultation paper:

> Taking an image of such a wrongful act is clearly wrongful and further violates the victim's privacy and dignity. In such circumstances the victim should be afforded the full protection of the criminal law from images of them being taken (and subsequently shared), and the prosecution should not have to prove an additional element that is intended to exclude less harmful behaviours.[21]

10.25 For the reasons provided in paragraph 10.12 and 10.13 above, we considered that when changing in a public changing room, or breastfeeding in public, individuals will always have a reasonable expectation of privacy in relation to the taking of an intimate image.

10.26 Victims of upskirting and downblousing also always have a reasonable expectation of privacy that such an image will not be taken. This is different again; the nature of the act of taking violates their privacy, it seeks to capture something they did not consent to being seen regardless of where they were.

10.27 We therefore proposed the following:

> Reasonable expectation of privacy could be incorporated into the offence by requiring an additional element to be proven when:
>
> (a) the intimate image is (or was) taken in a place to which members of the public had access (whether or not by payment of a fee); and
>
> (b) the victim is (or was), or the defendant reasonably believed the victim is (or was), voluntarily engaging in a sexual or private act, or is (or was) voluntarily nude or semi-nude.
>
> The additional element would require the prosecution to prove that the victim had a reasonable expectation of privacy in relation to the taking of the image… the legal burden of proof for this test would be on the prosecution.[22]

---

21 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.97.

22 Above, para 11.102.

10.28 The “voluntary” limb of the test means that images of sexual assaults or of someone involuntarily nude or partially nude in public would be excluded from the test. This means that they will be included in the offence without the prosecution having to prove that they had a reasonable expectation of privacy in the circumstances. We also proposed a “reasonable belief” element to this limb of the test. The culpability of the person taking the image is key; if someone observes another person nude or engaged in a sexual act in public and reasonably believes the nudity is voluntary or the sexual act is consensual, taking an image in such circumstances is no more culpable than taking an image of someone who genuinely is voluntarily nude or engaging in sexual activity. Consider the streaker at the football game. Taking an image of the streaker is not criminally culpable. If, unbeknownst to those watching the game, the streaker had been threatened with violence if they did not streak, their nudity at the public event was not voluntary. However, those watching and taking an image could not have known that and so their behaviour is insufficiently culpable to be criminal.

10.29 Images of upskirting and downblousing are also excluded from the test. This is because the victim was not nude or partially nude in public. The test applies to the circumstances of the person depicted rather than the image. In upskirting and downblousing, the image that results is intimate (as it shows breasts, buttocks, or genitals whether exposed or covered by underwear) but the person depicted is usually clothed. This means that upskirting and downblousing images will be included in the offence without the prosecution having to prove the persons depicted had a reasonable expectation of privacy.

10.30 We proposed that legislation or accompanying explanatory notes set out the circumstances in which a person will always have a reasonable expectation of privacy in relation to the taking of an intimate image when breastfeeding in public or changing in a public changing room. This means that the test will apply to such images, but the person depicted will always be found to have a reasonable expectation of privacy.

The proposed test

10.31 At Consultation Question 33 we asked:

> We provisionally propose that where:
>
> (a) 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
>
> (b) the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude,
>
> the prosecution must prove that the victim has a reasonable expectation of privacy in relation to the taking of the image. Do consultees agree?

10.32 This test would include within the offences we proposed images taken in public which should receive the protection of the criminal law, and exclude images taken in public which should not. We also considered it sufficiently flexible to allow for consideration of the specific circumstances in individual cases. Further, the test does not exclude all images taken in public. Rather it requires the prosecution to prove that in such

circumstances, there was still a reasonable expectation of privacy in relation to the taking of the image. Where that can be established, for whatever reason, the image will not be excluded from the intimate image offences.

Consultation responses and analysis

10.33 The majority of consultees who responded to this part agreed with the proposed test (24 out of 36).

10.34 South West Grid for Learning, who run the Revenge Porn Helpline, agreed that context of the image is an important factor, saying "sometimes an image taken in public will be considered to be private and other times it will not: circumstances and context are key and need to be taken into account".

10.35 The Crown Prosecution Service ("CPS") also agreed with the proposal:

> Where the victim is in a public place (which is generally defined as indicated) it would be proportionate to require proof that the defendant was aware that there was a reasonable expectation of privacy. We consider that such a provision would assist in providing clarity and legal certainty.

10.36 Professor Tsachi Keren-Paz proposed an alternative; relying on reasonable belief in consent to exclude the relevant images. He submitted "unlike the analysis in the consultation, I think there is a significant difference between prolong[ed] gaze and recording" and that

> The reason why the unauthorised taking in the three examples mentioned in the paper [the nude streaker, protestor and rambler] should not be criminalised is that the taker has a reasonable belief that the subject consented, indeed even wished to be viewed naked.

Ultimately, relying on reasonable belief would have similar results as our proposed test, but is less accurate. We think that it is preferable to consider the question of reasonable expectation of privacy rather than infer consent to one act (the taking of an image) from consent to another (being observed).

10.37 Garden Court Chambers Criminal Law Team neither agreed nor disagreed with the proposed test, but submitted "concerns about the complexity of such legislation and the difficult route to verdict a jury would have to follow in such cases". We acknowledge that the test adds an extra element but this is justified as it appropriately limits the offences, reducing the risk of over-criminalisation. We also proposed that the test would not apply to cases where the image was taken in private. As we explain from paragraph 10.51, this will significantly limit the number of cases in which proof of this extra element is required, reducing the burden on prosecutors and minimising complexity for the majority of cases.

10.38 Consultees who disagreed[23] with the proposed test argued that there should always be a reasonable expectation of privacy in relation to an intimate image being taken. Academic Marthe Goudsmit submitted:

> It should not be considered acceptable to take images of people doing private acts even if they are in public. People (semi)nude at a beach should not be regarded as having consented to being depicted.

Consultees who neither agreed nor disagreed[24] suggested that lack of consent was sufficient regardless of the circumstances in which an image was taken. We have not been persuaded that all intimate images taken in public without consent should be included in intimate image offences. The majority of consultees who responded agreed that there should be some carve-outs because relying only on consent risks overcriminalisation.

Public place

10.39 Kingsley Napley LLP agreed with the proposal. However, to avoid overcomplication they recommended changing the focus to whether the place was private: "it would be preferable that a place could be considered private by virtue of the particular circumstances of the case". We are still of the view that a focus only on the place is too limiting. Whether a single place is public or private can change depending on the circumstances at the time. Further, a place is not determinative of whether someone has a reasonable expectation of privacy in relation to an image being taken of them. The act of upskirting demonstrates this. One can be in a public place but it should still be an offence to take an upskirting image. A focus only on the place does not allow for the necessary consideration of all circumstances in which the image was taken.

10.40 Consultees, including the Bar Council, were concerned with how public and private would be defined. The Bar Council queried the wording of public in the proposed test (whether members of the public have access, by payment of a fee or not) suggesting that it "does not address how a person comes to have access, assuming they did not pay". For example, a trespasser does not pay but gains access to a place, which does not make the place public. We do not anticipate this to be the only distinguishing feature of whether a place is public or not. The wording used reflects previous definitions of "public" in criminal law offences such as section 16 of the Public Order Act 1986.[25] The wider question of when a place is public or private is a valid concern. We consider this more fully from paragraph 10.98 below as it is a key element of both proposed tests. Ultimately the courts are well placed to determine whether, given the facts of individual cases, a place is public or not.

10.41 Further, this test only applies to circumstances in which an image was taken. It is therefore limited to consideration of tangible places as either public or private, and not online spaces which are arguably more difficult to categorise. Online spaces have almost infinite possible configurations, limitations, conditions, and accessibility that

---

23 Including Welsh Women's Aid and Marthe Goudsmit.

24 Including Refuge, and Laura Bloomer of Backed Technologies Ltd.

25 Under which a "public place" includes "any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission".

could make them either public or private. Real life places, while still capable of ranging from fully public to fully private, have more tangible features to demonstrate how public they are. Online spaces are also much newer and people's awareness and understanding of public and private spaces online is still developing.

10.42 One consultee[26] suggested that a sign displayed in a public place that prohibits photography should suffice to establish a reasonable expectation of privacy. This could be one of the circumstantial facts considered as part of the test, but it could not be conclusive in all cases. The visibility, knowledge, and enforcement of such notices in individual cases would vary enormously and should be part of the assessment. Further, in some places where no sign is present there could still be a reasonable expectation of privacy and victims' protection should not depend on whether a venue's management has chosen to display a sign.

Voluntarily nude, partially nude or engaged in sexual act, and reasonable belief

10.43 Consultees were concerned with evidential issues that arise with the second limb of the test; that the victim is (or was), or the defendant reasonably believed the victim is (or was), voluntarily engaging in a sexual or private act, or is (or was) voluntarily nude or semi-nude. Professor Gillespie queried whether a victim of a sexual assault would need to give evidence that goes to the question of whether the perpetrator had a reasonable belief that the sexual activity they recorded was consensual. He argued that if so, it could be damaging to victims and asked whether existing offences, or a discrete offence to capture recording of sexual offences, would be preferable. We agree that there is a risk of retraumatisation whenever a victim is required to give evidence about their experience. While mindful of that, there still remains a need to adduce and test evidence that is relevant to the defendant's culpability. When evidence from a victim of a sexual assault is required, the full range of special measures available to victims of intimate image abuse would be available to them.[27] It is unclear how a separate discrete offence would resolve this concern as the victim's evidence may still be required to establish that the defendant had no reasonable belief that the victim was voluntarily engaged in a sexual act – an element needed to ensure that the defendant is sufficiently culpable.

10.44 Professor Keren-Paz raised examples of more momentary involuntary nudity or partial-nudity, including part of dress falling and exposing underwear or breast, or someone stumbling in such a way that their underwear or crotch are temporarily visible. He considered such cases would be considered involuntary but requested clarification. We do consider that these would be, and should be, interpreted as examples of involuntary nudity or partial-nudity and therefore would not be excluded from the offence by this test. The prosecution would still need to prove that the defendant did not reasonably believe that the victim was voluntarily nude or partially nude. Where nudity was momentary and in such circumstances, it would be difficult for the defence to argue successfully that the defendant reasonably believed that the nudity was voluntary.

---

[26] Gregory Gomberg, personal response. The point was also raised by the Bar Council in a consultation meeting.

[27] See Chapter 13 for full discussion and our recommendations for ancillary orders for victims of intimate image offences.

Conclusion

10.45 There was significant support for the principle of excluding and including respectively the examples discussed from intimate image offences. There was also support for achieving this by using the proposed test. The main concerns expressed by consultees related to the definition of public, and evidential difficulties with the second limb. We consider the definition of "public" and "private" further below. While we acknowledge there may be some evidential issues when it comes to establishing "voluntariness" or "reasonable belief" these are not unique to this test, nor these offences. We do not think these concerns raised by consultees are a barrier to successful implementation of the test.

10.46 It is necessary and proportionate to exclude some images taken in public – images of a nude streaker, protestor, or rambler in a heavily populated place, for example. It is equally necessary and proportionate to ensure that images taken in public of sexual assault, of someone nude against their will, upskirting and downblousing, intimate images of someone breastfeeding or changing in a public changing room are not excluded from intimate image offences. The test as proposed is the most appropriate way to achieve this.

10.47 We conclude, at paragraph 10.60 above, that the test should only apply to images that were not taken in private. We remain of the view that the test should apply to both taking and sharing offences, with the focus for both being the circumstances in which the image was taken.

10.48 We have further considered the issue of voluntariness and reasonable belief. For the reasons explored above and in the consultation paper, if a defendant has taken an image in circumstances where they reasonably believed the person depicted was voluntarily nude or engaging in a sexual act or toileting in public, the defendant has not acted with a level of culpability that warrants criminalisation. In the circumstances as that defendant reasonably believed them to be, their conduct is the same as taking an image of someone who was in fact voluntarily nude or engaging in a sexual act or toileting in public. It is necessary therefore to reflect this fully in the test. Where a defendant reasonably believed that the person depicted was voluntarily nude, partially nude or engaging in a sexual act or toileting in public, the prosecution should have to prove that *in the circumstances as the defendant reasonably believed them to be*, the person depicted had a reasonable expectation of privacy in relation to an image being taken.

10.49 Finally, it is worth reiterating that the reasonable expectation of privacy test allows for consideration of the wider context and not just the place. The test does not automatically exclude from the offences images that were taken in public, or where the person depicted was voluntarily nude or engaged in a sexual act in public. The test does not mean that someone in such circumstances will never have a reasonable expectation of privacy in relation to the taking of an intimate image. Consider someone partially nude and urinating in public. Where they have decided to do so in full view of a busy high street, they may not have a reasonable expectation of privacy. Where they have decided to do so in a quiet field in the evening, behind a hedge, they would likely have a reasonable expectation of privacy in relation to the taking of an image of them.

10.50 We recommend that the reasonable expectation of privacy test applies to the offences of taking or sharing an intimate image without the consent of the person depicted and to the offence of threatening to share an intimate image. The burden of proving this test should be on the prosecution. To satisfy this test the prosecution should have to prove beyond reasonable doubt that:

(1) the intimate image was not taken in a place to which the public had access; or

(2) (a) the victim was not voluntarily engaging in a sexual act or toileting or was not voluntarily nude or partially nude; and (b) the defendant did not reasonably believe that the victim was voluntarily engaging in a sexual act or toileting or was voluntarily nude or partially nude; or

(3) the victim had a reasonable expectation of privacy in relation to the image being taken.

Where the prosecution has proven that the victim was not voluntarily engaging in a sexual act or toileting or was not voluntarily nude or partially nude in public (that is, proven (2)(a) above), but has not proven that the defendant did not reasonably believe the victim was voluntarily engaging in a sexual act or toileting or was voluntarily nude or partially nude in public (that is, not proven (2)(b) above), then in relation to (3) above, the prosecution must prove that in the circumstances as the defendant reasonably believed them to be, the victim had a reasonable expectation of privacy in relation to the image being taken.

The test can be satisfied if any one of these limbs can be proven.

Intimate images taken in private

10.51 The discussion above considers what the law should be where an image is taken in a public place. Here, we turn to whether a reasonable expectation of privacy test should also apply where an image is taken in a private place. As described above, the majority of intimate image abuse involves images that were taken in private. It is clear that someone in a private setting can reasonably expect that no one would take, or subsequently share, an intimate image of them without their consent. An additional legal requirement for the prosecution to prove that the complainant had a reasonable expectation of privacy is not needed. It would complicate the offence, placing an additional unnecessary burden on the prosecution in most cases. However, there is a need to exclude *some* images that were taken in public from the offence. A reasonable expectation of privacy test provides a way to distinguish criminal taking and sharing of intimate images from conduct which is not culpable in the same way. We therefore proposed that a reasonable expectation of privacy test should only apply to images that were taken in public.

10.52 In summary, where an image was taken in private, the prosecution should not have to prove that the person depicted had a reasonable expectation of privacy. The first limb of the test at paragraph 10.50 above was designed to achieve this.

10.53 At Consultation Question 32 we asked:

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?

Consultation responses

10.54 The majority of consultees who responded to this question agreed (30 out of 37). Consultees referred to the inherent expectation of privacy that arises from being in a private setting. Refuge submitted "in a private place, a person could always reasonably expect that a picture or video of them would not be taken without their consent". Similarly, Marthe Goudsmit said "there is inherently a reasonable expectation of privacy in a private place".

10.55 Consultees in support also highlighted the unnecessary additional element it would present, and the practical implication this would have on convictions. Refuge said it would complicate the offence by "placing an additional burden on the prosecution". The Bar Council said it would "unjustifiably complicate further the task of the tribunal of fact" and the Magistrates Association said it would "be an additional hurdle to successful prosecutions".

10.56 Conversely, Professors McGlynn and Rackley submitted that the test should apply to all images because it:

> 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.

10.57 Relatedly, a few consultees (including those who supported the proposal) questioned what would count as "private" or "public" in this context. Senior District Judge (Chief Magistrate) Goldspring said in response:

> This is very much dependent on any definition of a private place. Given the suggestion that a place may be both public and private it needs careful thought, or to be left to the court or jury by use of the "reasonable expectation" test.

The CPS recommended that "consideration will need to be given as to whether the legislation will define 'private place'". Professor Gillespie cited homes and bedrooms as clear examples of a private space, but questioned "whether other privately-owned spaces are private (e.g. school classrooms, offices, hire cars etc.)". He submitted that the common explanation of the public-private distinction – that members of the public have access – lacks clarity.

Analysis

10.58 Consultation responses highlighted the concerns we had that applying such a test to all intimate images risks over-complicating the offence to the detriment of the majority of cases. It is an unnecessary burden for the prosecution to meet where an image was clearly taken in private.

10.59 Consultees queried how a context can be clearly defined as "private", and therefore where the test would not apply. Concerns about a clear definition of public and private are understandable; we explore this further below from paragraph 10.98. Professors

McGlynn and Rackley submitted that applying a test to all images would avoid having to make this "difficult distinction" and is therefore an attractive proposition. There will be many instances where it is indisputable from the evidence that an image was taken in a private place (such as a bedroom or toilet). We acknowledge that in other cases, a decision will need to be made on the facts whether an image was taken in public or private. If a test applied to all images, consideration of the circumstances in which it was taken, including whether it was in private or public would still be required albeit within the framework of the test rather than before it is applied. Therefore, it will only complicate those cases where the image was indisputably taken in private, arguably the vast majority of intimate image abuse cases. It will not remove the need to determine the context in the remaining cases. The primary aim of this project is to simplify the law and ensure better protection for victims. It is not justifiable therefore to introduce a test that makes prosecution of the majority of cases more difficult by adding an extra element for the prosecution to prove. It is possible it would also introduce an opportunity for defendants to evade liability by putting the prosecution to proof that an image was not taken in public. Where there is a genuine dispute over the context in which an image was taken, the test would apply appropriately. Consider the following examples:

(1) An image shows A nude on her bed in her bedroom at home. This image clearly shows the details of her bedroom. It is indisputable this image was taken in a private place. The prosecution should not have to prove A had a reasonable expectation of privacy in relation to the taking of the image.

(2) An image shows B lying topless on a deckchair on grass. There is only a small amount of background visible. B claims this photo was taken in her garden at home. Her housemate who is charged with taking the photo without B's consent, claims it was taken in a local park. To establish that an intimate image offence has been committed, the prosecution would have to prove that the image was either (a) taken in the private garden, or (b) taken in a public park and that B had a reasonable expectation of privacy in relation to the housemate taking that photo.[28]

(3) An image shows C on a public beach topless, surrounded by many members of the public. For the offence to apply, the prosecution should have to prove that C had a reasonable expectation of privacy in relation to the taking of an image in these circumstances.

10.60 For these reasons we recommend that a reasonable expectation of privacy test should not apply to images taken in private.

Application to sharing

10.61 This discussion has so far focussed on the taking of intimate images in a public place. We now turn to consider the sharing of such images. Consider two examples: an

---

[28] In these circumstances, the jury should be entitled to find that defendant was guilty either because it was taken in a private garden, or that it was taken in a public park and that the person depicted had a reasonable expectation of privacy. The jury should not be required to agree unanimously on where it was taken, if they are satisfied that the offence has been committed. See D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), D18.44.

image taken of a streaker at a public football match, and an image taken of the victim of a sexual assault in a public place.

- Taking an image of a streaker without their consent is not so wrongful or harmful as to be criminal. If someone then shared that image without consent it should also not be criminal. The harm and culpability are low because the image was taken of someone who was voluntarily nude at a public event.

- Conversely, sharing an image of someone being sexually assaulted in a public place should be criminal as should the taking of such an image. The harm and culpability are high because of the circumstances in which the image was taken.

10.62 The wrongfulness and harm arise from the circumstances in which the image was taken. For this reason, we proposed that the test to exclude some images taken in public should apply to both taking and sharing offences. Crucially, for both taking and sharing offences the test should focus on the circumstances in which the image was taken. This approach has already been adopted in New South Wales. The intimate image offence in section 91N of the New South Wales Crimes Act 1900 incorporates a reasonable expectation of privacy test as to the circumstances in which the image was taken, for both the taking and sharing offence.

10.63 The proposed threat offence[29] applies to all images that are included in the sharing offences. It is appropriate that images carved out from the sharing offences by this test are also carved out from a threat offence. While threats are a more serious type of behaviour generally, it should only be a criminal offence to threaten to share an intimate image when it would be a criminal offence to share that image. In the consultation paper we explained that both of the public element tests described in this chapter would apply to a threat offence.

10.64 We did not ask a specific question in the consultation paper in relation to this. However, one consultee in their response to Consultation Question 33 disagreed that the test for both a taking and sharing offence should refer to the circumstances in which the image was taken. Honza Cervenka argued:

> Months and years can pass between the events of taking and sharing. I am aware of some cases where a person attended a party (in a private, semi-public or public place, with many other people present) and was, one way or another, nude or semi-nude at one point. While the circumstances of the taking of a picture of them in that state may not pass the reasonable expectation of privacy test, what if it subsequently becomes apparent that the person was intoxicated or lacked capacity at the time? Would it still be appropriate for the photographer to continue sharing the image? I think not…. There should be separate considerations of the circumstances surrounding the taking and sharing of an intimate image.

10.65 Where the person depicted lacked capacity, through intoxication or otherwise, at the time the image was taken, it might be relevant to the voluntariness limb, though this will not address all the behaviour Honza Cervenka raises. Images could be taken of someone who was voluntarily nude in public while intoxicated but with capacity to act

[29] See Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, Chapter 12 and Chapter 12 of this final report.

voluntarily. The person depicted may never have so acted if they were not intoxicated and may seriously regret their actions if images surfaced years later. We acknowledge the general concern about changing circumstances between a taking and subsequent sharing. There may be some cases where the person at the time the image was taken, was voluntarily nude or engaging in a sexual act and did not have a reasonable expectation of privacy, but subsequent sharing of the image, years later, would cause them serious harm and is seriously culpable behaviour because of the nature of the sharing or individuals involved. However, certainty of the criminal law is important. The test necessarily carves out behaviour that is on the whole, much less culpable. It would be too complicated to try and carve out from the carve-out these very rare examples where criminalisation might be justified. Attempting to do so could risk the protection that the test provides for the greater number of people.

Recommendation 32.

10.66 We recommend that where a defendant is charged with taking or sharing an intimate image without consent, and:

(1) the intimate image was taken in a place to which members of the public had access (whether or not by payment of a fee); and

(2) the victim was, or the defendant reasonably believed the victim was, voluntarily engaging in a sexual act or toileting, or was voluntarily nude or partially nude,

the prosecution must prove that, in the circumstances as the defendant reasonably believed them to be, the victim had a reasonable expectation of privacy in relation to the taking of the image.

Breastfeeding and changing in public

10.67 In the second part of Consultation Question 33 we asked about breastfeeding in public, and changing in a public or semi-public changing room:

> 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?

Consultation responses and analysis

10.68 The majority of consultees who responded to this part agreed (28 out of 31). No consultees disagreed.

10.69 The Centre for Women's Justice added:

> A person may be "voluntarily" semi-nude in front of other persons in certain contexts but that does not [mean] they have consented to anything more than fleeting observation by onlookers around them, and thus do still have a reasonable expectation of privacy from observation that is untoward.

10.70 Marthe Goudsmit suggested other situations are analogous to breastfeeding and changing room contexts:

> People breastfeeding should be considered to having a reasonable expectation of privacy because they have privacy interests even though they are in a public place. I do think that also applies to people e.g. sunbathing topless (there is a substantial difference between consenting to being fleetingly observed and being depicted without consent).

This proposal concerns two specific circumstances in which we consider that it should be an offence to take an intimate image without consent. This does not preclude people in other contexts, such as sunbathing images, from being found to have a reasonable expectation of privacy in relation to the taking of an intimate image. It would be a matter of fact for the jury or magistrates to consider. Someone sunbathing topless will not invariably have a reasonable expectation of privacy, for example if they are on a heavily populated public beach. For this reason, it is not appropriate to include it alongside breastfeeding and changing in public changing rooms.

10.71 Many consultees addressed the breastfeeding context specifically. The Centre for Women's Justice described taking intimate images of breastfeeding as an "unpleasant invasion" that "leaves women feeling particularly vulnerable, afraid or ashamed to take necessary care of their children in public".

10.72 Some consultees[30] disagreed that breastfeeding should be characterised as an "inherently private" act. In their joint response, the End Violence Against Women Coalition and the Faith and VAWG Coalition explained:

> We do not object to there being a provision in legislation that a woman automatically has a reasonable expectation of privacy where she exposes her breast during breastfeeding. However, there are concerns as to whether breastfeeding should be considered by the law to be an 'inherently private' act and not instead normalised as entirely acceptable in public.

10.73 Refuge added that they "caution against defining breastfeeding as 'an inherently private act' as this risks stigmatising what is, in fact, an entirely normal and acceptable act". We agree that breastfeeding is not always an inherently private act and that it is, and should be, entirely acceptable in public. We still consider that it *can* be a private act; some people may experience it in this way, some may not. The wider, objective, element of privacy arises from the fact it can necessitate exposing a breast which in other contexts is inherently private (and the reason we include images of breasts in the definition of intimate).

10.74 Both joint responses from Professors McGlynn and Rackley and the End Violence Against Women Coalition and the Faith and VAWG Coalition warn that the current proposal risks misleading as to its scope:

---

[30] Including Professors McGlynn and Rackley, the End Violence Against Women Coalition and the Faith and VAWG Coalition, and Refuge.

> There is a risk… 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.[31]

10.75 We did not propose that all images of breastfeeding would be included in intimate image offences. The definition of intimate limits the application of the offences to images which show a breast that is bare, covered by underwear, or similarly exposed as if covered by underwear; or an image that shows breastfeeding and is otherwise nude, partially nude, sexual or involves toileting. Images of breastfeeding would therefore need to show a breast bare, covered by underwear or similarly exposed, to be within scope of the intimate image offences. Images of breastfeeding where no breast is visible, or the breast is covered by a scarf or clothing would not be included.[32] This proposal seeks to ensure that intimate images of breastfeeding are not excluded simply because they were taken in public. It does not aim to include all images of breastfeeding taken in public. The image must first be intimate before this test would apply.

10.76 In Chapter 2 we set out the new breastfeeding voyeurism offence, inserted into section 67A of the SOA 2003 by section 48 of the Police, Crime, Sentencing and Courts Act 2022. The offence criminalises recording, and operating equipment in order to observe, someone who is breastfeeding, without consent, and with the intent of someone observing or looking at the image, for the purposes of either obtaining sexual gratification or humiliating, alarming or distressing the person depicted.[33] This offence covers a much wider range of images than the offences we have recommended. The approach taken in the breastfeeding voyeurism offence focuses on the act of breastfeeding itself, meaning that an image taken from behind where no child or breast is visible, would be caught. In fact, the legislation states that it is irrelevant for the purpose of the offence whether or not the victims' breasts were exposed or what part of their body the perpetrator intended to, or did, capture in the image.[34] Our approach focuses on what is captured in the image, and only criminalises images that are intimate. The remit of our project extends only to images that are intimate. Additionally, the breastfeeding voyeurism offence only applies where there is the specific intent to obtain sexual gratification or humiliate, alarm or distress the person depicted by looking at the image. It will not apply where the person taking an intimate breastfeeding image does so because they are curious, because they insist it is their right to do so in public, where they have no particular intent, or where intent could not be proven.

10.77 We consider it appropriate to criminalise the taking or sharing of images of breastfeeding without consent, whether in public or private,[35] where the image is "intimate", regardless of intent.[36] We think that this addresses the most serious

---

31 Professors McGlynn and Rackley, Consultation Response.

32 Unless otherwise sexual, nude, partially nude or involves toileting.

33 SOA 2003, s 67A(2A) and (2B).

34 SOA 2003, s 67A(3B).

35 The breastfeeding voyeurism offence also applies to recording both in public and private.

36 Although we do propose that where such an image is taken or shared for the purpose of obtaining sexual gratification or humiliating, alarming or distressing the person depicted, a more serious offence will apply.

violations of privacy. There was strong support from the public and Parliamentarians for an offence that addresses voyeuristic behaviour towards women who are breastfeeding in public and taking images of them.[37] Stella Creasy MP, one of the MPs who campaigned for such an amendment, connected the behaviour to the wider context of misogyny.[38] This project cannot make any recommendations as to the criminality of distressing or voyeuristic behaviour towards someone breastfeeding that does not result in an intimate image being taken or shared, or does not involve an attempt to do so. It is generally not a criminal offence to take non-intimate images of anyone in public without their consent.[39] There are strong policy and freedom of expression reasons why. To do so without limitations would risk mass overcriminalisation. There is a different quality to taking images of someone breastfeeding; it relates to the intimacy of the act,[40] and the interference with the right to feed one's child in peace in public. The former is appropriately addressed by our recommended offences. The latter is not limited to image taking, but could be similarly violated by prolonged observation, or by directing unwelcome comments. This behaviour falls outside of our project.

Non-intentional taking

10.78 In response to this part, Kingsley Napley LLP submitted:

> Clear provision must be made to ensure that inadvertent images captured are not prosecuted. The image should centre/focus on the behaviour complained of rather than it simply being one aspect of an image captured.

We agree that inadvertent intimate images should not be captured by the intimate image offences. In Chapter 5 we explain how the "intentional" element of the offences will address this. We can see that images taken in public have greater scope for inadvertently capturing something intimate, but for an intimate image offence to apply, the perpetrator has to have intended to take an intimate image.

Conclusion

10.79 There was strong support from consultees for expressing in legislation or explanatory notes that a victim who is breastfeeding in public or is nude or partially nude in a

---

37 See Julia Cooper "A stranger photographed me breastfeeding my baby. Let's make this disturbing act illegal", *change.org,* https://www.change.org/p/a-stranger-photographed-me-breastfeeding-my-baby-let-s-make-this-disturbing-act-illegal.

38 *Hansard* (HC), 28 February 2022, vol 709, col 772.

39 See Devon and Cornwall Police, *Taking photographs in a public space* (22 January 2016, updated 16 June 2020), https://www.devon-cornwall.police.uk/advice/your-community/taking-photographs-in-a-public-space/ and Avon and Somerset Police, *Report someone taking photographs in a public place*, (2021) https://www.avonandsomerset.police.uk/report/taking-photographs-in-public-places/.

40 Julia Cooper was photographed while breastfeeding her child in a public park; upon learning that the behaviour was not criminal she started a petition that ultimately led to the current amendment. In her petition she says "I cannot believe someone would feel so entitled to photograph my body during an intimate, but otherwise completely natural act"; Julia Cooper "A stranger photographed me breastfeeding my baby. Let's make this disturbing act illegal", *change.org,* https://www.change.org/p/a-stranger-photographed-me-breastfeeding-my-baby-let-s-make-this-disturbing-act-illegal.

public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of an intimate image.

10.80 Our recommended offences will only apply to images of breastfeeding that show a breast bare, covered by underwear or similar exposed as if covered by underwear, or where the image is otherwise nude, partially nude, sexual or involves toileting. The breastfeeding voyeurism offence introduced by section 48 of the Police, Crime, Sentencing and Courts Act 2022 is both wider (it would criminalise images of someone breastfeeding that are in no way intimate or even show the breastfeeding, and also applies to operating equipment to observe) and narrower (it only applies where there was specific intent to obtain sexual gratification or to humiliate, alarm, or distress the person depicted) than the recommendations in this report. The current offence therefore criminalises a different range of images and conduct. We describe in Chapter 4 the impact this has on our recommended offences. It is possible therefore that there is justification for the breastfeeding voyeurism offence to remain if our recommended offences are implemented.

Recommendation 33.

10.81 We recommend that a victim who is breastfeeding in public or is nude or partially nude in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of an intimate image.

INTIMATE IMAGES PREVIOUSLY SHARED IN PUBLIC

10.82 The recommended offences criminalise the sharing of an intimate image. They capture both an initial sharing and resharing, where the image has already been shared by another, or by several people. Not all resharing conduct justifies criminalisation. The previous section explored when taking an intimate image in public may be less culpable; this section considers lesser culpability when images have been previously shared in public.

10.83 Addressing the criminality of resharing poses a substantial challenge. As the discussion below explains, our view is that criminal culpability must depend on the extent to which an image was previously shared in public, the consent of the person depicted to that original sharing, and the relevant knowledge of the sharer.

10.84 In this section we explain the need for limits on criminalisation and the test that was proposed in the consultation paper. We then set out the consultation responses and analysis. Based on this, we recommend a test that excludes from the sharing offences sharing an image that has previously been shared in public with the consent of the person depicted.

The need for a more limited approach to intimate images previously shared in public

Onwards sharing that should not be criminalised

10.85 The definition of sharing we set out in the consultation paper necessarily includes the sharing of images that have previously been shared in some way (“resharing” or

"onward sharing").[41] This ensures that resharing without consent images that have previously been shared with consent is captured by the offence. For example: A sends their partner, B, a nude photograph of themselves as part of consensual sexual activity. B then sends that nude photo to B's friends, without A's consent, to "show off". This behaviour is sufficiently harmful to A, and culpable on the part of B, to attract criminal liability.

10.86 It also ensures that resharing images that have been previously shared without consent is captured. An example of this would be where B's friends, in the situation described above, reshare the photo of A with their friends. Ongoing non-consensual distribution of an intimate image can be, as we described in the consultation paper, very harmful to the person depicted.[42]

10.87 However, we also recognised that there are circumstances in which sharing an image that has been shared before is considerably less wrongful, and less harmful by virtue of that previous sharing. We argued that where an intimate image was previously shared in a public place, and with the consent of the person depicted, that any onwards sharing was significantly less culpable and harmful and did not merit criminal liability. We concluded that such a situation should be carved out of the base offence.

10.88 It is useful to consider the following examples, none of which are sufficiently culpable to deserve criminalisation, but all of which could incur criminal liability without the proposed carve-out:

- A sexual video is uploaded to a mainstream porn website with the consent of the people depicted in it. A person downloads this video and emails it to their friend.
- Lending a pornographic magazine to a friend.
- C posts a partially nude photograph of themselves on their public Instagram page. D takes a copy of this image to include on a poster in their college as part of a body positivity campaign.

10.89 In such cases both the harm caused and the sharer's culpability are below the threshold for criminality for three reasons. First, the people depicted shared their intimate image in public, or consented to that sharing. Their bodily privacy and sexual autonomy are therefore not violated in the same way in these examples as where an image was not previously consensually shared in public. Secondly, the original image was made available to the public at large; those with whom it was shared could have accessed the image at the original source. Thirdly, the behaviour is also very common; resharing social media posts, sharing magazines, using images from a public source on the internet are actions many of us do daily. If these posts, magazines, and images involve nudity, partial-nudity or a sexual image they could all be caught by the base offence without the carve-out we proposed. This would risk massive overcriminalisation.

---

41 In Chapter 4 we distinguish the types on onward sharing that would not be captured by our definition of "sharing".

42 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 2.69 to 2.70.

Onwards sharing that should be criminalised

10.90 In the consultation paper we made proposals to carve out sharing that did not warrant criminalisation: sharing an intimate image would not be an offence where the image was:

(1) previously shared in public,

(2) with the consent of the person depicted.

We argued that both elements must be satisfied. If either are not, the onwards sharing is likely to be more culpable and harmful and therefore more appropriately subject to criminal prosecution.

10.91 In relation to the first element, where an image has been previously shared privately (or non-publicly) then the onward sharing would still be criminal. This is especially important because the quintessential example of intimate image abuse, as described in paragraph 10.85 above, is where an intimate image is shared in private between partners, friends, or sexual acquaintances and is then reshared to others outside that dynamic without the consent of the person depicted. In such cases the original sharing was in private, not in public, and therefore the behaviour should not be excluded from the offences.

10.92 In relation to the second element, where the previous sharing was without the consent of the person depicted then the onward sharing would still be criminal. This has a particular relevance where, for example, sharing occurs on so-called “revenge porn” websites where images have been shared publicly but without the consent of the person depicted. Any onward sharing of an image from such a website can cause significant harm, and we argued that it should not be excluded from the intimate image abuse offences.

10.93 Where an image was previously shared only in private, or in public but without the consent of the person depicted, there is an inherent expectation of privacy attached to the image that renders any onward sharing without consent wrongful.

Knowledge or reasonable belief

10.94 In the consultation paper we then considered the level of knowledge which the person who reshares such an image should be required to have before they incur criminal liability. We concluded that where they had knowledge of, or reasonable belief in, the fact the image was previously shared in public with the consent of the person depicted, their culpability was low enough not to warrant criminalisation. If they did not reasonably believe that the image was shared in public with the consent of the person depicted, then they are more culpable and it would not be appropriate to carve their behaviour out of the offence.

10.95 The following example illustrates this point. A posts a nude photo of their ex-partner B to a so-called “revenge porn” website with text that reads “LEAKED NUDE - now she will be sorry she left me”. C sees this image on the website, downloads it and emails it to a colleague. Although the image of B was shared in public, it was done without their consent. C did not have direct knowledge of the circumstances of the original sharing. C, knowing the purpose of such websites and with the caption accompanying the

message, could not reasonably believe that B consented to the original sharing. Therefore by emailing it to someone else, C perpetrates and perpetuates intimate image abuse, and should be liable to prosecution for sharing.

10.96 The situation might be different, however, if A had shared the image of B to a mainstream porn website with text that read "I'm Sally, I'm new to this site and excited to share more of my sex life with you, follow me for more pictures". C could reasonably believe that Sally consented to the picture being shared on the website as it appears that Sally uploaded it herself. If C then reshares the same image to their colleague they could assert a reasonable belief that the person depicted in the image consented to its original sharing. In this example A would have committed an intimate image offence, but if C reasonably believed that the original public sharing was with Sally's consent then C has not.

10.97 In both cases B may be caused serious and significant harm. Their image has been made available in public without their consent, and can be shared repeatedly, prolonging the harm. In such cases rapid responses from platforms to help remove the images can help reduce the risk of ongoing harm.[43] The focus for the criminal law should remain the culpability of each person who shared that image.

Public vs private places

10.98 In the consultation paper we went on to consider the nature of public and private spaces. Both online and offline spaces can be either public or private – any carve-out would need to apply equally to both. Spaces can be entirely private (such as an email exchange between two people), entirely public (such as appearing on a live national news broadcast) or, where access to the space is limited in some way, semi-public (such as a ticketed event or membership only webpage).

10.99 Given an almost infinite variety of those "in-between" spaces, we were faced with the challenge of distinguishing between circumstances that did and did not warrant criminalisation, and how a test might enable these distinctions to be made. We argued that the key feature that distinguishes public spaces such that previous consensual sharing in such a space should preclude criminalisation for further sharing was that members of the public could have access to the space either:

- without restriction (which would be an entirely public space), or
- with restriction such as payment of a fee or being a ticket holder (which would be a semi-public space).

10.100 Both entirely public spaces and semi-public spaces would be "public" for the purposes of the new offence.

10.101 We took the view that it would be impossible to draw a meaningful line between public and private spaces in statute. Instead, we argued that the courts are well placed to determine on the facts of each case whether a space in which an image was shared was public or private. In most cases it will be indisputable that an original sharing was in private (between partners, friends, members of a private club or

[43] We consider the Online Safety Bill provisions as to platform liability in Chapter 13.

organisation). Where there is dispute as to whether the sharing was in a public or private place, courts can consider all of the circumstances of the case: for example, number of people with access to the space and any limitations on access set by the original sharer. Such an approach has the benefit of flexibility without being unduly burdensome given that in the majority of cases there will be no dispute as to the fact that an image was originally shared in private.

Provisional proposal

10.102 We proposed a test that would allow the less culpable, less harmful behaviours to be carved out from the intimate image abuse offences. We provisionally proposed 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.[44]

At Consultation Question 34 we asked consultees whether they agreed with this proposal.

Consultation responses and analysis

10.103 Of the 40 consultees who provided views on this issue, 17[45] agreed overall, 10 disagreed and 13 responded "other". There was general agreement with the principles outlined above that some resharing of images previously shared in public should be excluded from the offences, and some should remain within the scope of the offences. There was support for these principles even by some who disagreed with the proposal.[46]

10.104 Refuge, in their response, agreed with the provisional conclusions in the consultation paper:

> Where images are shared with the public at large, it should not be a criminal offence to share those images further, nor should it be a criminal offence to share

---

44 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.138.

45 Including: HM Council of District Judges (Magistrates' Courts) Legal Committee; Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks Society); The Magistrates Association; Senior District Judge (Chief Magistrate) Goldspring; Centre for Women's Justice; South West Grid for Learning; CPS; The Law Society; Bar Council; Ann Olivarius; Kingsley Napley LLP; Mayor's Office for Policing And Crime (London Mayor).

46 Professors McGlynn and Rackley.

commercial pornographic images, unless it can be proven that the individual depicted was coerced into consenting to the taking of these images.

10.105 Professors McGlynn and Rackley had reservations about the ways distinctions were drawn but were supportive of the core proposition that where images had been shared publicly and with consent then onward sharing should not be an offence:

> 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…. 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.

10.106 Many consultees made clear in their responses that resharing images that were previously shared in public still has the potential to cause serious harm. Professor Keren-Paz described the potential harm where an image from a porn website is shared with people who know the person depicted personally. Those recipients – who may be family, friends or employees – may have deliberately avoided accessing the image on the porn site because of the relationship they have with the person depicted. They may also have not been aware that they had access to the image. Honza Cervenka referred to the example we gave in the consultation paper where an image was taken from someone's Instagram account and displayed in a student area. He asked in his response, whether the person depicted might have to walk past their own image every day if they were a student there; the context of an education provider being very different from an Instagram page. In their response, campaign group #NotYourPorn explained that is very common for sex workers' content to be reshared without their consent on different websites than those to which they were originally uploaded and submitted that this posed "a real risk to the wellbeing of online sex workers".

10.107 We acknowledge that there is the potential for serious harm to a range of victims where an image that was previously shared in public with consent is reshared without consent. However, we remain of the view that the culpability of the person in resharing these images is not sufficient to criminalise them for these actions.

10.108 The main concerns raised by consultees involved the "grey area" between the clear examples of criminal and not criminal behaviour described above. We turn now to consider what consultees told us about:

- Consent to sharing in public – issues arose over what constitutes consent, when there is reasonable belief in consent, and the position when consent is withdrawn.

- Limited or conditional sharing – issues arose regarding the position when images were shared to a limited audience, the definition of public space for these purposes, and views on how the law should deal with intimate images which have previously been shared for reward.

- Burden of proof – issues arose in relation to who should bear the burden of proof.

Consent

10.109 A strong message that came through the consultation responses was that consent to one sharing should not be taken as consent to further sharing. Refuge submitted that:

> The law needs to be extremely clear that consenting to share intimate images with one person/group of people, regardless of its size and regardless of whether this is in a place where members of the public had potential access, does not automatically translate into consent to share outside of that group

10.110 Similarly, the London Mayor's Office for Policing and Crime commented that "consent given once should not be assumed as consent for distribution in different formats".

10.111 We agree that the law should be clear on this. Under the offences we recommend, where an image has been shared in private with consent, each subsequent act of sharing requires consent, or a reasonable belief in consent, in order to not attract liability. However, this does not address the problem which arises where an image has been previously shared in public. There are difficult questions about the extent to which consent is relevant when considering the criminality of onward sharing.

Reasonable belief in consent

10.112 As we discuss above, in the consultation paper we provisionally proposed that in order to avoid liability a person must have a reasonable belief that the image they have reshared without consent, was previously shared in public with consent.

10.113 Some consultees – including those who agreed with our provisional proposal, disagreed, or gave no indication either way – were concerned with issues relating to reasonable belief in consent to the original sharing. This was primarily expressed as an evidential issue concerning non-consensual sharing to mainstream porn sites which purport to require consent for all images they host.

10.114 Professor Alisdair Gillespie made this point in his response:

> As is well-known, many pornography sites have space for 'amateurs' or 'real-amateurs'. While some sites will have 'revenge' or 'voyeur' labels, it is known that some footage is actually consensual (as evident by the manner in which it is filmed, the 'victim' looking in a particular location, the presence of particular lighting etc). Similarly, some material that is posted as consensual is not…The position is more complicated by the fact that many websites will say that they only host lawful material or will take-down non-consensual material, although there is significant doubt that they do so (often wanting extraordinary proof of it being 'non-consensual').

10.115 Ann Olivarius of McAllister Olivarius shared her experience representing victims of intimate image abuse:

> Many of my image abuse clients have had their images shared without their consent on well-known, large-audience pornography websites that allow users to post their own photos and videos... User postings, in fact, are an integral part of the business model of these websites. These sites all have Terms of Service which users must agree to prior to uploading images. But none of these websites have any verification

> system in place; they are not legally required to do so, and any such system would threaten their financial stability. After all, these websites profit from image abuse. As a result, few users or viewers of these websites harbour any honest expectation that all the images posted are lawful and consensual – especially when many videos are titled in such a way as to imply the lack of consent (e.g., with words such as "revenge," "getting back," "ex-girlfriend," etc.). It is not clear to me that a "reasonable person" would believe that these images, although they are posted on a public website, are all consensual. Yet proving this would be a sizable hurdle for the prosecution.[47]

10.116 The example we describe above, where an image is shared on a so-called revenge porn site[48] illustrates how the context of a publicly shared image can be evidence that the sharing was non-consensual. Dedicated revenge porn sites often make explicit reference to the lack of consent or purpose of degrading or humiliating the victims. This is not limited to revenge porn sites, however. As Ann Olivarius highlights, sometimes the images themselves, the title given to the image or video or comments or captions uploaded with it can similarly evidence non-consent. Our proposed test would operate in the same way in such cases and the prosecution could rely on such evidence to prove there was no reasonable belief in consent to the original public sharing.

10.117 Ann Olivarius further suggested that the test could be more explicit as to what would be considered when determining whether belief in consent to a previous public sharing was reasonable:

> Perhaps the final text of this new offence could include something to the effect that a reasonable belief that the person depicted in the image consented would take into account the totality of the context in which the image appeared, including the nature and reputation of the website or online host, the title of the image, the username of the person who posted the image, other information provided in the comments about the image and depicted persons, and similar.

10.118 We anticipate that all relevant circumstances could be considered under a test which requires a reasonable belief in consent. We can see merit in providing a non-exhaustive list in legislation. We envisage that such a list would include:

- nature of the site, page, or place in which the image was originally shared and/or is hosted;
- any title, caption, description, or comment accompanying the image, and whether it appears to be authored by the person depicted and/or the person who originally shared the image;
- any statements made by the person depicted about the nature of the image and its original sharing;

---

47 Professor Tsachi Keren-Paz made a similar point and referenced the prevalence of non-consensual images in mainstream porn sites.

48 And see Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.120.

- known information about the person who originally shared the image including relationship to the person depicted.

10.119 Consultees were also concerned about images shared publicly without any reference to the consent of the person depicted. Ann Olivarius and Professor Gillespie described how mainstream porn sites may purport to require evidence of consent, but that this is rarely or never verified or enforced in any way. It was also noted that people accessing images on such websites are alive to the fact they may not all be consensual. Non-consensual intimate images are a prevalent feature of commercial pornography websites. One study found that in one in eight titles of content on the front page of the most popular pornographic websites, sexually violent material, including image-based sexual abuse was described.[49] In many instances, this is a direct violation of the websites' own terms and conditions.[50]

10.120 We considered during the development of the proposed test whether content hosting sites' assertions or terms and conditions regarding consent would be relied upon to evidence reasonable belief in the consent of the person depicted, even where the perpetrator was aware that they may be non-consensual. This is not static; some sites will be more stringent than others, user knowledge and understanding of these terms and conditions will develop and change, as will wider public understanding. This is particularly true with the advent of the Online Safety Bill which imposes liability on platforms that host illegal content.

10.121 Our view remains that the test of "reasonableness" is best placed to determine such issues. It is not simply a matter of the prosecution proving someone had a genuine belief in consent, that belief must be reasonable.[51] Slateford Law recognised this, submitting in their response that the "reasonable belief" test may not be met where someone simply says they thought an image was shared with consent. In some cases, reliance on terms and conditions of a website will be genuine and reasonable. In such cases it is right that the carve-out will apply. In other cases, perhaps where an online platform is notoriously bad at enforcing their terms and conditions, it may not be deemed reasonable.

10.122 Garden Court Chambers Criminal Law Team raised the issue of consent in a different set of circumstances. They described "paparazzi photos", intimate images which are often, by their nature, taken without the consent of the person depicted and then shared without consent to the public in magazines, newspapers and online. Upskirting images of celebrities climbing out of taxis for example, used to be a

---

49 Fiona Vera-Gray, Clare McGlynn, Ibad Kureshi, and Kate Butterby, "Sexual violence as a sexual script in mainstream online pornography", *British Journal of Criminology* (September 2021), 61(5), p 1243 to 1260.

50 Clare McGlynn and Lorna Woods, "Pornography platforms, the EU Digital Services Act and Image-Based Sexual Abuse" *Inforrm* (3 February 2022) available at https://inforrm.org/2022/02/03/pornography-platforms-the-eu-digital-services-act-and-image-based-sexual-abuse-clare-mcglynn-and-lorna-woods/.

51 The CPS guidance on consent in rape and sexual offences suggests that the reasonable belief in consent test is determined by asking two questions, the first being "did the suspect genuinely believe the complainant consented? This relates to his or her personal capacity to evaluate consent". The second question is "If so, did the suspect reasonably believe it? It will be for the jury to decide if his or her belief was reasonable". Crown Prosecution Service, *Rape and Sexual Offences* (21 May 2021), https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-overview-and-index-2020-updated-guidance.

relatively common occurrence. The images themselves may demonstrate the lack of consent (for example a celebrity with their hand towards the camera lens trying to prevent an image being taken). Garden Court submitted that the previously shared in public with consent test:

> Would not avail individuals who would otherwise commit an offence by sharing articles from magazines or tabloid newspapers containing paparazzi photographs of celebrities coming within the definition of private or sexual images.

A defendant who has reshared in these circumstances would not have a reasonable belief that the original image was shared with the consent of the person depicted..

10.123 As a consequence, a person who reshares an intimate image in these circumstances may commit an intimate image offence under our recommendations, although at the lower end of culpability. In such examples, the resharing is only criminal because the original public sharing was without consent. The key target for charging and prosecution should be the primary sharer of non-consensual images. Here, the paparazzi are the ones responsible for taking the intimate image without consent and their publishers with making it available to the public at large without consent. Where they do not have a reasonable excuse (see Chapter 13 of the consultation paper and Chapter 11 of the final report for further discussion of reasonable excuse for taking or sharing that is in the public interest), there should be effective recourse in criminal law to hold them to account. In practice, if there were a reasonable excuse to share a paparazzi intimate image in public – of which the onward sharer could not avail themselves – it is unlikely that any subsequent sharing would be prosecuted. The CPS consider for all cases whether prosecution is in the public interest.

10.124 Further, the less culpable behaviour here may be excluded by our limitation to the definition of sharing (see Chapter 4). Where someone sends a link to an article with such an image, this would not be included in our definition of “sharing”, whereas the primary sharing by uploading the image to the website, will be. This will not exclude all such behaviour. However, were someone to download the image from the website and share that instead of a link, it would be included in our definition of “sharing” and not excluded by the public element tests.

10.125 We do not however, want to undermine the potential seriousness of this behaviour. We recommend the sharing offence includes resharing in acknowledgment of the potential to cause serious harm to victims by the repetitive sharing of an image which they never consented to being shared in public in the first place. Celebrities are not immune from such harm. They are more likely to be harassed by photographers in public, particularly when in a vulnerable state. Even if it is common behaviour, and at the lower end of culpability, resharing an intimate image which one knows was taken and shared without consent of the person depicted is still culpable.

10.126 Ultimately, the offences we recommend would make the taking or sharing of such an image an offence, and the paparazzi should not be taking them, nor should publishers be publishing them. While there is a risk that relatively low-culpability resharing could be prosecuted, the risk will diminish as the quantity of non-consensually publicly shared intimate images diminishes. If such an image is taken or published it will usually be in the public interest to prosecute the taker or publication. It is, however, unlikely to be in the public interest to prosecute those who reshare where culpability is

at the lower end. Additionally, our proposed definition of sharing, and in particular the acts of "secondary sharing" that we do not think should be included, may exclude some of this, lower level onward sharing behaviour. For further discussion, see Chapter 4.

Withdrawn consent

10.127 An issue raised by consultees that we did not consider in the consultation paper is where consent to the original public sharing is subsequently withdrawn. The Law Society submitted:

> It may be important to define what is expected to amount to evidence of previous consent given, and whether there are any circumstances under which such consent once given may be withdrawn.

Marthe Goudsmit, in her response, said that "consent can be withdrawn and that should be respected". Professor Keren-Paz reminded us that "data protection principles establish the right of data subject to withdraw one's consent" and asked how withdrawn consent could be addressed.

10.128 We have considered a number of examples where consent may be withdrawn to better understand the issues it presents. First, we considered accidental sharing followed by immediate withdrawal. For example: A takes a nude image of themselves to send to a sexual partner. They share it on their Instagram page instead by accident. They immediately take it down and share a post that explains they uploaded the photo by mistake. B happens to see the image as it was uploaded, and quickly takes a screenshot which they then reshare with others. While A did in fact share the image in public themselves, they did not do so knowingly, and it is therefore arguable that they did not consent to sharing the image in public. Consent must be informed about the act to which one is consenting. A's immediate withdrawal of the image, and their statement explaining that the sharing was inadvertent would be relevant to the assessment of whether B had a reasonable belief that A consented to the original sharing. If B did not see the statement and did not know that the image had been withdrawn, they might still be able to argue that they had a reasonable belief that the image was shared with A's consent. It would still be for the prosecution to prove that they did not.

10.129 Secondly, and more complicated, is a situation where the initial sharing was intentional, and the withdrawal of consent was not immediate. Say A intentionally shared their image on Instagram intending it to be seen by their followers. After a few minutes they change their mind, regret posting the image online and delete it. However, again B takes a screenshot in the few minutes that the image was posted, which they then reshare after the original image was removed. A shared the image in public with consent; changing their mind subsequently does not change that fact. Our proposed test would only address the facts at the original sharing, regardless of the state of consent to the original public sharing when it is reshared. In relation to our provisionally proposed test, A's change of mind is irrelevant.

10.130 Thirdly, resharing could occur much later than the original public sharing and the positions of individuals may have changed. For example: when she was 18 years old C agreed to a nude photoshoot for a select magazine. Now in her mid-twenties she

considers that her agreement to the nude photoshoot was naïve; she regrets having allowed the photos to be published. She publicly withdraws her consent to those images being available in public. However, that does not alter the fact that she did consent to the original sharing. Under our provisional proposals no one who reshares the images would be committing an offence. This seems right where D lends their friend an old magazine containing the images, even where they do so for the purpose of that friend obtaining sexual gratification. It is harder to defend where E, after seeing a news story in which C explains her reasons for withdrawing consent and asks people not to share the images, seeks them out and reshares them widely with the express intent of embarrassing and humiliating her. Neither behaviour is appealing, and E's is deplorable. People should be able to grow, change their minds, to make mistakes and not have them ruin or dictate their whole lives.

10.131 However, it is difficult to address such circumstances within the intimate image offences in a way that allows for certainty and clarity in law. To achieve this, images shared with consent in public where consent to the public availability of the images is later withdrawn would need to be excluded from the carve-out we propose. This would require proactive communication from the person depicted and knowledge on the part of the person resharing the image. It is not realistic to require the person depicted to inform everyone who may have had access to the image that they have withdrawn their consent. But if they do not do so, it is unfair to expect the person resharing to know that. And if the person doing the resharing does not know that consent has been withdrawn – in other words they continue to believe that the image is available in public with consent – their culpability is not sufficient to merit criminal liability. Needing to prove that either the person depicted made sufficient effort to inform, or that the person resharing had or should have had that knowledge creates real uncertainty.

10.132 However, we understand and see the force of the concerns that consultees raised. We have real sympathy for situations where an image was shared in public that the person depicted now regrets and may wish to stop the image being readily available to anyone. However, there needs to be certainty and clarity in the offences; people need to know when they might be breaking the law.

10.133 In light of the concerns expressed by consultees we think there is reason to alter our position to capture the most egregious examples of resharing where consent has been withdrawn, while still maintaining sufficient certainty in the law. We now consider that the public element test should not apply where the person depicted in the image has withdrawn their consent to the public sharing and the person who reshares knows that they have done so. In order to ensure certainty, and to focus on those sufficiently culpable, we recommend that the prosecution must prove that the defendant had actual knowledge that consent had been withdrawn.

10.134 Withdrawing consent in these circumstances effectively means withdrawing consent to ongoing public access to the image. It does not undo the original consent; the image will always have been originally shared in public with consent and that act, if legal at the time, will not retrospectively become illegal. Continued possession of the image will also not be an offence. It is the knowing onward sharing of an image, once someone knows that the person depicted does not consent to it being publicly available, that is culpable behaviour that warrants criminalisation. This is also true for images that are privately shared; someone can withdraw consent to the original

recipient having access to the image. Continued possession is not sufficiently culpable behaviour, but onward sharing is. Non-consensual onward sharing of images shared in public is included in our recommended sharing offence.

Limited and conditional sharing

Sharing to a limited audience

10.135 Another message that came through from consultation responses was that some images that have been previously consensually shared in public, but in a limited way, should be protected in law from onward sharing without consent.

10.136 End Violence Against Women Coalition and Faith and VAWG Coalition submitted that "everyone has a reasonable expectation of privacy when sharing images with a closed/limited group of people, even if it is a large group, such as OnlyFans". South West Grid for Learning, who run the Revenge Porn Helpline, "agree that content that has been shared with consent in a limited way should be protected".

10.137 We agree that serious harm can be caused by resharing without consent images that have previously been shared in public in a limited way. These are similar to the harms caused by resharing images without consent that have only been shared in total privacy. The behaviour is also very similar; there are often clear expectations around an image that is shared consensually to a limited group. Resharing images without consent outside a narrow and defined dynamic with whom the person depicted chose to share, is a culpable act.

10.138 We can conclude from the consultation responses that it is not appropriate to include all non-consensual resharing behaviour in an offence, nor is it appropriate to carve out all such behaviour. A key aspect of the responses quoted at paragraph 10.136 above is the control and limitations placed on the original sharing by the person depicted. People who share intimate images privately do so by sharing in a very limited and conditional way. They choose for example to send an intimate image to their partner in the context of a sexual relationship, or a small group who share an interest in nude art. This can be done in places that are exclusively private (such as sending a photo by post), or in places that allow public sharing, but a private method is chosen (such as sharing on Facebook but using a private message rather than a public group).

Defining public space

10.139 Consultees raised related concerns with the concepts of public and private.[52] In the consultation paper, we referred to spaces both online and offline that are public, semi-public and private. The effect of our proposal was binary; a space is either private (and therefore the carve-out would not apply) or it is public/semi-public (and therefore the carve-out would apply). Semi-public spaces were explained in the consultation paper as being spaces which members of the public could access subject to some limitation, for example by paying an entrance fee. Some limitations will be so stringent that they in fact render the space private as members of the public do not have access.

---

[52] Including: The Bar Council; Muslim Women's Network UK; Maria Miller MP; Professors McGlynn and Rackley; Professor Alisdair Gillespie.

10.140 Consider as an example a small bar. When it first opened anyone over the age of 18 could enter and buy a drink. This was a public space. Later the owner decided to charge an entrance fee. Anyone over 18 who could afford that fee was still able to enter: it was a semi-public space. The owner then introduced an exclusive membership requirement: only people who were known to and approved by the owners and who paid a high annual fee were allowed to enter. This space is now far towards the private end of the spectrum of semi-public places and may even have become a private space as it is not open to members of the public. If the owner chose to hang a nude photograph of themselves in their members only bar, they have done so knowing that they have full control over who has access to that image. They have, arguably, shared it in a private space.

10.141 We acknowledge however, that small amendments to the facts could make such examples less clear. If the owner held a party in the venue and permitted members to invite a guest, without personally vetting all guests it is arguable that they have opened the space up to members of the public for that event.

10.142 In online spaces, these concepts are arguably even less clear. Kingsley Napley LLP, in their response, asked whether WhatsApp groups could ever be public. Many WhatsApp groups are used for small group, or one-to-one communications. However, some organisations may use WhatsApp groups to share information with wider audiences. Events such as demonstrations may set up WhatsApp groups to allow anyone attending on the day to share information and pictures after the event. Professors McGlynn and Rackley, in their response, mentioned Facebook groups. In the consultation paper we described a closed Facebook group with five people in as "intrinsically private".[53] Closed Facebook groups can have thousands of people in and the entry requirements simply involve a "request" to join that is approved by a group admin. That admin may not know the people they are admitting and it is arguably public despite being a "closed" group. Similarly one could have a public Instagram page that only has five followers. If the owner of that page shared an intimate image there, they do so in the knowledge that only five people will be likely to see it. However, it is an open page and therefore anyone on Instagram could access the page if they wanted. One consultee suggested the test be whether the court could access the place during the trial.[54] Though it could be useful indicator as to whether members of the public could access a place, it would significantly limit the test. For example, if a public website was closed between the offence and trial it would not apply or if a place is only open to the public overnight, the court would not be able to access it during the trial.

10.143 Such examples demonstrate how difficult it is to draw clear lines between public and private spaces.

10.144 Professors McGlynn and Rackley submitted that lack of clarity in this area meant people could not moderate their behaviour to ensure any original sharing would retain the protection of the criminal law from onward sharing. Although we are sympathetic

---

53 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.118.

54 Gregory Gomberg, Consultation Response.

to their argument, we are not persuaded that any of the possible solutions would improve the position.

10.145 The distinction cannot be based on the place itself. It is not possible to pick distinguishing features that will apply in all cases of private sharing or all cases of public sharing. As we have seen, neither the size of the audience nor the measure of control the owner exerts over the space are satisfactory alone to determine this. It will always be a question of degree.

10.146 In the absence of clear determinative factors, the better option is for flexibility on a case by case basis. We provisionally concluded the courts are best placed to consider whether a place was private or not. In the consultation paper we explained:

> The courts have already demonstrated a willingness and ability to consider questions of the public nature of online spaces and social media… the courts in *Soriano v Forensic News LLC*[55] and *Green Corns Ltd v Claverley Group Ltd*[56] held that information that has been made available to the public in online spaces can "still be information in which an individual enjoys a reasonable expectation of privacy against mass dissemination".[57]

10.147 No suitable alternatives to judicial discretion were provided during the consultation process and we therefore remain of the view that this is the best option. We acknowledge that this leaves some ambiguity for those who want to share an intimate image in a semi-public place. However, there is common understanding of what is a public and private space so potential ambiguity is limited to this middle ground. Moreover, a set of common-sense factors similar to the issues we discuss above – including limitations and conditions on access to the space where the image is shared – should provide a guide.

Content creator sites and sharing for reward

10.148 Some places that could be considered public allow for content creators to place conditions and limitations on access to the content shared. The best known of these currently is OnlyFans, which was raised by a number of consultees. OnlyFans is a platform which allows content creators to share their own intimate images to subscribers, in return for payment.

10.149 Refuge, in their consultation response, argued that:

> Individuals consenting to share intimate images via a platform such as Only Fans, for instance, are consenting to share these images at a specific time and place and in a specific way, with specific members who can access these photos by payment or with a fee. The fact that any member of the public could potentially access these photos by providing payment/fee should not have a bearing on the question of consent here. If an individual went on to share these intimate images outside of the Only Fans platform, this would be without the consent of the depicted individual. The same logic would apply to re-sharing images that were initially shared consensually

---

55 [2021] EWHC 56 (QB).

56 [2005] EWHC 958 (QB), [2005] EMLR 31.

57 Soriano v Forensic News LLC [2021] EWHC 56 (QB) at [106].

for an intended audience in a Facebook or similar group, regardless of the size of the group or its criteria for access. Perpetrators may re-share these images with an unintended audience, such as friends, family or employers, thereby causing significant harm to that individual. It is critical that the new intimate image offence(s) would cover these types of sharing.

10.150 Professors McGlynn and Rackley asked:

> 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).

10.151 They provided views on the harm that can be caused by resharing such images:

> 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.

10.152 Dame Maria Miller MP also addressed previous sharing in spaces that are "'semi-public' (eg on OnlyFans site)" and submitted:

> Limited consent to share within a specific semi-public forum should be recognised. Individuals should be able to determine the scope of their privacy. The sharing of intimate images with a specific group of people should be recognised and respected.[58]

10.153 As we have discussed above, limits on access can provide evidence that a sharing was private rather than public, regardless of the forum used to share. This must also be true therefore for sites such as OnlyFans. OnlyFans and similar content sharing sites allow for a wide range of sharing behaviours. One could share an image to the public at large by allowing anyone to be a subscriber, or create a private group open only to individuals known to the content creator, and selectively invited, to subscribe. The two extremes are akin to sharing on a commercial porn website and a small private Facebook group.

10.154 We agree with the point made by Professors McGlynn and Rackley that numbers are not definitive. An OnlyFans account may be open to limitless subscribers, but only currently have five. Alternatively, it may have 50 subscribers, with no intention to allow more all of whom are known personally to the content creator and included due to a common interest. The former may be public and the latter private. What is key is the

---

58 Maria Miller MP also suggested considering the approach taken in Ireland, where there is no such exception for images that have been previously shared in public under their intimate image offences in the Harassment, Harmful Communications and Related Offences Act 2020. Section 3 of that Act makes it an offence to record, distribute or publish an intimate image of another without their consent where it "seriously interferes with that other person's peace and privacy or causes alarm, distress or harm to that other person". The inclusion of such a consequence element related to actual harm makes the offence more limited than our recommended base offence. In Chapter 9, we rejected the possibility of requiring proof of actual harm.

extent to which members of the public had access. Leaving aside the issue of reward, which we consider below, and having agreed that on the basis of the public nature of the original sharing, resharing images from commercial porn sites should not be criminalised, and that resharing images from a private Facebook group should be, there is nothing distinct about the access limits or criteria for OnlyFans or similar hosting websites that warrants creating an exception or differential treatment.

10.155 Should it make a difference to criminal liability for onward sharing if the original sharing was for reward? Content creator sites allow creators to make money from sharing the content. Creators may receive a direct payment for each image, a salary for being a content creator or subscriber fees. The current disclosure offence provides a defence where an image was previously shared for reward.[59] We provisionally decided against replicating that approach.

10.156 In the consultation paper at paragraph 11.122 we explained why sharing for reward was not an appropriate way of distinguishing which images should be carved out from the intimate image offences. Simply put, it creates inconsistencies that undermine the protection of sexual autonomy and bodily privacy to which individuals are entitled and which the intimate image offences aim to protect. A simple example highlights this: an image could be shared in private between two individuals but the sharing was in exchange for a reward. It is the privacy of the sharing that means it should be protected from non-consensual resharing. Where the sharing for reward was public sharing, onward sharing would not be criminalised but that is not because of the reward – it is because the sharing was public. On the other hand, an image could be shared in the most public way but not for reward, for example on a live news broadcast. Such a public sharing means it would be inappropriate to criminalise any non-consensual resharing. If reward were the basis used for carving out, the image shared between two individuals would not be protected but the public consensual sharing on national television would be. We provisionally concluded that this would be inappropriate.

10.157 Consultees' responses, where they addressed the issue of reward, agreed with our provisional conclusion. Women's Aid submitted that the commercial aspect of the original sharing should not be a factor for criminalisation: "sharing an image for financial gain does not remove a women's rights to privacy and a chosen level of consent". Professors McGlynn and Rackley agreed:

> There is no justification why sharing an intimate image for financial reward should make a difference regarding the validity of their consent or the applicability of the criminal law.

They argued that it risks perpetuating victim-blaming of those who initially shared their images.

10.158 We agree. It is crucial that a person who chooses to sell intimate images of themselves does not forfeit their right to sexual autonomy and bodily privacy so far as

[59] Criminal Justice and Courts Act 2015, s 33(5).

images of themselves are concerned. Professor Tsachi Keren-Paz drew comparisons with sex work that involves physical sexual activity:

> On a more principled level, the argument that same commercial purpose is enough for consent proves too much and is potentially dangerous: could a client B rape a sex worker and say that her consent to A should suffice since the sex act is for the same commercial purpose? If the answer is surely not, why should it be different in the image abuse context.

10.159 Where the damage being perpetrated against a content creator is fundamentally commercial in nature, there will be other more appropriate criminal offences[60] and, indeed, civil action. Responding on a different point, Laura Bloomer of Backed Technologies Ltd described "sharing content that's available behind a paywall and available only under the conditions adhered to by the subscription terms" as a potential "copyright infringement".[61]

10.160 We conclude therefore that whether an image was previously shared for reward is not a relevant consideration for determining criminal culpability of resharing in the intimate image abuse offences. In many cases, an image that was previously shared in public with consent will have been so shared for a reward. If so, our test would exclude from the sharing offences any onward sharing. It is appropriate that it is the public nature of the sharing that determines whether onward sharing is criminally culpable conduct, not the fact it was for reward.

Conditional sharing

10.161 Professors McGlynn and Rackley submitted:

> 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.

10.162 Sharing can be conditional. For example, a person could share in a place where access was only granted to "verified" people. Such verification could require new "friends" to read rules of engagement that specify all discussion and content shared is to stay within the page. Terms and conditions on websites, social media platforms and commercial porn websites are all common examples of conditions. They often specify that no resharing, copying or downloading is permitted.

10.163 These are all steps one could take to place conditions around a particular sharing. If a person only shares intimate images in a place over which they have a large amount of control, they have shared in a conditional way rather than to the public *at large*. Conditions may assert a lack of consent to any resharing. As we explain above, and inherent in the commercial porn website and magazine example, resharing can be done without consent but still not be sufficiently harmful and culpable to warrant

---

60 It is noted that numerous criminal offences serve to protect the commercial interests of victims, including theft, bribery, money laundering, and fraud offences.

61 Laura Bloomer, Consultation Response.

criminalisation. Therefore, conditions that seek to restrict onward sharing by withholding consent are not a satisfactory way of carving out less culpable behaviour from an intimate image offence. This is a different consideration to withdrawn consent, which we do believe increases the culpability of the resharer in a way that makes criminalisation appropriate. Where someone withdraws consent to the original sharing they are saying they do not consent to that image being available in public at all. Where the consent to public or semi-public sharing is conditional on an image not being reshared, there is still consent to the image being available in public in some way. Resharing in either of these contexts may be reprehensible behaviour but withdrawing consent to the image being available at all to the public is a stronger statement about the privacy of the image, making resharing more arguably criminal.

Burden of proof

10.164 We also proposed that the legal burden of proof for the previously shared in public test should be on the prosecution.[62] One consultee commented on this proposal, disagreeing and suggesting instead that it should be for the defendant to prove. Honza Cervenka, of law firm McAllister Olivarius, said:

> I believe this should instead be a defence with the burden on the defendant. If it is not, I fear that prosecutors will turn away worthwhile complaints with a broad-brush approach that will make it de facto difficult to prosecute cases where the intimate image has been shared in the public (i.e., the nuance of "reasonable belief" will be, for practical reasons, overlooked).

10.165 He suggested that an approach similar to section 75 of the Sexual Offences Act 2003 might be adopted. That section provides a list of circumstances in which it is presumed that a complainant did not consent to sexual activity. The defendant is then subject to an evidential burden to raise an issue as to whether the complainant consented. If the defendant is able to provide such evidence, the prosecution must prove beyond reasonable doubt that the complainant did not consent, and that the defendant had no reasonable belief in consent.

10.166 It is difficult to see how this approach might work in the context of intimate images shared consensually in public.

10.167 We have not heard any evidence to suggest that the reasonable belief in consent element would be treated any differently by prosecutors than it is in any other offences with a reasonable belief element. We also note that the CPS agreed with the proposed test.[63] Therefore we are not persuaded that the evidential burden should instead be on the defendant.

Altering images and resharing

10.168 The final issue we address in this chapter is the resharing of publicly shared images that have been altered. Onward sharing of altered images can occur in two ways:

---

62 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 11.128.

63 CPS, Consultation Response.

(1) A makes an intimate image by digitally altering a photograph and posts the altered image to an online group of which B is a member. B subsequently shares that image with other groups. The liability of B will be governed by all the principles discussed above; there is no difference here between sharing an image that has been made and sharing an image that was taken.

(2) A posts an intimate photograph to an online group. B downloads that photograph, alters the image so it is still intimate, and shares the altered image with other groups.[64]

We now turn to how such examples should be dealt with by the intimate image offences.

10.169 Where an image that has previously been shared in public is altered before being reshared, it constitutes a new, altered image and therefore the previously shared in public test will not apply. This is true regardless of whether the altering made the image more, less, or equally "intimate" than the original intimate image. This could result in inconsistencies.

10.170 Consider two possible situations where A shares a nude image of themselves on their OnlyFans page to which they have 10,000 subscribers. This is considered to be an image shared previously in public (because the number of subscribers, and lack of limitations on who those subscribers are, render it a public space).

(1) First; B, a subscriber, downloads the image and emails it to A's workplace to "advise them" about A's online presence. This would not be a criminal offence under our recommended offences because the image was previously shared in public, with A's consent.

(2) Secondly: C, a subscriber, downloads the same image of A. C then alters it so that A is seen to be in a different pose from the original image, and shares it with a friend, D, who is a fan of A. The position is now different; this would be a criminal offence under our recommended offences as C has shared an image of A without A's consent that was not previously shared in public.

10.171 The altering by C made a new image, although it was equally "intimate" as the original. While it may seem inconsistent at first glance to criminalise C's behaviour but not B's, there is clear justification which is consistent with the rationale for the offences. People who share intimate images whether in private or public have autonomy over their images when they share them with consent. Altering an image in any way removes that autonomy. The person depicted has had their control over the image removed from them; they are no longer able to determine how they are depicted and have not consented to alternative depictions. The violation of their sexual autonomy and bodily privacy makes it appropriate to criminalise sharing an

---

64 Professors McGlynn and Rackley, in response to Consultation Question 14, commented that there should be no inconsistency in protection between victims who have an image made and victims who have an image taken. We considered this point and worked through all the ways that made and taken images would be treated in a sharing offence. This exercise led us to consider the issue of altering images that have previously been shared.

altered intimate image, even when the original image was intimate and shared in public previously.

10.172 In the examples above, B has shared an image that was exactly as A had intended an image of themselves be shared in public. C however had depicted A in a way they had not consented to. Images that are altered to be more intimate than the original are the most obviously harmful, and clearly should be covered by the offences. The principle is the same however for images that are altered to be equally or less intimate than the original, as long as the resulting image is still within the recommended definition of intimate.

Conclusion

10.173 In the consultation paper and in this chapter, we have explained how culpability and harm can be lower when resharing an intimate image that has previously been shared in public. We have discussed how bodily privacy and sexual autonomy may not be violated in the same way compared to images that have never been previously shared, or only shared in private. We concluded that the harm caused to victims may be lower than in other instances of intimate image abuse, although this will not always be the case and is therefore not the reason for recommending the test. The low culpability of the perpetrator is sufficient justification for recommending the test we provisionally proposed.

10.174 It is worth emphasising that the carve-out we recommend will serve to exclude a small number of cases. The test does not apply to any instances of taking without consent. It does not apply to instances of sharing where there has been no previous sharing, or where the previous sharing was in private. We understand that these make up the vast majority of cases of intimate image abuse perpetuated in this jurisdiction.

10.175 In the consultation paper we proposed a two-limb test that would effectively carve out from the intimate image offences resharing behaviour that is significantly less culpable and not worthy of criminalisation. The majority of consultation responses on this issue were supportive of the proposed test. Although a significant minority disagreed, there was general support for the aim of the test we proposed. A number of important issues were raised by consultees, both those in support and those who disagreed. These have been explored in detail above and have caused us to consider alternatives and clarify our proposal. In light of consultees' views, we agree that resharing an image that was previously shared in public with consent, where that consent is withdrawn and the perpetrator knows consent is withdrawn, is sufficiently culpable to be included in sharing offences.

10.176 We therefore recommend 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,

(3) unless the person depicted subsequently withdrew their consent to the image being publicly available and the defendant knew that they had withdrawn that consent.

10.177 The courts are best placed to determine whether the place where the image was previously shared was public or private. The legal burden of proof for this test should be on the prosecution.[65] The consent provisions and presumptions in sections 74 to 76 of the Sexual Offences Act 2003 that we recommend should apply to the intimate image offences should apply to the consent elements of this test. (See Chapter 8 for a full discussion of consent.)

Recommendation 34.

10.178 We recommend 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 the person depicted in the image consented to that previous sharing, unless

(3) the person depicted subsequently withdrew their consent to the image being publicly available and the defendant knew that they had withdrawn that consent.

CONCLUSION

10.179 In this chapter we have described the contexts where a public element should exclude some behaviour from intimate image offences:

(1) where an intimate image is taken in public; and

---

65 That is, the prosecution would have to prove that either: (1)(a) the intimate image was not previously shared in a place to which the public had access; and (b) the defendant did not reasonably believe that it was previously shared in a place to which the public had access; or (2)(a) the person depicted did not consent to that previous sharing; and (b) the defendant did not reasonably believe that the person depicted consented to that previous sharing; or (3)(a) the intimate image was previously shared in a place to which the public had access with the consent of the person depicted; (b) the person depicted subsequently withdrew their consent to the image being publicly available; and (c) the defendant knew that they had withdrawn their consent.

(2) where an intimate image has previously been shared in public.

We have recommended two public element tests that would effectively carve out the relevant images from intimate image offences of taking, sharing, and threatening to share. The tests will only apply to images that were taken in public or previously shared in public. In cases that involve images that are taken in private, never previously shared or only previously shared in private, the prosecution will not be required to satisfy these tests.

Chapter 11: Limiting liability for the base offence

INTRODUCTION

11.1 The base offence that we have recommended is necessarily broad. It is needed to capture a wide range of conduct that cannot be categorised by particular motivations. It requires only that a person has taken or shared an intimate image without consent and without reasonable belief in consent. However, because of this breadth, we recognise that there will be instances where the taking or sharing of an intimate image of another, even in the absence of consent, will not warrant criminalisation. The circumstances and nature of the conduct can mean it is not morally wrongful or harmful, or the harm caused is minimal. It is appropriate for the base offence to be limited so that a person who takes or shares intimate images without consent in such circumstances is not held criminally liable. In this chapter we recommend two ways of appropriately limiting the base offence to achieve this; a reasonable excuse defence and two specific exclusions. First we set out the scope of the base offence and the elements already recommended that limit its application.

The base offence

11.2 Under the "base" offence we recommend in Chapter 6, it would be an offence for a person (D) intentionally to take or share a sexual, nude, partially-nude or toileting image of someone else (V) if—

(a) V does not consent; and

(b) D does not reasonably believe that V consents.

11.3 As the base offence contains no additional intent element, it has greater potential than the existing disclosure, voyeurism and "upskirting" offences to incorporate conduct which should be considered justifiable and acceptable in the circumstances. There are three ways that the scope of the base offence is contained so that justifiable and acceptable conduct will not be criminalised: through limits on the base offence, through a reasonable excuse defence, and through two specific exclusions.

Limiting the base offence: images taken or shared in public

11.4 There are two limits that apply to the base offence; the two additional elements that only apply when the image is taken or has previously been shared in public. We discuss these limits in depth in Chapter 10. However, they are outlined here to show that they are distinct from the defence and exclusions.

11.5 First, where:

(a) the intimate image was taken in a place to which members of the public had access (whether or not by payment of a fee); and

(b) the victim was, or the defendant reasonably believed the victim was, voluntarily engaging in a sexual act or toileting, or was voluntarily nude or partially nude,

Then it will not be an offence to take an intimate image unless the prosecution can prove the victim had a reasonable expectation of privacy in relation to the taking of the image.

11.6 Secondly, it will not be an offence to share an intimate image without the consent of the person depicted where:

(a) 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

(b) 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,

(c) unless the person depicted subsequently withdrew their consent to the image being publicly available and the defendant knew that they had withdrawn that consent.

11.7 These are component parts of the offence; the legal burden of proof would be on the prosecution to prove beyond reasonable doubt that none of these circumstances existed.

Limiting the base offence: reasonable excuse

11.8 In this chapter, we first consider how a defence of reasonable excuse can be included in a new legislative framework for intimate image abuse. We begin by outlining the nature, structure and possible scope of the potential defence. The defence should only be available to the base offence which has the potential to capture a broad range of conduct but not to any additional intent offences where that intent would inherently negate the justificatory basis of any defence. In other words, if an image is taken or shared with an intent to obtain sexual gratification or to cause humiliation, alarm or distress, or there is a threat to share, this invalidates any possible reasonable excuse and remains criminally culpable.

11.9 We then address the five categories of the defence that were provisionally proposed in the consultation paper at Consultation Question 42 and other conduct that may not fall within the listed categories but which may constitute a reasonable excuse. We recommend that a defence of reasonable excuse should be available against the base offence and set out what the scope of that defence should be.

Limiting the base offence: exclusions

11.10 Secondly, we consider two categories of images of children that should not be within the scope of the base offence: images taken or shared of young children of a kind ordinarily shared between family and friends; and images of children taken or shared in connection with their medical care or treatment where there is valid parental

consent. We recommend that this conduct should be specifically excluded from the offence as opposed to relying on a defence. We recommend that taking or sharing in such circumstances will not be an offence.

REASONABLE EXCUSE DEFENCE

The nature, structure and scope of a reasonable excuse defence

The nature of the defence

11.11 In criminal law, where the prosecution has proved the offence (or where the defendant has admitted the offence) then it must be asked whether any defences are available.[1] In this chapter we use the term "defence" in that context: a defence arises for consideration only if the offence can be established.

11.12 The precise sense in which the word "defence" is used is important. Sometimes it may appear that a defence has been raised but in reality the point in issue will be an element of the offence; the prosecution must produce evidence and present argument to prove the element. For example, in prosecuting the base offence the question may arise as to whether an image was taken in a public place; it may appear that the accused is raising a defence that the image was taken in a public place, but it is not in fact a defence. Rather, it is an element of the offence.

11.13 In considering the defence it is helpful to outline some overarching theoretical and practical matters.

11.14 First, we consider and recommend a single defence: a defence of reasonable excuse. There are different ways the defence can be established and we will refer to these as the grounds of the defence or categories of the defence. However, there is only one defence.

11.15 Secondly, a defence typically takes one of two forms, drawn from criminal law theory:[2]

(1) Justification (also called permission): here, a defendant is in effect saying it was acceptable for them to do what they have done, or they had a right to do it, because of the reasons why they did it. As a consequence, they should not be criminally liable.

(2) Excuse: here, a defendant effectively says they recognise that it was wrong to do what they have done – that the conduct was not acceptable – but argues that, in spite of being wrong, there are considerations that, in all the circumstances, mean they should not be criminally liable.

11.16 The law does not require a defendant to identify the rationale when they claim a defence. However, the rationales are helpful to keep in mind because, although our

---

1 Intoxication, for example, may be thought of as a defence but it is not technically a defence; rather the defendant may be arguing that intoxication may have prevented them from forming the requisite intention. See generally Horder, Ashworth's Principles of Criminal Law (9th ed 2019) 216-217.

2 J Horder, *Ashworth's Principles of Criminal Law* (9th ed 2019), pp 100, 216-217, 237; V Tadros, *Criminal Responsibility* (2005), pp 122-123; John Gardner, 'In Defence of Defences' (first pub 2002) in John Gardner (ed), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*, (2007) Ch 4.

list of grounds of the defence is non-exhaustive, the listed grounds are primarily justificatory. By extension, and consistent with consultation responses, any ground or circumstances that could give rise to the defence should be justificatory. That is, unless conduct was justifiable, it should attract criminal liability.

11.17 Thirdly, although the listed grounds are justifications and any non-listed grounds are also likely to be justificatory, we have labelled the defence "reasonable excuse" rather than "reasonable justification". That may seem anomalous and potentially confusing. However, the label has been chosen because it is commonly understood in the law, is consistent with established legislative terminology, is a phrase that has been interpreted by the courts, and provides a practical, single umbrella under which different grounds may sit. We expand on these points below but note here that the label "reasonable excuse" does not mean that the defence captures excusatory rationales.[3]

The structure of the defence

11.18 The defence limits the extent to which the "base" offence criminalises conduct. It is not the only limit; there are also limits within the offence itself. Setting out the offence and the defence together shows how the question of whether a justification existed may arise in proving the offence (with the associated burden of proof falling on the prosecution) whereas other aspects of justification will fall to the defence to establish.

11.19 Under the defence we recommend in this chapter, a defendant who has committed the base offence will not be criminally liable if they have a reasonable excuse for doing so.

11.20 The legal burden of proof will fall on the defendant, who would be required to prove on the balance of probabilities that they had a reasonable excuse for taking or sharing an intimate image without consent.

11.21 In Chapter 12, we recommended a separate offence for threats. The reasonable excuse defence we consider in this chapter would not be compatible with the threats offence.

The scope of the defence

11.22 In the consultation paper we examined how the concept of reasonable excuse operates in the law in England and Wales, and what types of conduct or circumstances a defendant might rely on to establish reasonable excuse. In doing so we examined the existing law in England and Wales as well as the position in comparable jurisdictions. We also noted that although reasonable excuse does not feature in the existing disclosure offences in England and Wales or Scotland, those offences have an additional intent element and so a defence is arguably unnecessary. It was, however, included in the more recent intimate image provisions in the Australian states of New South Wales ("NSW") and Western Australia ("WA").[4]

---

[3] We also note here that, although we use "reasonable excuse" in our analysis and recommendations, we make no recommendations about wording that should or should not be used in legislative drafting.

[4] See Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 13.10 to 13.16.

11.23 We take the two issues of operation and types of conduct in turn to examine what will constitute a reasonable excuse.

The operation of "reasonable excuse": an undefined concept

11.24 There are various offences in England and Wales that contain either a defence of reasonable excuse or within the offence require that the prosecution prove the defendant acted "without reasonable excuse".[5] The case law makes it clear that reasonable excuse is not defined but, instead, "what constitutes a reasonable excuse is essentially a question which is dependent on the circumstances of each case in the context of the offence to which it relates".[6] The Court of Appeal has said that "the concept of 'reasonable excuse' is par excellence a concept for decision by the jury on the individual facts of each case".[7] Whether there was a reasonable excuse for taking or sharing an intimate image without consent would be a question of fact to be determined by the trier of fact (the magistrates or the jury).

11.25 In the language of the explanatory memorandum accompanying the Bill in Western Australia, a defence in undefined terms:

> give[s] courts the capacity to consider the myriad factors that may amplify or diminish the criminality of a given distribution. It recognises that there are circumstances in which the distribution of an intimate image is consistent with community standards and should therefore not give rise to criminal liability.[8]

11.26 A consequence of this, however, is that the defence of reasonable excuse is potentially broad in scope. As we indicated in the consultation paper, although there is merit in the argument that each case should be judged on its own facts, there is a risk that an unguided or unconstrained defence may be so broad as to undermine the objective of preventing the serious wrongs and harms of intimate image abuse, diminishing the protection a new offence should offer to victims.

11.27 Informed by approaches to intimate image offences in other jurisdictions, we considered how best to mitigate that risk.

Types of conduct: a non-exhaustive list of grounds

11.28 We looked at existing defences to intimate image offences in several common law jurisdictions and found compelling the New South Wales and Western Australia approaches that included some guidance in a statute.[9] As we explained in the

---

5 See the offences listed in *JB v DPP* [2012] EWHC 72 at [14]-[16] and more recently, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

6 *JB v Director of Public Prosecutions* [2012] 1 WLR 2357, [2012] EWHC 72 at [15] (per Sir John Thomas P (as he then was)).

7 *R v AY* [2010] 1 WLR 2644, [2010] EWCA Crim 762 at [25].

8 Parliament of Western Australia, *Criminal Law Amendment (Intimate Images) Bill 2018 Explanatory Memorandum presented in the Legislative Assembly* at p 5. https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=DC68AED6CEC73FFB482582B90017A6C3 (last visited 6 May 2022). The WA defence was a "reasonable person" defence.

9 These statutes state that an offence will not have been committed "where the conduct was reasonable in all the circumstances" and in considering whether the conduct was reasonable the court will have regard to the

consultation paper, we considered that this makes for more transparent decision-making and encourages a more unified and consistent approach while retaining a degree of judicial discretion and flexibility to take account of the circumstances of individual cases.

11.29 We were also influenced by Lord Rodger's view in *R v G*:

> It is comparatively easy to identify examples of excuses which could never be regarded as reasonable. It is similarly easy to give examples of excuses which everyone would regard as reasonable. … [But] it is impossible to envisage everything that could amount to a reasonable excuse …. Ultimately, in this middle range of cases, whether or not an excuse is reasonable has to be determined in light of the particular facts and circumstances of the individual case.[10] Unless the judge is satisfied that no reasonable jury could regard the defendant's excuse as reasonable, the judge must leave the matter for the jury to decide. When doing so, if appropriate, the judge may indicate factors in the particular case which the jury might find useful when considering the issue.[11]

11.30 With these approaches to guidance in mind we then considered several potential justifications or permissions that identify circumstances in which the defendant's conduct could be acceptable.

11.31 It would be possible to position the justifications as either examples of conduct or circumstances upon which a single defence of "reasonable excuse" could be based, or as series of discrete defences. Our view in the consultation paper was that the former approach was preferable. As we explain below, it is also the approach we take in our recommendation.

11.32 A non-exhaustive list of grounds is consistent with existing approaches to the concept of reasonable excuse – it remains undefined – while providing practical guidance that increases certainty in the law. The non-exhaustive list approach is appropriate for our recommendations because on the one hand there are clear categories of circumstance that may support a reasonable excuse defence and, on the other, we cannot and should not discount the possibility that other circumstances may arise where a defendant can legitimately claim to have a reasonable excuse for their actions, albeit that the claim does not fall within an anticipated category. As we noted in the consultation paper, examples might include limited further sharing of an image in order to obtain advice on how to proceed on receipt of it, or recording of care being received in a nursing home. The use of an inclusive list as part of our recommendations thus provides explicit grounds for the most frequent scenarios where there is reasonable excuse to take or share an intimate image without consent, while providing scope for courts to consider reasonable excuse in rarer examples

---

following: the nature and content of the image; the circumstances in which the image was recorded or distributed; the age, mental capacity. vulnerability or other relevant circumstances of the depicted person; the degree to which the accused's actions affect the privacy of the depicted person; the relationship between the accused and the depicted person; and (in WA only) any other relevant matters: Crimes Act 1900 (NSW), s 91T; Criminal Code Compilation Act 1913 (WA) ('Criminal Code 1913 (WA)'), s 221BD(3)(d).

10 *R v G* [2009] UKHL 13 at [81].

11 *R v G* [2009] UKHL 13 at [81]. See also, *R v AY* [2010] 1 WLR 2644, [2010] EWCA Crim 762 at [25].

where appropriate. We consider both of these examples explicitly at paragraphs 11.195 and 11.198 below.

The provisional proposals

11.33 We provisionally proposed a defence of reasonable excuse with a non-exhaustive list of categories. At Consultation Question 42 and Summary Consultation Question 17 we asked:

> We provisionally propose that there should be a defence of reasonable excuse available in the context of our provisionally proposed base offence which includes:[12]
>
> (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?

Consultation responses and analysis

11.34 Just under half of consultees who responded to these questions agreed with our proposal (113 out of 256).

(1) There were 48 responses to Consultation Question 42, of which 28 agreed, four disagreed, and 16 neither agreed nor disagreed.

(2) The Summary Consultation Question received 208 responses, of which 85 agreed and 64 disagreed. Fifty-nine neither agreed nor disagreed.

The inclusion of a reasonable excuse defence

11.35 As the responses indicate, of those who expressly agreed or disagreed with the proposal there was a majority of support for including a reasonable excuse defence. Breaking the responses down adds weight to that support in significant respects.

11.36 First, it appears likely the weaker level of support and higher proportion of disagreement in summary consultation responses was influenced by the fact that, unlike the full consultation paper, the summary paper did not provide examples of behaviours that would fall under each category of conduct or comment on their reasonableness. The absence of examples may have been particularly relevant where summary paper consultees expressed disagreement with the defence; there were

---

[12] The consultation paper considered grounds 2 and 3 together but they have been separated here at the outset, which reflects the consultation responses and is consistent with the form of our recommendation.

often statements that they could not think of examples of instances where non-consensual taking or sharing of intimate images could be justified. This can be contrasted with the full consultation responses, where only four of 48 disagreed.

11.37 Secondly, among the organisational responses, there was substantial support. A significant number agreed that there should be a reasonable excuse defence. This included: five judicial respondents, five academics, five victim support groups, three operational groups (including policing groups and the Crown Prosecution Service ("CPS")), eight legal stakeholders (including individual practitioners, law firms, and representative bodies), and four medical bodies.

11.38 Of the consultees who responded positively, the majority did not give reasons for supporting the "principle"' of the reasonable excuse but rather focused on the details of the defence they would perhaps reconsider. General comments in support included the CPS, who stated that "providing for the defence of reasonable excuse would be proportionate". The Magistrates Association noted: "we agree as this is consistent with existing legislation".[13] Similarly, the Youth Practitioners Association said, "we agree that there should be a defence of reasonable excuse and are satisfied with the scope of its definition".

11.39 Thirdly, although some consultees (responding to the summary paper) expressed a blanket disagreement with the inclusion of a reasonable excuse defence, it was more common for responses expressing disagreement to be focussed on or driven by concerns about some of the conduct that was proposed to give rise to a reasonable excuse. We deal with those concerns in depth in the next part of this chapter.

11.40 Finally, other general suggestions and points of caution were raised. Welsh Women's Aid said that there should not be a defence where the perpetrator intended to cause distress. We proposed that the reasonable excuse defence would apply only to the base offence, therefore if the defendant were charged with the more serious offence requiring proof of intention to cause humiliation, alarm or distress, the defence would not be available. Welsh Women's Aid supported guidance and monitoring of its use in court to ensure it is appropriate and not causing harm to victims. They submitted that the guidance "should be informed by expertise from specialist services and victim's groups to ensure that they are watertight and do not allow for loopholes or distressing cross examination".

A non-exhaustive list of grounds

11.41 With respect to the general approach of using a non-exhaustive list of grounds, consultees overall expressed support for the defence in the form proposed, though few gave specific or explicit comments about the general approach. Among those who did, the CPS suggested non-exhaustive lists are beneficial and generate certainty. West London Magistrates' Bench agreed it is "appropriate" that the list be non-exhaustive as there will be other contexts where the defence should apply.

11.42 However, the Bar Council supported an exhaustive list:

---

[13] The CPS also noted this.

> If appropriate, an exhaustive list is preferable to an inclusive list as it provides certainty and consistency. There will always be unusual and unforeseen factual scenarios which may or may not justify the application of a 'reasonable excuse' defence, but that eventuality can be addressed by the use of the prosecutorial discretion.

We agree that certainty and consistency are important, however we are aware that prosecutorial discretion does not always operate to address every eventuality. It is also important to ensure that this defence is flexible enough to allow for future developments. The exponential rise in medical images necessarily being shared by phone due to the pandemic demonstrates that we cannot always predict how intimate images will be used in the future.

11.43 We note also the comments of consultees who expressed support for indicating what might be a reasonable excuse, but also highlighted the need for guidance. For example, HM Council of District Judges (Magistrates' Court) Legal Committee agreed "that it is important to provide notice to society about behaviour which is not criminal and therefore that a list of possible reasonable excuses should be set out in statute". Welsh Women's Aid submitted: "there needs to be very clear explanations and guidance on the use of 'reasonable excuses'". In the second part of this chapter, when we look at what might constitute a reasonable excuse, we discuss the possibility of such guidance.

The breadth of the defence

11.44 That said, there were concerns raised about the concept of reasonable excuse and potential breadth of the defence. The Rt Hon Baroness Morgan of Cotes stated that she agrees with the concerns Dr Charlotte Bishop raised and which we cited in the consultation paper: there is a risk that objective standards become masculine standards.[14] There were also comments made to the effect that the defence should not be too wide in scope; West London Magistrates' Bench submitted "we believe the 'reasonable excuse' defence should be construed narrowly". There were comments that it should not "pave the way for legal loopholes" or be able to be "manipulated by perpetrators", especially where coercive control underpinned conduct.[15]

11.45 Other consultees raised concerns about the breadth of the defence in terms of the categories described in the consultation paper. While this issue is addressed in depth below, some examples may be helpful here. Muslim Women's Network UK felt "the definitions need to be tightened and examples given of the circumstances in which the excuses would apply". Professors McGlynn and Rackley suggested that, with the exception of investigation of crime and legal proceedings with representatives, the categories "might be too broad and ultimately undermine the purpose of the legislation" and recommended that "clear examples are given of the limits of these excuses in the explanatory notes". Slateford Law suggested that the scope of the public interest category needs to be made clear in explanatory notes.

---

[14] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 13.20.

[15] Clive Neil, personal response; Anon 15, personal response; The Mayor's Office for Policing and Crime (London Mayor).

11.46 We agree that the scope of the defence should not be so wide as to permit culpable conduct to avoid criminalisation, nor should it be amenable to manipulation or allow the concept of reasonableness to operate to blame victims. The listed grounds will be important in ensuring the defence is appropriately limited, as will the way courts exercise discretion in relation to conduct that is not listed.

11.47 Overall, our view remains that a reasonable excuse defence should be available, and that the non-exhaustive list of grounds is an appropriate approach. As the comments above foreshadow, however, the content of the possible grounds gave rise to a range of comments and concerns that warrant attention. We now turn to those matters.

Conduct which might constitute "reasonable excuse"

Consultation responses and analysis

11.48 It was particularly noteworthy that helpful comments and analysis regarding the conduct and circumstances that might constitute a reasonable excuse were received from across the spectrum of responses. Responses from those that agreed, those that disagreed, and those that were neutral on their answer to the consultation question all informed our thinking in the ways they addressed the categories of conduct we listed in the proposed provisions, other categories of conduct that we had not included, and examples of real and hypothetical specific conduct.

11.49 We consider the responses relating to conduct under six headings:

- five headings relating to the five grounds listed in the proposed provision; and
- a sixth heading relating to grounds that were identified in the consultation paper but which were not listed in the proposed provision including the onward sharing for the purpose of seeking advice about how to deal with the images.

For the purposes of preventing, detecting, investigating or prosecuting crime

The provisional proposal

11.50 We proposed that conduct constituting a reasonable excuse would include taking or sharing the defendant reasonably believed was necessary for the purposes of preventing, detecting, investigating or prosecuting crime.

The rationale

11.51 In the consultation paper we reviewed the ways that the law in England and Wales and in comparable jurisdictions (Scotland, New South Wales and Western Australia) excluded from criminal liability conduct that was aimed at the prevention, detection, investigation or prosecution of crime.[16]

11.52 Our starting point was that the existing disclosure offence provides such a defence:

[16] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 13.25 to 13.57.

> It is a defence for the person … to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.[17]

11.53 There are similar provisions for intimate image offences in the comparable jurisdictions, though there were two points of difference that were potentially contentious relating to:

(1) whether the defence should be available to any person, or whether it should only be available to law enforcement officers (or other public officials tasked with those functions); and

(2) whether it is sufficient that the defendant reasonably believed the conduct was necessary for those purposes, or whether it was in fact necessary.

11.54 On the first point our view was that the defence should be generally available. It is of course clear that law enforcement officers and others tasked with the relevant functions will be required to share material that includes intimate images in their work. However, it was also plain that at times members of the community may possess intimate images that they rightfully want to share with law enforcement. For example, a person may want to share with law enforcement an intimate image they have been sent or discovered if the image is itself unlawful or provides evidence of unlawful conduct (such as a sexual assault). A person may also want to take an image with a view to providing information or evidence to authorities.

11.55 On the second point, we noted other laws regarding data protection and harassment where a defence was stated in similar terms and with the burden of proof on the defendant, but in neither was the threshold stated as reasonable belief.[18] However, our view was that the reasonable belief threshold was appropriate as the alternative would set the bar too high, especially as the burden of proof will rest on the defendant. As we explained in the consultation paper:

> To require the defendant to prove that the act was necessary risks imposing a disproportionally high threshold and has the potential to criminalise conduct where the defendant was insufficiently culpable to warrant the sanction of the criminal law. The defendant's reasonable belief that the act was necessary should be sufficient. There is a public interest in the effective prevention, detection, investigation and prosecution of a crime which outweighs the harm that might inadvertently be caused to individual victims, and negates the wrongfulness that would be present in other circumstances.[19]

---

17 Criminal Justice and Courts Act 2015, s 33(3).

18 Data Protection Act 2018, s 170(2)(a); Protection from Harassment Act 1997, s 1(3)(a). See the consultation paper at 13.52 to 13.56 for detailed discussion. We were aware of no cases on the former and the Information Commissioner's Office consultation response stated they held no records of cases where the defence had been utilised.

19 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para13.57.

Consultation responses and analysis

11.56 This category of the defence was the one least singled out for comment by consultees.

11.57 Some consultees[20] suggested this category should be restricted to situations where an image was only shared with, or taken by, the relevant authorities whether immediately or with relevant haste, and images deleted after such use. Such a restriction does not seem to us to be necessary. The facts of each individual case, including who an image was taken by and shared with, will be considered when the court looks at whether the defendant had the requisite reasonable belief that sharing was necessary for the stated purposes. Therefore, an image shared with friends rather than law enforcement might mean the defence is not made out. That said, we consider that it is preferable to allow the category to apply generally rather than only to law enforcement officers. Engagement with the community may often be key to gathering evidence of crime.

11.58 Stonewall did not oppose the proposed defence, but submitted that it must be drafted or explained in such a way that does not disproportionately impact LGBTQ+ people, in particular trans people. In respect of this category in particular they pointed to the "transphobic narratives that trans people are 'sex offenders', 'sexual predators' and 'paedophiles'". They raised a concern that:

> Given harmful narratives that erroneously link trans people with criminal behaviour, we are concerned that this provision could be interpreted as enabling individuals to take pictures of trans people without their consent in order to 'expose' them of undertaking criminal activity without reasonable grounds.

11.59 We recognise the concern but in our view the defence would be not be available in the circumstances described, where the image was intimate and therefore within scope of the intimate image offences. Where an intimate image of a trans person was shared publicly, as opposed to being shared with law enforcement, it would be very difficult to establish a reasonable belief that public sharing was necessary for the purpose of preventing, detecting, investigating, or prosecuting crime.

11.60 Overall, there is a clear case for this proposed provision to be included in the list of non-exhaustive grounds.

For the purposes of legal proceedings

The provisional proposal

11.61 We proposed that conduct constituting a reasonable excuse would include taking or sharing the defendant reasonably believed was necessary for the purposes of legal proceedings.

The rationale

11.62 The disclosure offence in England and Wales does not provide for any defence based on a claim that disclosure was necessary for the purposes of legal proceedings. As we noted in the consultation paper, because an element of the disclosure offence is an

---

[20] Dr Brian J B Wood, Anon 57, Joanne Clark, Anon 107, Anon 136.

intent to cause distress to the person depicted, such a defence is arguably unnecessary. However, given our proposed new base offence does not have that additional intent, it is conceivable that such a defence might be appropriate.

11.63 We were informed also by the existence of the defence for intimate image offences in comparable jurisdictions. In New South Wales and Western Australia there are provisions that, in different ways, carve out exceptions for taking or sharing that is "reasonably necessary" for the conduct of legal proceedings.[21]

11.64 However, what was most significant in our consideration was attention to the range of possible circumstances in which a person might reasonably believe that taking or sharing a non-consensual intimate image is necessary for legal proceedings. This was particularly important given pre-consultation evidence that in family proceedings there has been a rise in the use of intimate images, including evidence that images may be used maliciously.

11.65 In the consultation paper we drew on work by Ariel Ricci, Julie Pinborough and Frances Ridout, who identified several scenarios where intimate images may be taken or shared for use in family proceedings:[22]

(1) injunctions – to prevent sharing intimate images, threats to share intimate images, or creating online profiles to impersonate the victim and encourage unwelcome advances by third parties;

(2) private law proceedings – as part of a fact-finding exercise to determine the extent of controlling, manipulative, or harassing behaviour during a relationship or following separation to the extent that it is relevant to child arrangements;

(3) public law proceedings – where vulnerable teenagers or young people are victims of sharing (or threats to share) intimate images;

(4) financial remedy proceedings – where sharing intimate images or posting information on social media platforms may have direct impact on an individual's current or future employment and might therefore become a relevant conduct issue, or sexual photographs or videos might become disputed property;

(5) in any proceedings, allegations may arise of threats to release intimate photos or videos as a means to manipulate or coerce an individual into taking or ceasing a particular course of action.

11.66 Our provisional view was that legal proceedings warranted inclusion in the non-exhaustive list because, although there were concerns about the potentially wide reach of the exception and the motivations for some actions, non-consensual images may be relevant and admissible and it was appropriate to ensure that parties were not

---

21 Crimes Act 1900 (NSW), Section 91T(1)(c); Criminal Code 1913 (WA), section 221BD(4); Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 13.60 to 13.68.

22 Ariel Ricci, Julie Pinborough and Frances Ridout, "Malicious Use of Intimate Images: The problems and some practical and legal remedies" (2015) *Family Law Week* https://www.familylawweek.co.uk/site.aspx?i=ed146063; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 13.71.

hampered or undermined in adducing relevant evidence by the threat of criminal sanctions.

Consultation responses and analysis

11.67 The consultation responses on this category of the defence revealed very high levels of concern that it could undermine the purpose of the offence, especially the protection it gives to victims. As Dr Charlotte Bishop put it:

> It is important this defence is not able to be exploited by [a defendant] e.g. to claim they had a 'reasonable excuse' to share images of their former partner when they are going through child contact proceedings in the family courts (e.g. to show court that [the victim] isn't a fit mother, etc.)

11.68 Marthe Goudsmit made a similar point that she "would be hesitant to include this as it seems to offer opportunities for abuse in family court proceedings (eg divorce cases with an abusive partner arguing that the images were taken for the purposes of the legal proceedings)".

11.69 Consultees made it clear that this risk is neither theoretical nor minor. Responses were overwhelmingly characterised by concerns that intimate images are misused in family proceedings with the purpose of humiliating, manipulating, coercing or controlling a female partner who had already been subjected to abuse in a relationship.

11.70 The responses did not always distinguish between the use of images that had been taken consensually and those taken non-consensually, and there was no quantitative data available, but across the board the view was that sharing intimate images was abused in family proceedings.

11.71 South West Grid for Learning reported that they "frequently see cases where content is shared within family proceedings to shame one party, this cannot ever be necessary". They "fail to see why in any legal proceedings it is necessary for the actual images to be shown, particularly when considering the impact on the victim" and suggested where there is a genuine need, a statement of the image's existence should suffice.

11.72 Julia Slupska of the Oxford Internet Institute explains that:

> Recording images in the home, including intimate spaces such as bedroom or bathrooms, is often used as a part of coercive control. Abusive partners have also used such footage in legal proceedings, for example to retain custody over a child.

11.73 The Suzy Lamplugh Trust also noted that they "see cases where perpetrators share 'revealing' images of ex-partners in court to demonstrate that they are of a 'promiscuous' nature" and would be "very concerned that in these cases the defendant would use this point as a reasonable excuse".

11.74 There were significant worries that this ground of defence may not merely enable abuse but could incentivise it.

11.75 Refuge expressed concern that this category (alongside investigating crime and administration of justice) may have unintended consequences:

> Incentivising perpetrators/accused perpetrators to seek out images of the victim-survivor to use in evidence in court, attempting to demonstrate the previous behaviour of the victim-survivor is part of a pattern of behaviour implying consent to the images being taken.

They suggest that an "overarching public interest defence only" would be less open to "unintended consequences".

11.76 Professor Tsachi Keren-Paz "strongly disagree[d]" with our provisional proposal to include this category of defence and suggested family law proceedings should be excluded from it. He argued that the adversarial nature of legal proceedings invites tactical intimate image abuse:

> I tend to think that whenever the context is adversarial – where the sharer of the image intends to use it in order to get some advantage over the subject of the image, the taking and sharing should be criminalised. Analytically, such use is very close to threats and blackmail. In terms of public policy, failing to criminalise such behaviour creates an incentive to take and share such images, which is, in my opinion, socially undesirable.

He suggested that if such a defence is included, it should not include "reasonable belief", to limit its application.

11.77 Where a threat to share has been made, even in the context of genuine legal proceedings, the defence would not be available as it applies to the base offence only and not to the recommended threat offence. However, it is not difficult to see that if the defence operates to permit images to be shared in family proceedings, it could embolden perpetrators and incentivise such threats being made.

11.78 The misuse of images may also occur in other areas, such as immigration proceedings. In a meeting with the Angelou Centre, they explained that they had seen intimate images used against victims with no recourse to public funds and insecure immigration status. They provided examples of threats to send images to the Home Office as "proof" that the victim is engaging in illegal activity or when a victim is in the UK on a spousal visa, threats to share images that would suggest they are no longer in a relationship with the spouse. They noted that such behaviour is "often in the context of abusive relationships".

11.79 The Angelou Centre also provided an insight into the actual harm caused, particularly to Black and minoritised victim survivors, due to the constant threat that intimate images of them could be shared:

> …there is often the fear that the image, if shared, could impact in both multiple and distinct ways if they are engaged in family law proceedings, criminal proceedings or immigration processes. There is also the fear that the sharing of these photos could impact on their engagement within these systems. For example a woman seeking asylum fearing that the Home Office would criminalise her for the sharing and distribution of intimate photos as a result of the hostile environment.

11.80 Muslim Women's Network UK suggested that some intimate images may be necessary for a victim to seek an Islamic divorce (citing an example of images proving adultery on behalf of the husband where the husband refuses to grant an Islamic divorce). Religious proceedings may fall outside the definition of legal proceedings, however, the taking or sharing of an intimate image without consent in the context of religious proceedings may still constitute a reasonable excuse. The defence is non-exhaustive in order to enable such flexibility.

The scope and application of the category

11.81 We have been left in no doubt that the behaviours and risks identified by consultees are both serious and real. We are acutely aware of the need to ensure that any defence does not create an undue gap in protection for victims who are going through family court proceedings or other proceedings where parties may misuse images. However, this sits alongside another challenge: we need to ensure that the new offence does not operate to limit the ability of parties to family proceedings to adduce any evidence relevant to their case. This issue is particularly acute with the number of unrepresented parties in family courts who may not benefit from advice from lawyers as to the relevance of evidence.

11.82 Some of the comments above include approaches suggested by consultees. Some consultees suggested that the ground of defence should not be included at all, or that it should not apply in family proceedings, or that it should be included but should be carefully limited. Other suggestions were also made.

11.83 Professors McGlynn and Rackley suggested that the defence could only apply in proceedings where there is a representative. While that could offer some professional oversight to the use of such images, the current state of legal representation in family and immigration courts means this could be an unfair limitation. They also suggested that altered images should be excluded by way of this defence as there is no justification for their use in legal proceedings. This argument is valid in cases where the intimate image is taken or shared as evidence of the act it purports to show, however the sharing of altered images shared by a perpetrator and therefore needed as evidence of harassment for injunctive relief could be justified in the same way "original" images would be. Further, if an image is altered to make it less intimate (for example by covering genitals with a black strip) to mitigate harm to the person depicted, that altering should not make the defence unavailable.

11.84 Given the consultee responses we received we sought further expert input. Resolution[23] provided a written response that included the following:

> Resolution believes a legitimate reasons type exception or defence is needed in the context of family law proceedings. Unfortunately, that doesn't mean that individual parties would not seek to abuse the availability of such a defence.

We agree with both these propositions.

---

[23] Resolution is a membership organisation for professionals working in family justice, such as family lawyers, who work to a Code of Practice that prioritises constructive, non-confrontational resolutions.

11.85 The risk of abuse is plain but ultimately it is clear that there may be circumstances where intimate images, including intimate images that were taken without the consent of the person depicted, may be relevant and admissible in family court proceedings. While the recent introduction of no-fault divorce[24] should significantly remove the risk of use of intimate images in one area of proceedings, there are other circumstances where such images may be used.

11.86 For example:

> A and B were married and have a child. They are now separated and the child spends time living with each. A fears that the child is exposed to risk of harm when staying at B's house because they suspect B is engaging in risky behaviour in the home involving sex, alcohol and drug use with others. A engages a private investigator or friend to take photographs through the window of the house. The photographs include intimate images. A then wishes to use these images as evidence to seek an order that prevents the child living with B and imposes conditions on which B may have contact with the child.

11.87 In these circumstances, non-consensual intimate images may provide relevant and admissible evidence in proceedings.[25] If the offence operates to prevent A disclosing those images to a lawyer and/or to the court then this would be unsatisfactory; it both prevents a party adducing relevant evidence and affects the safety of the child. However, the defence would not operate to allow unfettered non-consensual taking or sharing of intimate images because there must be a reasonable belief that it is necessary to take or share the images for the purposes of legal proceedings. Within the test there are three controls:

(1) Genuine belief: there must be a belief, and by definition a belief must be genuine.

(2) Reasonable belief: the belief must be reasonable.

(3) Necessary: the taking and sharing must be reasonably believed to have been necessary for the specified purpose.

11.88 These controls apply to each individual taking or sharing. It is not a matter of the defendant saying "I reasonably believed it was necessary for me to share this collection of images."

11.89 Legal professionals and the courts must be alert to these elements of the defence. If A is unable to prove that their belief was genuine or reasonable or that they thought the conduct was necessary then they will be unable to establish the defence. A finder of fact may take into account circumstances such as whether:

---

[24] Matrimonial Causes Act 1973, section 1, as amended by the Divorce, Dissolution and Separation Act 2020; the relevant provisions came into force on 6 April 2022 under the Divorce, Dissolution and Separation Act 2020 (Commencement) Regulations 2022.

[25] There are other ways images may come into existence. Resolution told us that their members "are noticing an increased use of indoor CCTV where there is a fear of violence within a home which clients may wish to disclose to their lawyers and the court".

- A party has told a legal adviser or the court that images exist and discussed their potential relevance, or whether they have shared those images without first discussing them.

- A party has taken and/or shared a greater number of images than are needed to establish their case.

- A party has shared images with people with whom it was not necessary to share the images, or indicated that they may do so.

- A party has shared specific images or parts of images that were irrelevant or beyond what was required to establish a case.

- A party has shared images in other forums (eg, social media or directly with other individuals) as well as with lawyers or the court. (A defendant sharing in any other forum would almost certainly not be able to rely on this ground of defence; any reasonable excuse defence would need to rely on a different ground).

- There is evidence of motivations other than sharing for the purpose of legal proceedings, including evidence of abuse, coercion or controlling behaviour in the past or in the proceedings.

- The type of proceedings that are in issue. (Resolution, for example, told us that intimate images may be raised by unrepresented parties in financial remedy proceedings but are "highly unlikely to be relevant" to those proceedings.)

Considerations such as these may lead a finder of fact to conclude that the defendant cannot establish that they reasonably believed that taking or sharing the images was necessary for the purposes of legal proceedings.

11.90 In some circumstances there is the clear potential for abuse. For instance, where a woman is seeking a non-molestation order against an abusive former partner, the abuser may share intimate images in the course of proceedings to cause her distress, no matter that such sharing is unnecessary for the proceedings. However, those same controls will apply all the more and the abuser will not be able to establish the defence.

11.91 It is important, however, that these controls are active in proceedings. It is of little comfort and effect if they do not result in protecting vulnerable parties. In our view this will require legal professionals and courts to be acutely aware of the potential for abusive taking and sharing of intimate images, and to ensure that:

- any person who may engage in such conduct is made aware at the first possible opportunity that they may be criminally liable;

- any use of images in evidence or sharing among court officials is limited to what is in fact necessary for the proceedings.[26]

[26] We address this point further below at para 11.101 in discussing the administration of justice.

11.92 This may be facilitated by a combination of professional practice, training and awareness raising about the defence and its scope, practice and procedural rules, or other strategies that ensure that, while the rights of parties to obtain advice and adduce evidence are protected, they are not protected at the expense of vulnerable victims.

11.93 Resolution told us the following, which captures some of the challenges and some of the ways that controls may be made effective:

> We would expect lawyers to consider and advise whether it is absolutely necessary to file actual images within proceedings and to seek the direction of the court as necessary about how evidence should be presented. In child arrangements cases some judges will want to see images to be able to assess the evidence, its relevance and weight, as part of fact finding in the context of [Practice Direction 12J]. The court has to consider what other evidence is available to the court that provides a sufficient factual basis on which to proceed. Unrepresented parties may simply exhibit images to statements and serve such – it can be difficult to unpick and assess whether this is about a lack of understanding of the relevance of evidence and how it should be presented, or to deliberately cause distress or for the purposes of humiliating usually a female partner. What has happened will unfortunately not necessarily come to the judge's attention until the hearing itself. …
>
> It also seems difficult to frame a defence which cannot be abused by sometimes highly manipulative individuals. A reference to sharing of images where the court directs for evidential purposes or with the consent of the court may assist.
>
> In terms of protections within existing procedures to limit risk, this is partly about the understanding of domestic abuse and robust case management by the judge and any professionals involved, but many perpetrators or alleged perpetrators of domestic abuse are not legally represented.

Regulators

11.94 Consultees queried whether regulatory processes would be included under legal proceedings, and suggest a specific exception is appropriate. The General Medical Council (GMC), for instance, suggested that it would be helpful to clarify that "legal or regulatory" proceedings would fall under reasonable excuse so they can consider material relevant "to a fitness to practise investigation". They note that when evidence is prepared for a case that "has been referred to the Medical Practitioners' Tribunal Service for hearing" it would fall under legal proceedings, but that:

> Where a case is in the earlier triage and investigation stages of the fitness to practise process, the situation is less clear. We would also need to consider the position of complainants, who may need to share images with us if we are to be able to investigate genuine concerns. We are uncertain whether this aspect of the matter has been considered.

11.95 We agree that regulatory processes of this type constitute legal proceedings for the purposes of the defence, and that it is appropriate to clarify this by including "regulatory" in this category.

Conclusion

11.96 In our view legal or regulatory proceedings should be a listed ground of defence. The rights of parties to seek advice and adduce evidence without being criminally liable is essential. However, the defence should be carefully and narrowly construed, and procedural, professional and practical steps taken to mitigate the risks of abuse. In particular, where taking or sharing is done to humiliate, manipulate, coerce or control then the defence should not operate to protect a perpetrator.

For the purposes of the administration of justice

The provisional proposal

11.97 We proposed that conduct constituting a reasonable excuse would include sharing the defendant reasonably believed was necessary for the administration of justice.

The rationale

11.98 In the consultation paper we reviewed the existing law in England and Wales and in comparable jurisdictions. We addressed the issue alongside taking and sharing for the purposes of the legal proceedings.

11.99 As we explained in the consultation paper, it is inevitable that intimate images will need to be shared in the course of the administration of justice and the defence:

> Usually covers situations where images have been gathered during the course of an investigation of a crime and are presented as evidence in a criminal trial or disclosed to the defence as part of service of evidence or disclosure of unused material and/or shared with the bench, judge and jury as part of the trial process. Therefore, it may extend to a broad range of individuals who work within the justice system.[27]

11.100 In comparable jurisdictions the exception is made in different ways, either encompassed by "legal proceedings" or specifically with reference to the administration of justice.[28]

11.101 Many of the points in the discussion of legal proceedings above apply equally to grounds relating to the administration of justice. In particular, a person must reasonably believe that the conduct is necessary for the specified purpose. The controls inherent in the test (above at 11.87) apply here so that, for instance, it would be unlikely that a defendant could establish the defence if they have shared images with colleagues who did not need access to the material. Similarly, as we explained in the consultation paper, images should be used sensitively; for example, certain parts of an image might be blacked out or blurred for distribution whilst retaining the originals. Whether this good practice was adhered to would be a relevant consideration. Generally, however, the distribution of these images for the administration of justice should not be criminal.

---

[27] Consultation paper at 13.59; Crown Prosecution Service, *Legal Guidance, Indecent and Prohibited Images of Children* (30 June 2020) https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children.

[28] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 13.60 to 13.68.

11.102 However, the most significant distinction we saw between the legal proceedings and administration of justice categories was that we did not think the taking of an intimate image could ever be necessary for the administration of justice. As such, our proposal was limited to sharing for this category of the defence.

Consultation responses and analysis

11.103 Consultees did not generally raise specific concerns about this ground of the defence. Rather, the core concerns were those raised in the previous section, which related to bringing images into the legal process. There was no disagreement with our view that this ground of defence should not apply to taking an image.

11.104 However, Professors McGlynn and Rackley suggested that interpretation of "administration of justice", along with medical and public interest categories, might be too broad and could therefore "undermine the purpose of the legislation". We appreciate this concern, though in our view the risk of undermining the purpose of the legislation does not significantly arise in this category of the defence. To the extent that it does, the development of professional, practical and procedural strategies outlined in the previous section should mitigate that risk, especially alongside a careful and suitably narrow construction of the defence.

11.105 Regarding regulators, the situation above envisioned by the GMC involved the administration of regulatory proceedings as well as evidence gathering. We consider that the administration of regulatory proceedings would be captured by the administration of justice in this ground of defence.

11.106 Overall, there is a clear case for including the administration of justice in the listed grounds, though only with application to sharing.

For a genuine medical, scientific or educational purpose

The provisional proposal

11.107 We proposed that conduct constituting a reasonable excuse would include taking or sharing for a genuine medical, scientific or educational purpose.

The rationale

11.108 In the consultation paper our review of the existing law explained that the disclosure offence does not contain a defence to this effect, though it may be unnecessary given that the disclosure offence has an additional intent element requiring proof that the defendant intended to cause distress.

11.109 In comparable jurisdictions there is more scope for protecting conduct done for medical, scientific or educational purposes. The Scottish disclosure offence also has no express provision but, as well as having an additional intent element, there is a general public interest defence that may capture such conduct.[29] In Australia, the New South Wales intimate image laws contain an exception for recording or distributing an intimate image without consent "for a genuine medical or scientific purpose".[30] The

---

29 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(3).

30 Crimes Act 1900 (NSW), s 91T(1)(a).

Western Australia exception is broader, though only applies to sharing: a person does not commit an offence if "the distribution of the image was for a genuine scientific, educational or medical purpose".[31]

11.110 The consultation paper gave particular consideration to whether and how conduct done in the course of medical care and treatment might not give rise to criminal liability. Intimate images may be taken and shared for the purpose of, for example, diagnosis or treatment. In doing so the paper drew attention to distinctions that arise where the non-consensual taking and sharing of an intimate image depicts a child lacking capacity to consent, an adult lacking capacity to consent, or persons with capacity to consent. It considered especially the scope of protections that are provided by the Mental Capacity Act 2005 ("MCA 2005"). In all instances where a defence might be raised it would be essential that the conduct was done in the best interests of the patient.

11.111 Although we did not mention this in the consultation paper, it is worth noting that a similar defence exists in the indecent images of children regime. The main offences in section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988 have a defence of "legitimate reason". Legitimate reason is not defined. The CPS guidance for indecent and prohibited images of children offences advises that:

> Prosecutors are reminded that where an intimate image is made, published, sent or stored for clinical reasons in accordance with the operational guidance led by NHS England and Improvement, this will normally amount to a "legitimate reason" in relation to the patient and/or carer and to any clinician involved in the process.[32]

Persons lacking capacity: medical care and treatment

11.112 Where an adult or child lacks capacity and there is a third party with lawful authority to consent, and the third party consents to the taking or sharing of intimate images that are required for diagnosis, care or treatment, that consent has only a limited effect. The conduct would be lawful to the extent that any potential civil wrong has been consented to. However, with regard to criminal liability, under the new base offence (or, indeed, under the current disclosure offence) that same taking or sharing would not be considered consensual because the consent is not from the person depicted. It is helpful to set out the position separately for adults and children.

11.113 Where an adult lacks capacity that gap is met by the statutory protection in section 5 of the MCA 2005.[33] This provides a general defence to criminal charges (such as physical assault) in the following circumstances:

> (1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if—

---

31 Criminal Code 1913 (WA), s 221BD(3)(a).

32 Crown Prosecution Service, *Indecent and Prohibited Images of Children – Legal Guidance* (30 June 2020) https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children.

33 This defence under the Mental Capacity Act 2005, s 5 also applies to children aged 16 or 17 who are deemed to lack capacity.

(a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and

(b) when doing the act, D reasonably believes—

(i) that P lacks capacity in relation to the matter, and

(ii) that it will be in P's best interests for the act to be done.

(2) D does not incur any liability in relation to the act that he would not have incurred if P—

(a) had had capacity to consent in relation to the matter, and

(b) had consented to D's doing the act.

11.114 Our view was that section 5 would provide protection against liability under the base offence for acts connected with the care or treatment of adults lacking capacity.

11.115 Where a child under the age of 16 lacks capacity, the protections of section 5 of the MCA 2005 will not apply. We have concluded that it is appropriate to have a similar protection from criminal liability under intimate image offences when taking or sharing an intimate image in connection with the care or treatment of a child under 16 who lacks capacity, where there is valid parental consent. This should operate as an exclusion, rather than as part of the reasonable excuse defence, to mirror the effect of section 5 of the MCA 2005. We therefore discuss this further as an exclusion from paragraph 11.220 below.

Persons lacking capacity: medical research

11.116 Where an adult lacks capacity to consent to participation in research then the MCA 2005 may be relevant. The Act regulates medical research that would involve conduct that would be unlawful if not consented to or, where an adult subject lacks capacity to consent, if it meets a series of conditions set out in sections 32 and 33. The consultation paper explained that, where an adult lacked capacity, taking or sharing intimate images for research purposes could in some very limited, and perhaps rare, circumstances meet those conditions and thus would not be unlawful. However, the fact it might not be unlawful under the MCA 2005 does not have the same effect as section 5 does for treatment and would not prevent a defendant from being criminally liable under the new offence.

11.117 Where a child lacks capacity to participate in research then the MCA does not apply. There will need to be consent from a third party with lawful authority but, as with treatment, this will not provide a defence to intimate image offences as the consent is not from the person depicted.

Persons with capacity: medical treatment, care and research

11.118 In the consultation paper we set out two examples where a person who had shared an intimate image without consent might potentially argue their conduct was justified, and as a result they should not be criminally liable for intimate image offences. We set those examples out again here as they provide the context for responses.

Example 1

D, is a GP who recently met V through a social networking app. D and V take a number of consensual sexual and nude images of each other. V sends D a flirty "dick pic" and D notices an aberration on the penis. He forwards the picture to his NHS email account, and then sends it without any identifying information to a friend who is a urologist, asking him for his professional opinion. The urologist states the aberration may be malignant. D sends V a message asking him to seek urgent medical attention. V is outraged and reports the matter to the police. D admits the non-consensual sharing with his urologist friend but claims that it was for a genuine medical purpose.

Example 2

E is developing a compound made from natural ingredients to deal with erectile dysfunction. The compound aims to boost testosterone production in men, particularly those over 35. As part of her research E has five male volunteers, aged between 30-60 and during the trial process she has been taking images of the men's penises before and after the drug has been administered to demonstrate its effect. All the volunteers have given their consent for the images to be taken for research purposes. During an academic conference E shares the anonymous images and her findings with those who are attending. Three of the five volunteers state that it was never their intention to consent to the public disclosure of their images. D states it was for genuine scientific and educational purposes.

11.119 Our view in the consultation paper was that D and E should have sought consent to the sharing of the intimate images from the persons depicted in them and the failure to do so may have civil or disciplinary consequences. However, our provisional view was that criminal liability should not attach to this conduct. First, the wrongs and harms described in Chapter 5 are weakly or minimally present.[34] Although the non-consensual sharing does violate the victims' sexual and bodily privacy, sexual autonomy and sexual freedom, infringe upon their dignity, and may cause some psychological harm, the anonymisation of the images mitigates both the wrongfulness and harmfulness of the conduct to some extent.[35] Secondly, the sharing of the images was for a genuine medical, scientific or educational purpose, benefiting both individuals (as in Example 1) and society (as in Example 2).

[34] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, Chapter 5.

[35] We discuss images taken where the person depicted is not identifiable in Chapter 3.

Our provisional conclusion

11.120 In the consultation paper, we provisionally concluded that the MCA 2005 provides a defence in some circumstances but there are other situations in which no defence is available:

(1) research involving adults lacking capacity that is permitted under the MCA 2005 (which would be for a genuine medical or scientific purpose);

(2) treatment involving children lacking capacity for which consent has been provided by someone with parental responsibility (which would be for a genuine medical or scientific purpose);

(3) research involving children lacking capacity for which consent has been provided by someone with parental responsibility (which would be for a genuine medical or scientific purpose);

(4) conduct for a genuine medical, scientific or educational purpose where consent was not sought from the depicted person.

11.121 We considered whether the first three situations could be resolved by specific, bespoke changes that would make the consent of a third party sufficient to found a defence and potentially some extension of section 5 of the MCA 2005. In the consultation paper, we reached the conclusion that:

> Where the taking or sharing without consent was for a genuine medical, scientific or educational purpose, a defence of reasonable excuse would be more flexible. In particular, it could also accommodate circumstances involving persons *with* capacity who have not consented to the taking or sharing of an intimate image.[36]

We have reconsidered this in respect of circumstance 2 involving medical treatment or care of children who lack capacity. See below from paragraph 11.220 for the full discussion.

Consultation responses and analysis

11.122 This category of the defence attracted a deal of concern and criticism from consultees. Many comments went to specific issues and circumstances, though there were some general comments. Whether framed in general or specific terms, most comments were in some way directed towards the breadth of the defence and argued that it should be narrowly construed or, at least in some circumstances, not available to a defendant.

11.123 Regarding the general position, the Bar Council, for example, noted that they were "not aware of a similar provision in a statutory defence to any other criminal offence" and suggested that, although the intended purposes are narrow, the wording could be "exploited by defendants seeking to take advantage of the broad statutory language" and queried whether "genuine" would need further definition.

---

[36] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 13.95.

11.124 Regarding the specific categories, the responses raised a wide range of issues and we subsequently sought further expert input, especially in relation to education and research. We approached more than 20 bodies or individuals for views, including research ethics committees at universities, and had further stakeholder engagement to discuss some of the issues raised. The analysis below takes account of both consultation responses and the subsequent input.

Medical care and treatment

11.125 We received consultation responses from six professional bodies associated with medical care and treatment or research. The General Medical Council (GMC), Health Research Authority (HRA), Royal College of Anaesthetists (RCoA) and Medical Protection Society (MPS) all provided views in support of the defence. The British Medical Association (BMA) and Medical and Dental Defence Union of Scotland (MDDUS) provided neutral responses. The Nursing and Midwifery Council (NMC) and the Royal College of Pathologists (RCPath) commented on the way the offences would apply in medical contexts, though these comments were not consultation responses.

11.126 The practicality and importance of treatment was important to consultees. Responses included information about how and why medical practitioners engage with intimate images, in particular in the context of increasing remote consultations, and argued that a defence was needed and would benefit patients. The GMC raised the concern that without a reasonable excuse defence the base offence may have a chilling effect; where a patient lacks capacity to consent but remote treatment and decision making is required, the absence of a defence could create "a barrier to these patients receiving care". They submitted that "identifying or providing for defences in law, and clearly communicating them, would help to avoid this outcome". The NMC "welcome[d] clarity for professionals in protecting the public and vulnerable people in particular".

11.127 The question of third party consent was raised by the MPS in the context of images of young children's genitals or buttocks where there is, for example, nappy rash. In such cases the parents often send the image to a doctor. The MPS suggest that "care needs to be exercised with interpreting these images".

11.128 It was clear that the bodies expected practitioners would adhere to all professional and legal requirements. The MDDUS stated that where use of intimate images is necessary "we would of course expect that health professionals comply with the law and professional guidance such as that issued by the General Medical Council and other authoritative bodies such as the guidance issued by the Faculty of Forensic and Legal Medicine of the Royal College of Physicians".[37] The NMC advised that they "would treat any concern that came to us about a commission of such an offence as a serious matter" and "expect professionals on our register to follow appropriate clinical guidelines and act within the laws of the country they practise in".

---

[37] They refer to paragraphs 31-33 of the GMC's guidance and 3.5 of the Faculty of Forensic and Legal Medicine guidance, available at: https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/making-and-using-visual-and-audio-recordings-of-patients/recordings-made-for-research-teaching-training-and-other-healthcare-related-purposes#paragraph-31 and https://fflm.ac.uk/wp-content/uploads/2020/03/PICS-Working-Group-Guidelines-on-Photography-Dr-Will-Anderson-Dec-2019.pdf.

11.129 Where intimate images were used in ways that did not adhere to the requisite professional standards then this should be dealt with as a professional conduct matter. In at least some submissions, that was seen as more appropriate than using the criminal law. The HRA and RCoA supported limiting criminal liability for medical practitioners, seeing criminal law as inappropriate for dealing with what they considered was professional negligence. The MPS supported the proposal on the grounds it is "not intended to catch medical practitioners who are motivated by the best interests of their patients or the public interest at large". They suggest it has the required flexibility where "there would not be a defence against criminal liability under the [MCA 2005] in its present form".

11.130 While these submissions make a case for including the defence, by no means would the inclusion of the defence result in medical professionals being immune from prosecution where it is appropriate. Though we note that the Bar Council suggested it is unlikely the CPS would prosecute "legitimate medical research professionals" acting in the course of their employment and that internal disciplinary procedures would apply, the possibility of prosecution should remain real. In addition, the fact that the grounds of defence are listed does not resolve individual cases – any defendant would need to prove the defence on the facts of their case.

11.131 There were some matters where clarity was sought. For example, the RCoA requested confirmation about the application of section 5 of the MCA 2005 to "the much more common situation for anaesthetists of normally competent patients who temporarily lack capacity as a result of trauma or, of course, general anaesthesia or sedation". We acknowledge that anaesthetists will encounter patients who temporarily lack the capacity to consent. Section 2(2) of the MCA 2005 clarifies that lack of capacity can be permanent or temporary. Therefore, the protections of section 5 will apply where the lack of capacity is temporary.

11.132 The MPS commented on the applicability to cross-jurisdictional medical treatment suggesting that the defence "must not exclude such cross border processing of images". This defence would apply only to prosecutions under the base offence in England and Wales. Where cross border processing engages criminal offences in other jurisdictions, that will be a matter for those other jurisdictions. We consider the issue of jurisdiction more generally in Chapter 15.

Medical research

11.133 The MPS supported the inclusion of this category on the grounds "using some intimate digital images may be crucial to assisting the public at large through research".

11.134 The HRA submission raised a specific example and argued that it should constitute a defence:

> We support the proposal that 'conduct necessary for a genuine medical, scientific or educational purpose' should constitute a defence of reasonable excuse and this would be applicable in both emergency research and research involving confidential patient information conducted with Section 251 support... We suggest that sharing intimate images as part of a research study that has received a favourable opinion from a research ethics committee operating as part of the Research Ethics Service

provided by the HRA (in England) or the Devolved Administrations or has HRA approval following advice from the Confidentiality Advisory Group (CAG) should always be considered to be a 'genuine' medical, scientific or educational purpose where this is in line with the approved research methodology.[38]

11.135 Other consultees also raised questions about whether drug trials, or Clinical Trials of Investigational Medicinal Products (CTIMPs), which are not covered by the MCA 2005, would attract protection. The position for both adults who lack capacity to consent and children involved in CTIMP research is the same as for children who lack capacity to consent to medical treatment (and are therefore also not covered by the MCA 2005 provisions). Under the Medicines for Human Use (Clinical Trials) Regulations 2004, a legal representative can give consent for an adult who lacks capacity or a child to participate in a clinical trial. As with consent to medical treatment on behalf of children who lack capacity, consent to such research is not valid for the purposes of intimate image offences as the consent is not from the person depicted. Therefore, someone taking or sharing intimate images for the purpose of a CTIMP, where the person depicted lacks capacity to consent, would need to rely on the defence of reasonable excuse.

11.136 We disagree with the position that section 251 support or any authorisation should "always" constitute reasonable excuse. Specifying authorisations would add unnecessary complexity to the law and if some are not mentioned it may contribute to uncertainty.

11.137 The HRA also suggested that in some research contexts consent from a third party might be appropriate and that the base offence could be amended to require consent only where it would "otherwise be required". In this way medical research professionals who do not need consent from the person depicted for the use of intimate images would not need to rely on a defence. We concluded that in the context of research, it is better to have a defence available. It would not be appropriate to alter the consent element of the offence to address these issues. We discuss below the approach to taking or sharing for medical care or treatment, where there is consent from a third party.

Criticism of sharing in medical contexts

11.138 While taking and sharing intimate images in most medical care, treatment and research is conducted responsibly, professionally and in patients' best interests, this is not always the case. We received evidence from stakeholders that intimate images are shared in healthcare contexts without consent, and not for genuine medical reasons.

---

38 "Section 251 support" refers to section 251 of the National Health Service Act 2006. The HRA submission explains the effect in the following terms: "[It makes] provisions for confidential patient information in England and Wales to be processed without consent for medical purposes, including medical research, where it would not be reasonably practicable to achieve that purpose otherwise, having regard to the cost of and the technology available for achieving that purpose. Under this legislation, the Confidentiality Advisory Group (CAG) advises the HRA whether applications to process confidential patient information (which may include intimate images) without consent for research should be approved or not".

11.139 NHS Safeguarding alerted us to such incidents. The incidents involved sending nude or partially-nude images of patients to colleagues for comment or mocking rather than for a clinical purpose.

11.140 Natalie O'Conner, in a personal response, suggested that handling instructions should accompany taking and sharing of intimate images "so that images cannot be viewed or accessed [casually]". This can apply to a range of professional contexts.

11.141 The Suzy Lamplugh Trust were concerned that images from cosmetic surgery providers are published on social media channels without consent and should not be excused. They noted that the Revenge Porn Helpline "has seen numerous cases where women have had procedures on their breasts, and the surgery has taken images of their chest without their consent and posted it on their online platforms".

11.142 These concerns should be taken seriously. It is inevitable that there will be misconduct by some medical professionals. It would seem equally inevitable that some of that conduct, such as sharing intimate images for non-clinical reasons, may constitute intimate image abuse and any defence must be appropriately limited to ensure that criminal liability is not avoided where it should be imposed.

Persons with capacity to consent

11.143 Among the clearest areas of concern was that the defence would permit intimate images to be used for genuine medical, scientific or educational purposes where the depicted individual had not consented but did in fact have the capacity to consent.[39] While this view was more common among responses to the summary consultation paper, in which we had not included Examples 1 and 2 above, it was also expressed by those responding to the full consultation. Of note, the Centre for Women's Justice suggested there would never be an excuse to take or share an intimate image without consent where the person depicted was able to consent and either was not asked or refused consent, submitting that to do so would "clearly be abusive and exploitative".

11.144 We disagree with the proposition that there can "never" be a reasonable excuse where a person has capacity to consent because the possibility of unforeseen circumstances needs to be accommodated. This is a consequence of having a base offence without an additional element. However, we appreciate these concerns and they have been among the points that have led us to review the formulation of this category of the defence.

Non-medical research

11.145 We engaged with a range of stakeholders to explore the extent to which other areas of scientific activity might require the taking or sharing of non-consensual intimate images in circumstances where the defendant may have a justification for doing so. A number of the comments from academic stakeholders reflected on both research and educational purposes.

11.146 The University of Liverpool's Senior Research Ethics and Integrity Officer advised that their research ethics committees members had said they "would struggle to

---

[39] Elizabeth Para; John Noble; Teresa Knox; Anon 103; Anon 107; Jeff Smith and Stella Creasy MP (although their response was limited to images of breastfeeding).

envisage a situation in which taking or sharing an intimate image without consent would be appropriate for educational or research purposes".

11.147 The Head of Research Policy, Governance and Integrity at University of Cambridge's Research Strategy Office told us that:

> A number of the responses from Committees that we received indicated that they could see no circumstances in which they would grant approval for a research project that intentionally set out to collect intimate images without consent. Indeed, one of our responses from a committee member was clear that he could see no genuine need for research or teaching to take priority over consent.

11.148 The Imperial College Research Governance and Integrity Team provided an example of the level of care that is taken, with protections that might be put in place to ensure intimate images were not taken even where participants had given consent. There was a study where residents in nursing homes would be asked to take photos of their living environment. The ethics committees "wanted assurances that they would not accidently take any photos that are considered inappropriate and so would be assisted by the researchers".

11.149 There were, nonetheless, some circumstances where it was said that research may use non-consensual taking or sharing of intimate images.

11.150 The Cambridge respondent summarised the comments they received from members of ethics committees:

- Cross-cultural variation: One response emphasised that definitions of 'semi-nude' and 'sexual' vary cross-culturally, so there might be pictures which the people depicted don't consider show nudity in the same way that we do or that is contemplated in the law. The respondent gave some examples where such photos might emerge in relation to teaching or research into:
    - questions of ritual "violence";
    - bodily ornamentation (where you are able to see semi-nudes even under dye, feathers, teeth, etc.), including tattoos;
    - techniques of the body such as posture, body moulding and training;
    - dance, swimming (including some forms of fishing);
    - societies where people's everyday dress might be considered 'semi-nude' in the West.
- Historical pictures: It was indicated that the use of historical pictures might be complex due to different standards of consent (and the difficulty of obtaining it) and noted that such pictures could be used in research and teaching, e.g. to problematise the power relations depicted in or through the photograph.
- Research in non-literate societies: This may make it very difficult to obtain any more than verbal consent and the respondent was unsure whether that

would be sufficient under the proposals. This issue would clearly interact with the challenges of cross-cultural variation.

- Unintentional collection of images: Some research projects might use unattended fixed cameras to collect research data in public spaces (e.g. to track traffic or pedestrian movement). Several respondents indicated that these could theoretically capture intimate images unintentionally.

11.151 Dr Charlotte Bishop (University of Exeter) wrote about her research on revenge porn: "I have accessed revenge porn sites and used research that has accessed revenge porn sites … and, if working in a team of researchers, can imagine needing to share the images/accompanying text for research purposes".

Other scientific purposes

11.152 Our stakeholder engagement uncovered some other areas where intimate images were taken or shared for scientific purposes.

11.153 In a consultation meeting, Henry Ajder, an expert on AI and deepfake technology, explained how work aimed at combatting intimate image abuse might require conduct that – absent a defence – would be criminal.

Example 3

R is a self-employed independent researcher working in the private sector. R is trying to understand the technology that is used to create synthetic images, with the aim of finding ways of combatting deepfake intimate image abuse. To do this R needs to analyse the intimate images that were created, without consent, by such technology. The original victims are not able to be identified and contacted. The images will also need to be shared with colleagues who are collaborating on the research. Those colleagues are in R's organisation and also in external organisations. R tries to mitigate potential harm and risk associated with the necessary handling of intimate images without consent by encrypting images, liaising with relevant law enforcement agencies, and ensuring the images are only shared with trusted colleagues and where necessary for the research, and that any colleague who receives the image understands the handling restrictions. There are strict protocols in place for deleting images.

11.154 In our view Example 3 is a good illustration of conduct that does not fall neatly into any one listed category of the defence and yet has a strong claim to being justifiable. It is not academic research, but it is research which has a scientific purpose and is for the public good. It may sit alongside and inform educational work, other research, criminal investigation and journalism. It is a prime example of why a non-exhaustive list of grounds is appropriate. However, the defence does not provide R with a blanket exemption; in any given instance, R's conduct would still need to satisfy the defence on the facts.

Education

11.155 The Bar Council noted that the consultation paper did not directly address the ambit of "educational" in the context of reasonable excuse. They asked if it is "proposed to be limited to formal, institution-based education?" and suggested that "again there is a risk that such a defence will be exploited".

11.156 Muslim Women's Network UK also requested greater clarification as to what would be covered by "educational" and suggested it may be too broad. They submitted for consideration the context of religious settings that could take advantage of an educational excuse:

> We wish to highlight at this point that there is a very serious issue of sexual abuse in religious settings, the dynamics of which also need to be taken into account in the context of intimate image based abuse. There are a number of religious settings which are unregulated and in which the term 'educational purpose' could be misused.[40]

11.157 We examined education as the basis for reasonable excuse more closely in light of these consultation responses.

11.158 We received no indication that school education would ever use non-consensual images and cannot see that any education defence is required in that regard. As the academic feedback on research indicates, education in universities would generally only ever utilise consensual images. However, it is conceivable that non-consensual images could be used. Dr Bishop provided an example of how this might occur and what might conceivably follow:

[40] MWNUK also referred us to their witness statement in respect of the Independent Inquiry into Child Sexual Abuse which addresses child sexual abuse in religious settings https://www.mwnuk.co.uk/go_files/resources/843712-Independent%20Inquiry%20into%20Child%20Sexual%20Abuse%20in%20Religious%20Settings.pdf.

Example 4

L is a university lecturer teaching a module on the legal regulation of gender and sexuality. L's teaching materials include non-consensual intimate images deemed to be so-called "revenge porn". L explained to colleagues and students that the use of real "revenge porn" examples was necessary to demonstrate effectively and adequately the harm caused and the violation that the sharing of such images represents.

Some students in the module are doing group research projects and look into the issues. They share images amongst their classmates for the purpose of their projects.

These and other students are horrified when they start to uncover the extent, purpose and impact of intimate image abuse. They want to highlight to friends and family how bad it is and, to do that, they share images with friends and family.

11.159 Dr Bishop's view of this scenario was:

> I'm not sure this is entirely a 'genuine' need, and I'm sure the person in the images wouldn't want this to happen, but I'm not sure if it should be criminal (there is a grey area, I think, where images are being reshared for entertainment even though there is horror expressed, compared with a genuine desire to educate others and raise awareness about this phenomenon).

11.160 Dr Bishop also explained why real images might be used in education:

> Seeing images and content of this kind has a very different impact when shown in the context of teaching and learning about the extent and underlying causes of male violence against women and, ideally, stimulates an emotional response and leads students to think and feel differently about the issue.

In our view Dr Bishop identifies conduct that has a genuine educational purpose (both L's teaching and student project work) and also conduct that does not have such a purpose (notably, the sharing among students that is not necessary for the projects). Where images are forwarded to friends or other students to "inform" them about the practice of so-called revenge porn this would not always be a reasonable excuse. It is important that students are advised about this when given the work so that intimate image abuse is not perpetuated under the guise of "informing others".

11.161 Outside the university context, the training of law enforcement officers was identified as an area where conduct might be justified. The College of Policing's Policing Standards Manager Digital and Cyber submitted that the College "think there is a requirement for an exemption for police training with particular regard [to] Child Abuse Image Database (CAID) and Domestic Abuse (DA) training".

11.162 Dr Bishop also saw it potentially "being useful to share images for educational purposes in terms of training, particularly in encouraging the police to take the new

offences more seriously by emphasising the types of harm and facilitating empathy with victims". However, she qualified this by saying that such images need not necessarily be non-consensual images, whether for police training or any other training.

Conclusions

11.163 We have carefully considered the concerns raised by consultees in relation to the position where the person depicted has capacity to consent.[41] We see a case for formulating the test for this category of reasonable excuse defence in a way that more explicitly provides protection, aligning it with the first three categories of the defence: taking and sharing the defendant reasonably believed was necessary for a genuine medical, scientific, or educational purpose.

11.164 This would ensure that the threshold is explicit and suitably high. The inclusion of "reasonably believed was necessary" would be particularly significant in several respects:

(1) Where a person has capacity to consent but has not in fact consented then the capacity to consent will clearly be a factor that is relevant to determining whether the defendant reasonably believed non-consensual taking and sharing was necessary.

(2) The word "reasonably" allows for the possibility that different judgements about care, treatment and research may be made.

(3) It ensures that the grounds of defence align with justificatory (rather than excusatory) rationales.

(4) It makes for consistency with the first three categories of the defence.

(5) It would be consistent with the requirements of most professional and research protocols, which prioritise consent where it can be obtained.

11.165 A court may consider matters such as how the images were taken, how they were acquired, capacity to consent, what the images displayed, whether the person depicted could be identified from the image, whether research ethics protocols and permissions were followed, or whether there was an emergency. These all go to whether the defendant reasonably believed the taking or sharing was necessary for the genuine medical, scientific or educational purpose. They may also, depending on the circumstances, be relevant to establishing the genuineness of the purpose.

The test in medical contexts

11.166 In our view it is clear that there may be occasions where the use of non-consensual intimate images is necessary for medical care, treatment or research. The reasonable excuse defence should operate in tandem with section 5 of the MCA 2005 and the

---

41 We acknowledge the different position where the person depicted does not have capacity to consent. S 5 of the Mental Capacity Act 2005 provides a defence for taking or sharing intimate images for medical care or treatment of people aged over 16 who do not have capacity to consent, and we recommend a similar exclusion for children aged under 16, see para 11.220 below.

exclusion for children who lack capacity to consent explained at paragraph 11.220 below, to ensure that liability in this area will not attach to individuals who are not sufficiently culpable. We acknowledge the concerns that the defence may be too broad. We note in particular the concerns raised by consultees about taking or sharing in a medical context where there was capacity to consent, but consent was not obtained. We think the reformulation of the test as described above should address such concerns.

11.167 We do think that the defence should still be available in circumstances where there was capacity but consent was not obtained, but only where the defendant had a reasonable belief that the taking or sharing was necessary for a genuine medical purpose. The circumstances in which this arises should be unusual, if not rare, as professional and regulatory standards will generally require consent – and a failure to adhere to those standards will attract professional sanction and potentially civil liability – but the possibility needs to be provided for.

11.168 As a result of this reformulation, our consultation paper Examples 1 and 2 (reproduced above) require some further consideration. Where in the consultation paper our view was that these were circumstances where the defendants would have a reasonable excuse, this may not be the case where the law requires that the defendant reasonably believe the conduct was necessary for a genuine medical, scientific or educational purpose. A defendant who has without consent shared images in circumstances where consent could have been obtained may well fail to establish the defence because, no matter if the defendant honestly believed it was necessary, and even though there was a genuine medical, scientific or educational purpose, the defendant must have held that belief reasonably. It will depend on all the facts but the outcomes in those examples may be different under a formulation that includes “reasonably believed was necessary”.

11.169 This defence does not mean anyone who has committed the base offence in a medical context will escape liability. It will not be sufficient to make a general statement that intimate images *can* be used for genuine medical purposes; the defendant will need to prove, on the facts, that they reasonably believed that the way they used the intimate images was necessary for that genuine medical purpose.

11.170 Further, professional misconduct proceedings are not an alternative to or substitute for criminal law. Criminal charges may still be laid. Medical professionals and others working in medical contexts should be aware of the nature of the base offence and the defence of reasonable excuse as it applies to the medical context.

11.171 This defence should be available in the context of medical research. We acknowledge the regulatory framework and approval processes explained by consultees. Liability for these offences cannot be excluded on the basis of these alone. However, if taking or sharing of non-consensual intimate images was done as a part of research conducted under such authorisations, where there are rigorous approval processes, and done pursuant to any requirements set down, it should meet the requirements of the defence and there will be no criminal liability.

The test in non-medical research and other scientific purposes

11.172 As the discussion above at paragraph 11.146 shows, it would generally be rare that non-medical research or other work done for scientific purposes requires non-consensual intimate images to be taken or shared. However, there will be times when it is genuinely necessary. There is a real public interest in the work we have identified (teaching, training, research) and people should be able to pursue this work responsibly without fear of criminalisation.

11.173 In these areas a defendant would generally be looking to the scientific-purposes ground, though other grounds may also be relevant. The same overarching points would apply to the test in these circumstances as in the medical context.

Education

11.174 Any medical education will constitute a medical purpose and we expect a defendant involved in medical education would frame a defence in those terms. We note that guidance from the Faculty of Forensic and Legal Medicine distinguishes between medical training and education, and clinical guidance and auditing processes.[42] We can see that intimate images may need to be shared in both contexts (for example, to review case notes or the outcome of an intimate medical examination). Audit or clinical governance processes could be considered a genuine medical purpose, or as an otherwise reasonable excuse to which the defence could still apply.

11.175 In non-medical education, if the use of intimate images is required then in the vast majority of circumstances the images are not in fact non-consensual and do not need to be non-consensual. However, we were convinced that there are circumstances where it could be necessary to use non-consensual images in non-medical education. Those occasions will be rare but, where they arise, they should be protected and so accommodated in this category of the defence. We would expect, though, that it will be construed very narrowly and with a close eye to the genuine purpose of the conduct being educational.

11.176 In our view there is a real concern that this category would be open to misinterpretation, especially by students sharing images with each other, which would perpetuate the harm of intimate image abuse. Institutions and professionals engaged in these areas will need to be alert to the law and ensure that students are aware that sharing intimate images without consent can be criminal, and sharing to inform others will not constitute a genuine educational purpose.

The public interest defence

The provisional proposal

11.177 We proposed that conduct constituting a reasonable excuse would include taking or sharing that was in the public interest.

---

[42] Faculty of Forensic and Legal Medicine, *Guidance for best practice for the management of intimate images that may become evidence in court* (June 2020) para 3.5.

The rationale

11.178 In the consultation paper we presented a detailed analysis of the ECHR jurisprudence on Article 8 (which protects privacy) and Article 10 (which protects freedom of expression). We also reviewed the law in England and Wales, noting that the current disclosure offence includes a public interest defence related to journalism. Further, we outlined the position in comparable jurisdictions, where there are also public interest defences available.

11.179 We reached two main conclusions. First, we thought it clear that a public interest defence of some kind needed to be available. It may only be in rare circumstances that the defence could be made out but the broad base offence, without any additional intent element, means that there must be some avenue for protecting freedom of expression and acknowledging the possibility that there may be times when the public interest justifies conduct that would otherwise be criminal.

11.180 In reaching that view we considered that there could be a legitimate need for images to be shared prior to publication (for instance, between a photographer, a journalist and editor) so that judgements and decisions could be made about whether publication would be in the public interest. We also considered circumstances where it was conceivable that a public interest defence might be raised and potentially succeed, using an example:

> If a politician were covertly photographed engaging in sexual activity with a foreign intelligence officer, we might recoil if the photographs were shown unedited, but there may well be a public interest in the photographs being shared in such a way that they are still, under the terms of our proposed offence, intimate. This may well be the only way of lending credibility to a story that could otherwise be dismissed as conspiracy.[43] The more broadly "intimate" is defined, the less scope there is for arguing that there is no public interest in seeing them.[44]

11.181 Secondly, we took the view that it should be a "true public interest" defence. That is, the defendant must prove that the taking or sharing was in fact in the public interest. This can be distinguished from thresholds that may be both lower and higher.

- A lower threshold would be that the defendant reasonably believed the conduct was in the public interest.

- A higher threshold would be that the defendant reasonably believed the conduct was in the public interest *and* the conduct was in fact in the public interest.

11.182 In reaching this conclusion we noted that where journalists are infringing on a person's privacy the courts have required that they act in good faith. We noted that

---

43 See *Fressoz and Roire v France* [1997] ECHR 194 (App No 29183/95) at [54].

44 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 13.142.

"images obtained through subterfuge or bad faith will weigh against the article 10 right".[45]

11.183 We noted also that the existence of a public interest defence does not provide unlimited scope – or even wide scope – to publish intimate images without consent, pointing to the important caveat in *Tammer v Estonia* that any intrusions into private life must be "justified by considerations of public concern" and "serving the public interest".[46] The fact that the publication as a whole engages the public interest does not mean that an intimate image can be published. If the public interest could have been met without publication of the intimate image then it is likely the intrusion into private life will not have been justifiable.

Consultation responses and analysis

11.184 The public interest category was the most commented on and least supported. The majority of comments came from members of the public responding to the summary consultation paper who queried whether taking or sharing intimate images without consent would ever be in the public interest. Some consultees expressed strong views that the public interest should not be a defence. For example, one consultee in a personal response, submitted:

> It is in my interest to have sex with someone behind closed doors and what I do whether a politician a teacher or anyone else is not the concern of the public. I could kill myself as could other victims because of [this category of the defence]. Perpetrators know about this nonsense of public interest.

11.185 A number of consultees submitted that what is of interest to the public is not in the public interest, for example "we need to forestall the common nonsense that when the public is interested in seeing something, showing it is in the public interest."[47] Lawyer Ann Olivarius submitted that this defence permits the propagation of misogyny:

> In most instances, the public interest in this regard entails the exposure of women against their will – which serves to reproduce the very same misogyny that often fuels image abuse.

11.186 Consultees also raised concerns that "public interest" is too broad or not satisfactorily defined. Slateford Law submitted it "risks being open to abuse if not clearly delimited in the explanatory notes". The Centre for Information Rights submitted "the concept of 'public interest' should be construed narrowly, as publication of intimate images in the public interest should still be conscious of the privacy implications of individual(s) involved".

11.187 These concerns rightly point to the need for a test that goes above examining what a defendant reasonably believed and requires that the conduct was in fact in the public interest. They also highlight the need for a cautious interpretation of "the public

---

45 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 13.156.

46 *Tammer v Estonia* [2001] ECHR 83 (App No 41205/98) at [68]; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 13.139.

47 Greg Gomberg, personal response.

interest" and careful scrutiny of the facts and circumstances that underpin any defence.

The threshold

11.188 The Bar Council and the Magistrates' Association both made submissions that the test should have a higher threshold, requiring both a reasonable belief and public interest in fact. The rationale from the Bar Council was that this would then be consistent with the law of defamation. We disagree that the higher threshold is appropriate. Defamation actions are civil matters and the standards need not match. More significantly, the public interest test is at its heart one of justification: the taking or sharing was done because there was a public interest in doing so. The belief of the defendant is not a determinant of that.

Investigative journalism and undercover journalism

11.189 The News Media Association (NMA) generally agreed with our position in the consultation paper. As they put it, though news publishers rarely engage with intimate images as a result of editorial standards and codes, "there may be a very small number of exceptions for which there is an editorial need and public interest, which must not be stifled". They pointed out that when journalists investigate matters the public interest is not always immediately obvious and journalists should not be deterred from investigating a story in such circumstances. They argued the taking and internal sharing of intimate images may be a part of that investigation. We agree. It is sensible to see that activity as one which might be undertaken in the public interest, though – as with any defence – any and all instances of taking and sharing must be justified to the requisite standard. The public interest defence is not a permission for unfettered behaviour prior to publication.

11.190 The NMA also sought clarification about whether undercover journalism would be viewed as conduct done in bad faith, arguing that the practice is sometimes necessary and that the two should not be conflated:

> Undercover investigative journalism, which is subject to higher editorial standards, plays a crucial role in modern democracy and has been a catalyst for social and legal change by shedding light on crime, corruption and injustice.

We agree that undercover journalism will not necessarily demonstrate bad faith. We do not see a need to state it as a specific exception, not least because given the rarity of the circumstances that does not seem necessary but also because the facts of any given case will be relevant to a public interest determination.

Conclusion

11.191 The listed grounds should include taking and sharing that is in the public interest. The occasions for its use will be rare but, with a broad base offence, there must be an avenue for protection. The test should be a true public interest test; it should not require reasonable belief.

Conduct that does not fall within the listed categories

11.192 The use of a non-exhaustive list means the defence can accommodate circumstances that do not fall within an existing category but do not warrant inclusion

as a separate category. There are two that arose in responses and stakeholder engagement. We discuss these further now but note two points in doing so.

11.193 First, other circumstances not mentioned in this discussion and not falling within the listed categories might also give rise to a reasonable excuse defence.

11.194 Secondly, just as with the listed categories, these are examples of circumstances where a defendant may conceivably establish a defence of reasonable excuse. In any given case a defendant will have to establish that each taking and sharing is justified on the facts in all the circumstances; there is no blanket exception for conduct of these general types.

Seeking advice

11.195 It is possible that an individual who receives or finds an intimate image may want advice about what they should do or may be disturbed by it and want to share it to, for instance, seek therapy or medical care for themselves or the person depicted.

11.196 Ann Olivarius submitted that people who forward intimate images for the genuine purpose of obtaining advice should be excepted from the base offence. She noted that she has worked on "a number of cases of image abuse where the victim was thwarted in the pursuit of justice by a zealous defence attorney or misguided police investigator claiming that the victim was possibly guilty of image abuse". She then explains that often, the client had come across intimate images and sent them to confidants for advice, citing examples including:

> A parent who snooped in their minor child's computer or phone, found intimate images of the child and other minors, and sent the images to friends for advice on what to do next (eg, confront the child or the other child's parents, go to the police or school authorities, and so forth).

And:

> [A] client gained access to a spouse's or partner's computer, discovered illicit images, and again sent them to friends for advice. In neither instance was the client motivated by maliciousness; the motivation was to receive advice from trusted friends on how to act on the knowledge.

She suggested that such forwarding often occurs in a moment of shock and worry for the person who has just discovered the images.

11.197 Where such sharing occurs for legal proceedings or for the purposes of investigating crime or for medical care then, if shared with a lawyer or law enforcement officer or medical professional, it is likely to fall within the categories we have listed. Outside those situations, however, it may be that in all the circumstances a defendant could establish that they had a reasonable excuse. We also note that there is substantial potential for harm in sharing images for advice. It should not be understood to be justified to share any intimate image without consent. For example, sharing an intimate image received from a sexual partner with friends, in order to gather their advice on the relationship, should not be justified.

Recording in nursing home or palliative care or other care circumstances

11.198 A person in a nursing home or hospice, or receiving other care (including care in their own home), may be vulnerable to abuse and lack capacity to consent to the recording of images that might help reveal any abuse, mistreatment or poor care. This can be a source of deep distress and worry to family members.[48]

11.199 It appears to us that where recording equipment is installed in such circumstances then it could potentially – but not certainly – fall within either of the listed categories of genuine medical purpose or preventing or investigating crime. However, especially if the recording was capturing conduct short of crime, it might be that a defendant seeks to argue that, although not in a listed category, the conduct is justifiable and constitutes a reasonable excuse for taking or sharing images. In our view it is entirely possible that a reasonable excuse could be established.

11.200 It should be noted that the installation of recording equipment that takes intimate images without the consent of the person depicted will be an invasion of the privacy and dignity of the person. To justify this there must be a genuine need. That would typically be demonstrated by some evidence that this was an appropriate and necessary step to protect the person. The mere fact a person is in or receiving care will not justify such conduct.

Conclusion

11.201 A defence of reasonable excuse should be available in the context of our recommended base offence. The defence should include the behaviours we identify in the non-exhaustive list of examples. The defendant should bear the legal burden of proof and the defence should be established on the balance of probabilities.

11.202 We note that the circumstances that give rise to the reasonable excuse defence will not apply to the image itself, but rather to individual acts. If a reasonable excuse is established for an individual act of taking or sharing, this does not mean that any further or additional acts of taking or sharing of the same image will also be considered to fall within the defence.

---

[48] An example of serious abuse, including rape by a care worker, came before the courts in February 2022: ‘Blackpool care home worker caught on camera raping a woman’, BBC News, 8 February 2022, https://www.bbc.co.uk/news/uk-england-lancashire-60299916.

Recommendation 35.

11.203 We recommend that there should be a defence of reasonable excuse available to our recommended 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 or regulatory proceedings;

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

(4) taking or sharing the defendant reasonably believed was necessary for a genuine medical, scientific or educational purpose; and

(5) taking or sharing that was in the public interest.

11.204 We recommend that the defendant should bear the legal burden of proof to establish the defence on the balance of probabilities.

EXCLUSIONS FROM THE BASE OFFENCE

11.205 During the course of the consultation we heard persuasive arguments that some contexts render the conduct of taking or sharing an image of a child without their consent so harmless, and with such low culpability or no culpability, that they should be excluded from the base offence entirely. Taking or sharing nude or partially nude images of young children of a kind ordinarily shared by family and friends should not be an offence. Taking or sharing images of children in connection with their medical care or treatment, where there is valid parental consent, should not be an offence. In the next part of this chapter we explain why we consider that the conduct in these two circumstances is not, and should not be criminal and therefore it is more appropriate that they are excluded from the base offence rather than relying on a defence of reasonable excuse.

11.206 If conduct is similar to, but falls outside these exclusions, it will still be possible to argue that the reasonable excuse defence applies.

Family photos of young children

11.207 Consultees were concerned that sharing family photos of young children, for example in the bath, with relatives or friends could fall within scope of a criminal offence. HM Council of District Judges (Magistrates' Court) Legal Committee argued that this should be explicitly carved out from the base offence:

> We consider it essential that the new base offence neither criminalises nor creates fear of criminalisation of the taking and sharing of baby photographs, in particular by parents and relatives. We are concerned that by creating a base offence which

leaves this as a theoretical possibility a real risk of fear of criminalisation may arise. One option would be to create a 6th example of a reasonable excuse although we recognise this would be difficult to draft. Alternatively, we note the Australian approach described at paragraph 13.14 [of the consultation paper] which allows for a reasonable conduct defence and provides appropriate fact-specific factors to take into account to that end.

11.208 They also suggested that it should be a statutory requirement for the DPP to issue guidelines in relation to the base offence "to supplement the legislative defence and to further allay concerns".

11.209 We noted in the consultation paper at paragraph 13.22 that when taking or sharing such family photographs, "it is clear that parents should not be liable for a criminal offence under these circumstances". We understand the desire to make clear such behaviour is not criminalised. It is in fact the clearest example of prolific and harmless behaviour and yet technically falls foul of the base offence. We agree that the conduct should not be criminal, and that the law should be suitably clear in that regard.

11.210 We have also looked to the example of Western Australia which excludes such image sharing from their offences. In the Western Australia offence of disclosing an intimate image, it is a defence to prove:

> A reasonable person would consider the distribution of the image to be acceptable, having regard to each of the following (to the extent relevant):
>
> (i) the nature and content of the image;
>
> (ii) the circumstances in which the image was distributed;
>
> (iii) the age, mental capacity, vulnerability or other relevant circumstances of the depicted person;
>
> (iv) the degree to which the accused's actions affect the privacy of the depicted person;
>
> (v) the relationship between the accused and the depicted person;
>
> (vi) any other relevant matters.[49]

The Explanatory Memorandum states:

> The 'reasonable person' defence is intended to give courts the capacity to consider the myriad factors that may amplify or diminish the criminality of a given distribution. It recognises that there are circumstances in which the distribution of an intimate image is consistent with community standards and should therefore not give rise to

[49] Criminal Code 1913, s 221BD(3)(d).

criminal liability; for example, where a parent sends a photo of their naked baby in the bath to the other parent.[50]

11.211 This approach makes clear that sharing in such circumstances is acceptable and consistent with community standards. The specific example provided is useful to define the parameters of such a defence.

11.212 The strength of argument that such behaviour is so harmless, and entirely appropriate conduct, leads us to conclude that it is right to exclude it from the scope of the base offence. By creating a specific exclusion, it will be clear that taking or sharing of this kind is not criminal. It is not wrongful conduct. It is important that parents, grandparents, family and friends know that they are not at risk of committing an offence, even if a defence would be available to them, when taking or sharing cherished memories of their young children.

11.213 When considering the appropriate scope and formulation of such an exclusion, we took the view that taking and sharing are different behaviours in this context that require a slightly different approach. Sharing nude, partially-nude, and toileting images of young children without consent does not give rise to the types of harms we seek to protect with the intimate image offences. Moreover, we think this type of harm does not arise regardless of the identity of the sharer or the recipient where there is no specific intent. Parents may share an image of their baby in a bathtub with grandparents, who may then share it on Facebook with all their friends, who may then share it on with their friends on WhatsApp when comparing cute grandchild photos. Harm does not arise in any meaningful way from these kinds of sharing. It is therefore appropriate to have an exclusion for sharing such images that is broad enough to exclude sharing by anyone, whether they know the baby depicted or not. What is important is that the sharing is of a kind ordinarily shared by friends and family; a photo of a baby in a bath, of young children playing in the garden nude, of potty training. The types of images that are harmless, we think, are easily identified from the image and the context of the sharing. This wording would enable courts to consider on the facts of each case where it is in question, whether a particular image is of a kind ordinarily shared by friends and family. People sharing such images know whether it is of a kind ordinarily shared by family and friends. We have explained “ordinarily seen” type tests in Chapter 3. The concept is familiar in law and we think it can be appropriately utilised here.

11.214 Taking is a different act; it requires a proximity to the young child. Consider an example: on a hot day young children are playing in a public fountain without clothes on. A parent, babysitter, nursery staff, or sibling may wish to take a photo to remember the day. That is entirely appropriate and harmless. If a stranger was at the fountain and also wanted to take a photo, that could be less harmless. It is appropriate therefore to limit the exclusion for taking images of young children so that only people known to the young child are able to avail themselves of the exclusion. We recommend therefore that the “taking” exclusion is limited to family and friends of the young child depicted. Courts are well able to determine on the facts whether someone

---

50 Parliament of Western Australia, Criminal Law Amendment (Intimate Images) Bill 2018 Explanatory Memorandum at p 5. https://www.parliament.wa.gov.au/Parliament/Bills.nsf/DC68AED6CEC73FFB482582B90017A6C3/$File/EM%2B76-1.pdf.

in question is someone to whom this exclusion should apply. If someone intentionally takes an intimate image of a young child who is not known to them in circumstances where it is arguable that it would not be appropriate to criminalise the conduct, the reasonable excuse defence will still be available.

11.215 We deliberately refer to “young children” rather than “children” (which means anyone under the age of 18). This reflects the fact that images shared of this kind are usually of young children; it is not common to share images of teen children nude or partially nude, for example. Older children are more likely to have capacity to consent to such images being taken and shared with family and friends. There is greater risk of harm when such images are taken and shared of older children without their consent. We do not think that this exclusion should apply to images of older children. However, it is not easy to determine a specific age at which it should not apply. The recommended exclusion does not require a specific age limit because it relies on what is ordinarily shared; images where it is inappropriate because of the child’s age are not ordinarily shared.

11.216 We also considered whether it was appropriate to include an element of parental consent and concluded it would not be. Parents may not give consent, but it does not necessarily make taking or sharing more culpable or harmful. Considering the Facebook sharing example above; the parents may not consent to the grandparents sharing the image with their friends. It can be argued that is such cases the grandparents should respect the wishes of the parents, but it does not make their behaviour criminal. Consider also an example of taking; a sibling babysitting for the day should not need to obtain prior consent to take an image of their baby sibling to avoid criminalisation. While consent may be inferred in such circumstances, this is not a desirable legal construct.

11.217 We are alert to the risk that intimate images of young children may be taken or shared in ways that are not harmless; they may be abusive or sexually harmful. The fact that the exclusion would apply only to the base offence ensures that taking or sharing intimate images of children for the purpose of obtaining sexual gratification or to cause humiliation, alarm, or distress remains criminal. The indecent images of children regime will also be a suitable alternative where there is any concern that the taking or sharing of such an image is criminal.

11.218 We also note that there may be some discomfort in describing such images as “intimate” with regards to photos and videos of young children taken and shared by family and friends. We have explained in Chapter 3 that intimate means nude, partially nude and toileting, as well as sexual. These kinds of images of children are likely to be nude, partially nude or of toileting. We use the term “intimate” in this report as an umbrella term for all of the images that would be covered by the recommended offences.

Recommendation 36.

11.219 We recommend that it should not be an offence:

(1) to share an intimate image of a young child if it is of a kind that is ordinarily shared by family and friends;

(2) for family and friends to take an intimate image of a young child if it is of a kind that is ordinarily taken by family and friends.

The burden should be on the prosecution to prove that this exclusion does not apply in cases where it is relevant.

Taking or sharing an intimate image of a child in connection with their medical care or treatment

11.220 As we identified in the consultation paper, and explain above, section 5 of the MCA 2005 operates to exclude from criminal liability conduct that may otherwise be an intimate image offence when the person depicted is aged over 16, lacks capacity to consent, and the conduct was in their best interests. There is not an equivalent exclusion for taking or sharing intimate images in connection with the medical care or treatment of children who lack capacity to consent, even when there is parental consent.

11.221 Whether a child under the age of 16 has capacity to consent is assessed at common law using the principles set out in the case of *Gillick*,[51] although more commonly in civil courts, the principles in the MCA 2005 are used to determine capacity. We consider the capacity of children to consent in Chapters 8 and 14 and conclude that the provisions of the Sexual Offences Act 2003 and MCA 2005 are suitable bases on which to assess capacity to consent. Where they are determined to have capacity, children can provide effective consent to medical care and treatment, as adults can. If they are determined not to have capacity to consent, in almost all cases someone with parental responsibility for the child can give their consent to medical care or treatment in the child's best interests. As we note above, consent to medical care or treatment involving intimate images by someone with parental responsibility for the child is not currently valid consent for the purpose of intimate image offences as it is not from the person depicted.

11.222 We note the concerns raised by medical professionals above that potential criminalisation for treating patients who lack capacity can have a chilling effect on those working to provide them medical care or treatment. Section 5 of the MCA 2005 demonstrates how the law can provide clarity and certainty for people providing medical treatment to adults who lack capacity; we conclude that it is appropriate that there be an equivalent provision to exclude from intimate image offences the taking or

[51] *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 AC 112, [1985] 3 All ER 402.

sharing of images in connection with the medical care or treatment of children under 16 who lack capacity to consent.

11.223 We therefore recommend that it should not be an offence to take or share an intimate image of a child aged under 16 who lacks capacity to consent, where it is taken or shared in connection with their medical care or treatment, and someone with parental responsibility has provided valid consent to the taking or sharing for this purpose.

11.224 This exclusion should apply to anyone who takes or shares such images in connection with the medical care or treatment of a child who lacks capacity; it is not limited to medical professionals. We are concerned with the example provided above of a parent or carer needing to send a photo of a child's nappy rash to their GP surgery, an increasingly common requirement since remote appointments became the norm during the pandemic. Staff at the GP's surgery should also be able to forward on such an image to the treating GP without fear of criminalisation.

Recommendation 37.

11.225 We recommend that it should not be an offence for a person D to take or share an intimate image of a child under 16 (P) in connection with P's medical care or treatment where:

(1) when doing the act, D reasonably believes

(a) that P lacks capacity to consent to the taking or sharing;

(b) the taking or sharing will be in P's best interests; and

(2) if D does not have parental responsibility for P, someone with parental responsibility for P has given valid consent to the taking or sharing in connection with P's care or treatment.

The prosecution must prove that this exclusion does not apply in relevant cases.

11.226 This exclusion only applies in cases where a child is deemed to lack capacity, and someone with parental responsibility has consented on their behalf and the taking or sharing was in connection with the child's care or treatment. We acknowledge the concerns raised by consultees about "excusing" taking or sharing for a medical purpose where someone has capacity to consent. We conclude that it is appropriate that anyone who takes or shares an intimate image for a genuine medical purpose of someone who does have capacity, or that otherwise falls outside this exclusion, should have to rely on a defence rather than be excluded from the offence. We explain this in more detail from paragraph 11.166 above.

Chapter 12: Threats to take, make and share intimate images without consent

INTRODUCTION

12.1 In this chapter we consider the extent to which threats to take, make or share intimate images might be criminal offences under a range of existing laws, the case for creating a new offence that would criminalise intimate image threats, and what the scope and content of a new offence should be.

12.2 We begin by setting out the spectrum of intimate image threats, addressing the type, nature and mode of threats, and outlining the questions we asked in the consultation paper. The second part of the chapter considers existing laws in England and Wales that are specifically directed to threats but cannot capture intimate image threats. We look at how those laws could inform the way a threat offence might be constructed. Third, we consider existing laws that are not generally directed to threats but which might nevertheless potentially capture some intimate image threats. This analysis demonstrates the gaps in the existing framework. Next, we examine how other jurisdictions have criminalised intimate image threats, identifying some key themes that can inform approaches in England and Wales. In the remaining three parts of the chapter we consider: the case for some specific reforms to provisions of the Sexual Offences Act 2003 that capture intimate image threats; the case for a potential new threat offence and what that should encompass; and the form and content of a potential new offence.

12.3 Among our recommendations is that there should be a new offence that criminalises threats to share intimate images.

THE TYPE, NATURE, AND MODE OF THREATS

Type: threats to take, make, and share

12.4 In the consultation paper we identified a range of behaviours in relation to threats. We summarise them here to present the context in which we consider the current law and the questions we asked in consultation. We identified three different types of threat:

(1) **Threats to take intimate images.** Pre-consultation stakeholder engagement did not reveal many examples of this behaviour but there were suggestions it may be happening in the context of abusive relationships or stalking. This type of threat may be made orally in person and is therefore harder to evidence and report than written threats.

In Consultation Question 37 we asked for examples of threats to take intimate images.

(2) **Threats to make intimate images.** Pre-consultation we were provided with some instances where threats were made to photoshop a photo of the victim's

face on to pornographic pictures. This was usually accompanied by a threat then to share those made images.

In Consultation Question 38 we asked for examples where there were threats to make intimate images, but where those threats were not accompanied by a threat to share them.

(3) **Threats to share intimate images.** This is the most common type of behaviour. Around 1 in 7 young women and 1 in 9 young men in England and Wales have experienced a threat to share an intimate or sexual image.[1] A quarter of calls to the Revenge Porn Helpline relate to threats.[2] However, at the time of publishing the consultation paper, threats were not specifically criminalised in the current disclosure, voyeurism or "upskirting" offences.

The consultation paper asked three questions related to issues arising from threats to share. Consultation Question 39 asked for examples where a threat to share an image of V was not made to V but was made to a third party. Consultation Question 40 asked for views about a proposed new offence of threats to share. Consultation Question 41 asked for views about whether the absence of consent should be an element of a new threat offence.

Nature: context and motivations for threats

12.5 Threats to share mainly occur in the context of abusive relationships as a way of exerting control over another or as a form of blackmail sometimes referred to as "sextortion" (where the perpetrator threatens to share an intimate image of the victim for either financial or sexual gain). Beyond this, as the consultation paper explained, there are a range of motivations, or no apparent motivation. Threats to share may be made to stop a victim reporting sexual or physical abuse or as a threat to "out"[3] the victim (for example someone who identifies as LGBTQ+ or a sex worker). Threats may sometimes be made solely to harass or distress the victim, or for a "joke". In some cases there is no identifiable reason for the threat and there is no obvious intention to gain or coerce anything in particular.[4]

12.6 Two consultation questions were directed at specific types and contexts of motivation. Both questions were framed around all three types of threat: taking, making and sharing. Both questions were concerned with the use of a threat to coerce or procure sexual activity.

---

1 Refuge, *The Naked Threat* (2020) https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf p 4.

2 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 12.1.

3 "Outing" is generally understood as disclosing a person's sexual orientation, gender identity or HIV status without their consent, but can be used to describe revealing other intimate information including involvement in sex work, without consent.

4 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, in chapter 2 and para 12.3.

(1) Consultation Question 35 sought views about whether, in circumstances where a threat was made with the intent of coercing sexual activity, there should be an evidential presumption that V did not consent to sexual activity.

(2) Consultation Question 36 sought examples where threats were made to procure or engage in sexual acts with a person with a mental disorder and the prosecution of such cases under the Sexual Offences Act 2003.

These are discussed under the consideration of threats in sexual offences, below at paragraph 12.195.

Mode: how threats are made

12.7 There are many ways threats can be made. A threat may include details about the image content or when or how it was taken or made, or a threat may be vague, leaving a victim uncertain when and if it may be carried out. A threat may relate to an existing image that the perpetrator obtained consensually or non-consensually, or the perpetrator may not possess an image but the victim may fear they do. A threat can be made with the intention of carrying it out, or not.

12.8 Threats may not always be explicit. Stakeholders made it clear in pre-consultation discussions that threats may be implied in abusive or controlling behaviour. For example, a statement by D that he or she possesses or can make intimate images may be sufficient to convey to V a threat that D can and may share those images.

12.9 It is clear that threats can cover a wide range of behaviours and motivations. We have considered whether all these behaviours should be criminalised, and if so, how.

CURRENT THREAT OFFENCES THAT DO NOT CAPTURE INTIMATE IMAGE THREATS

12.10 In the consultation paper we considered three offences in England and Wales that criminalise threats of violence to the person and threats to property, observing that they do not criminalise most threats to take, make or share intimate images. However, these offences deserve attention because they not only show the gap in the existing law but demonstrate that threats can warrant criminalisation even where they are not immediately actionable or effective, and that whether a threat has been made can be established objectively. We review these offences briefly here to highlight those aspects and foreshadow the ways we draw on them in the new threat offence we recommend at the end of the chapter.

Assault

12.11 In England and Wales the law of assault is the primary vehicle for criminalising threats of violence.[5] Defined in the common law, assault "is committed when D intentionally or recklessly causes another to apprehend immediate and unlawful violence".[6] There

[5] Criminal Justice Act 1988, s 39.

[6] D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), B2.1.

must also be "a present ability (or perhaps a perceived ability) to carry the threat [of immediate violence] into execution".[7]

12.12 Applied to a threat to take, make or share an intimate image without consent, the behaviour would only be criminalised if the threat included a threat of immediate physical violence that could be actioned at the time. This clearly excludes any threat to share that was not accompanied by or part of a threat of violence. Moreover, the "present ability" requirement means assault laws are unsuited to criminalising a threat to take or make an image if there are no means by which to take or make one, or a threat to share an image where an image does not exist.

12.13 The fault element of this offence includes recklessness in causing another to apprehend the violence. In summary, recklessness requires a defendant to be aware of a risk and to take that risk unreasonably (in the circumstances known to them at the time).[8] Therefore they do not have to intend a certain consequence, they can be aware that there is a risk that the consequence may occur and unreasonably pursue a course of action that could lead to that consequence. We consider recklessness in greater detail below when setting out the proposed new threat offence.

Threats to kill

12.14 The law regarding threats to kill plainly does not criminalise threats to take, make or share an intimate image. However, the law in this area is of assistance because it has a fault element that is clearly worded and directed to the threat, and the threat does not need to be an immediate one.

12.15 Section 16 of the Offences Against the Person Act 1861 ("OAPA") creates the offence of threats to kill, if "a person … without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person". The term "lawful excuse" includes situations such as the prevention of crime or a threat made in self-defence.[9]

12.16 The conduct element is that a threat is made. The only fault element is that the defendant must intend that the recipient of the threat fear that it would be carried out. There is no requirement for the defendant to have intended to carry it out, or for the recipient of the threat to have believed it would be carried out.[10]

12.17 In the Law Commission report Reform of Offences Against the Person, we concluded that a threats to kill offence was still needed, to reflect the severity of the behaviour. We also recommended that the threat to kill offence should be extended to include threats to rape. This would reflect the comparable level of harm caused.[11]

---

7 *Halsbury's Laws of England* (2020) p 528.

8 *R v G* [2003] UKHL 50, [2004] AC 103.

9 D Ormerod and D Perry (eds) *Blackstone's Criminal Practice* (2022), para B1.162.

10 See commentary on this in Reform of Offences against the Person: A Scoping Consultation Paper (2014) Law Com 217, para 2.160 and Reform of Offences against the Person Report (2015) Law Com 361, para 2.53.

11 Reform of Offences against the Person Report (2015) Law Com 361 para 8.11.

12.18 The relevance of this offence for intimate image abuse lies in the fault element. Specifically, in recommending the new offence below we use the language of this offence, requiring that D intend that the recipient of the threat fear that the threat will be carried out.

Threats to cause criminal damage

12.19 Threats to damage or destroy property are criminalised under Section 2 of the Criminal Damage Act 1971 ("CDA 1971"). Again, though it plainly does not criminalise a threat to take, make or share an intimate image, the language and structure of the offence are helpful in showing how threats can be criminalised.

12.20 Under section 2:

> A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out—
>
> (a) to destroy or damage any property belonging to that other or a third person; or
>
> (b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or third person;
>
> shall be guilty of an offence.

12.21 Several features of this offence are noteworthy and relevant to intimate image abuse threats. It is an objective question whether, on the facts, a threat has been made, and whether that threat was to destroy or damage property of another.[12] Like threats to kill, the only mental element required for this offence is that the defendant must have intended that the recipient of the threat would fear it would, or might, be carried out.[13] The intended victim does not have to fear that the threat will be carried out, as long as the defendant intended them so to fear.[14] The defendant does not have to intend to carry the threat out, nor does the threat have to be carried out, or even be capable of being carried out.

12.22 Section 5 of the CDA 1971 defines "lawful excuse" to include where the defendant believed that the person who could give consent to the property being damaged or destroyed had given or would give consent.[15] We consider below at paragraph 12.166 the relevance of consent in the proposed threat offence.

Application to intimate image abuse threats

12.23 The offences of threats to kill and threats to damage or destroy property show clearly that threats can warrant criminalisation and how they may be criminalised. In doing so

---

12 *R v Cakmak [2002] EWCA Crim 500; [2002] 2 Cr App R 10*.

13 R v *Ankerson* [2015] EWCA Crim 549.

14 D Ormerod and D Perry (eds) *Blackstone's Criminal Practice* (2022), para B8.35.

15 This definition of lawful excuse does not apply to s 2(b) or any part of the Act where endangerment to life is an element of the offence.

they are of assistance in devising a way to criminalise threats to take, make or share intimate images. Four aspects of these offences are particularly applicable.

12.24 First, the defendant is culpable if they intended the victim to fear that the threat would be carried out. In short, these offences make it clear that the intention of the defendant is the key fault element. That is consistent with the harm caused by a threat; the threat itself causes harm.

12.25 Secondly, the ability to carry out the threat is not relevant; the defendant need not have the means to carry out the threat for it to be considered sufficiently wrongful and harmful. A threat is harmful even if the perpetrator does not have an image to share and therefore cannot carry out the threat. This is an important consideration for intimate image abuse because the evidence indicates that many victims do not know whether or not an image exists when the perpetrator threatens to share an intimate image.[16]

12.26 Thirdly, the intention to carry out the threat is not relevant. These offences clearly recognise that a threat is harmful even when the perpetrator does not intend to carry it out. The harm lies in the victim's fear the threat will be carried out, and the culpability lies in the defendant's intention that the victim fears the threat will be carried out.

12.27 Fourthly, these offences do not require the prosecution to prove that the victim believed the threat. In Chapter 9 we discuss how the law in this context should not require proof of the impact on the victim; that is, it should not require proof of actual harm. Instead, it is the conduct and fault of the perpetrator that should be criminalised. This is the basis of criminalisation in the threats to kill and threats to damage or destroy property offences.

12.28 These considerations underpin the recommended new offence discussed from paragraph 12.75 below.

CURRENT OFFENCES THAT COULD APPLY TO INTIMATE IMAGE THREATS

12.29 In Chapter 2 we set out current offences that might be applicable to intimate image abuse and looked at the limitations of those offences with regard to taking, making or sharing intimate images. In this part of the chapter we look at the extent to which those offences might capture *threats* to take, make or share intimate images. In the consultation paper we considered these matters in some detail.[17] The discussion below summarises the current position including developments in the offences since its publication. This discussion will demonstrate that, though it has changed, the current landscape of offences still does not address all the gaps identified in the consultation paper.

12.30 The existing offences that may potentially capture threats are:

(1) Harassment and stalking;

---

16 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 12.15.

17 Above, paras 12.27 to 12.83.

(2) Controlling or coercive behaviour;

(3) Blackmail;

(4) Communications offences;

(5) Threatening to disclose private sexual images;

(6) Offences under the Sexual Offences Act 2003.

12.31 The first five of these are addressed in the discussion below. It shows that the current law does not clearly or completely criminalise threats to take, make or share intimate images, either in any single offence or by virtue of the patchwork of offences.

12.32 The last is discussed separately in the fourth part of the chapter, below at paragraph 12.195.

Harassment and stalking

12.33 Harassment is an offence under section 2 of the Protection from Harassment Act 1997 ("PHA 1997"). This criminalises conduct that occurs on at least two occasions – a "course of conduct" – which harasses another, and which the perpetrator knows or ought to know amounts to the harassment of another.[18] Harassment includes alarming the person or causing the person distress.[19] There must be a minimum degree of alarm or distress for conduct to constitute harassment, and conduct must also be oppressive or unreasonable.[20] A more serious offence of harassment is committed under section 4(1) of the PHA 1997 where D causes V to fear violence will be used against them if D knows or ought to know that their course of conduct will cause V to fear such violence, on at least two occasions.[21]

12.34 Section 2A of the PHA 1997 creates a separate offence of stalking. A course of conduct will constitute stalking if it amounts to harassment, the behaviours are associated with stalking and the perpetrator knows or ought to know that the course of conduct amounts to harassment.[22] Behaviours associated with stalking include contacting a person by any means or publishing any material about a person that relates to them or purports to come from them.[23] Section 4A of the PHA 1997 has a more serious offence of stalking where the course of conduct causes the victim to fear

---

18 Protection from Harassment Act 1997, ss 1-2.

19 Protection from Harassment Act 1997, s 7.

20 *DPP v Ramsdale* [2001] EWHC Admin 106; *Hayes v Willoughby* [2013] UKSC 17; [2013] 1 WLR 935 at [1]; *R v N* [2016] EWCA Crim 92; [2016] 2 Cr App R 10 at [32].

21 The s 2 offence is a summary offence with a maximum penalty of six months' imprisonment and/or a fine. The s 4 offence is an either way offence, on summary conviction the maximum sentence is 12 months' imprisonment but on indictment the maximum sentence is ten years' imprisonment.

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

23 Protection from Harassment Act 1997, s 2A(3)

violence will be used against them or causes serious alarm or distress which has a substantial adverse effect on the victim's daily life.[24]

Application to intimate image threats

12.35 Threats to disclose a person's intimate images may constitute unreasonable and oppressive conduct and therefore come within the definition of harassment in section 2 of the PHA 1997. We are aware of a recent case where the harassment offence was successfully charged where there was a threat to share an intimate image as part of a course of harassing conduct. In November 2021 Claudia Webbe MP was found guilty of harassment. She was found to have threatened a woman known to her partner a number of times; these involved a threat to use acid on the victim, and a threat to share the victim's intimate image with the victim's family.[25]

12.36 However, it may be difficult to establish a "course of conduct" because a threat may be made just once. Even if made more than once that will not of itself constitute a "course of conduct". The courts have held that the section is aimed at "repetitious behaviour" and "the fewer incidents there are and the further in time they are apart, the less likely it will be that they can properly be treated as constituting a course of conduct".[26]

12.37 This could make it challenging for prosecutors to apply the harassment laws to intimate image abuse. As the consultation paper indicated, stakeholders told us that in many cases there is likely only to be a small number of incidents; a threat to share an intimate image may only need to be made once to create the effect desired by the perpetrator.

12.38 For stalking offences, threats to take or share intimate images could be caught by the law because such threats often include contacting the victim or publishing material that relates to the victim or purports to be from them. For example, the stalking offences would capture the situation where a perpetrator creates a Facebook page pretending to be the victim, uploads intimate images and sends a link to the victim threatening to invite all their friends to view the page. This offence would also capture more widely understood stalking behaviour such as a perpetrator threatening a victim with taking photos of them through their bedroom window while they are getting undressed.

12.39 The limitation, however, mirrors that in the harassment offence: there must be a course of conduct and that will not always be the case when threats are made.

12.40 With regard to both harassment and stalking there are significant differences between penalties in the section 2 and 2A base offences, and the penalties for the section 4

---

[24] The basic stalking offence under s 2A is a summary only offence with a current maximum penalty of 51 weeks' imprisonment; the more serious offence under s 4A has a maximum sentence of ten years' imprisonment on indictment, and 12 months' imprisonment on summary conviction.

[25] Rajeev Syal, "MP Claudia Webbe given suspended sentence for harassing woman", (4 November 2021), *The Guardian*, https://www.theguardian.com/uk-news/2021/nov/04/mp-claudia-webbe-given-suspended-sentence-for-harassing-woman

[26] *Pratt v DPP* [2001] EWHC Admin 483 (165 JP 800) at [12]; *R v Patel* [2005] 1 Cr App R 440; *James v CPS* [2009] EWHC 2925 (Admin) at [11].

and 4A offences involving a fear of violence. The former are summary offences punishable by a maximum of six months' imprisonment and/or a fine. The latter are triable either way, with indictment allowing for up to ten years imprisonment. As we reported in the consultation paper, there was stakeholder concern that the lower level offences do not satisfactorily reflect the gravity of harm from threats involving intimate images.[27]

Controlling or coercive behaviour

12.41 Controlling or coercive behaviour is an offence under section 76(1) of the Serious Crime Act ("SCA") 2015. The offence includes requirements that:

- the defendant and victim are "personally connected", which will generally mean they are or were in an "intimate personal relationship", living together, family members, or civil partners; and
- that there is repeated or continuous behaviour that is controlling or coercive; and
- the behaviour has a serious effect on the victim, and the defendant knows or ought to know it will have such an effect.

12.42 Behaviour is said to have a "serious effect" if it causes the victim to fear, on at least two occasions, that violence will be used against them, or if it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities.[28]

Application to intimate image threats

12.43 This offence could apply if threats to share intimate images are made in a domestic abuse context, where the victim's intimate images are used as a means of gaining and retaining control. However, the offence only applies where the requisite relationship exists and where there is repeated behaviour. Again, those are significant limitations.

12.44 We consider below the considerable evidence of the use of intimate image threats to control the behaviour of the victim in abusive relationships, such as to coerce them into remaining in the relationship or to obtain child contact where they had separated.

Blackmail

12.45 The offence of blackmail will be committed where a person, with a view to making a gain for themselves or causing loss to another, makes an unwarranted demand with menaces.[29] The demand can be express or implied, and includes writing, speech or through conduct. It is irrelevant whether the person who made the threat intended to carry it out. It is not limited to threats of violence and can include threats of any action which is detrimental to or unpleasant to the person who is being threatened.[30] However, it is limited to threats made "with a view to gain, for [the defendant] or another or with intent to cause loss to another". While a "gain" for these purposes

---

27 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 3.148.

28 Serious Crime Act 2015, s 76(4).

29 Theft Act 1968, s 21(1).

30 *Thorne v Motor Trade Association* (1938) 26 Cr App R 51.

need not be financial, the Court of Appeal has ruled that the gain must consist of "property".[31]

Application to intimate image threats

12.46 This offence may cover some instances of threats to disclose, such as "sextortion", but it would not apply where the perpetrator does not seek to make a gain, but rather to humiliate or distress, to coerce or control, or to take revenge. That limitation means it is unlikely to apply in domestic abuse contexts.

Communications offences

12.47 In the consultation paper we explained that section 1 of the Malicious Communications Act 1988 ("MCA 1988") and section 127 of the Communications Act 2003 ("CA 2003") govern a range of grossly offensive, indecent, threatening, menacing and false communications. We also outlined the proposals for reform of these offences we had made in our Harmful Online Communications consultation paper.[32]

12.48 Since then, the Modernising Communications Offences report has been published.[33] The Government accepted our recommendations and, as a result, new communications offences which would replace the MCA 1988 and CA 2003 offences are currently before Parliament in the Online Safety Bill.

The new communications offences

12.49 The relevant new offence currently in the Online Safety Bill is a harm-based communications offence with the following elements:

(1) the defendant sends a message, and at the time of sending the message:

(a) there was a real and substantial risk that it would cause harm to a likely audience, and

(b) the defendant intended to cause harm to a likely audience, and

(c) the defendant had no reasonable excuse for sending the message.

(2) For the purposes of this offence, a defendant sends a message if they send transmit, or publish (or cause to be sent, transmitted, or published) a communication (including an oral communication) by electronic means, or they send (or cause to be sent) a letter or a thing of any other description.

(3) For the purposes of this offence, "harm" means psychological harm amounting to at least serious distress.

---

31 *R v Bevans (Ronald George Henry)* (1988) 87 Cr App R 64.

32 Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper 248. This was preceded by Abusive and Offensive Online Communications Scoping Report (2018) Law Com 381.

33 Modernising Communications Offences: A Final Report (2021) Law Com 399, HC 547.

(4) For the purposes of this offence an individual is a "likely audience" of a message if, at the time the message is sent, it is reasonably foreseeable that the individual: would encounter the message; or in the online context, would encounter a subsequent message forwarding or sharing the content of the message.

(5) When deciding whether the defendant had a reasonable excuse for sending or posting the communication, the court must have regard to whether the communication was, or was meant as, a contribution to a matter of public interest.

12.50 This offence is an either way offence, with a maximum sentence of two years' imprisonment on indictment, and 12 months summarily.[34]

12.51 Clause 153 of the Online Safety Bill contains a threatening communications offence. This only criminalises the sending of messages that convey a threat of death or serious harm; serious harm is defined as serious injury (amounting to grievous bodily harm within the meaning of the Offences Against the Person Act 1861), rape, assault by penetration (within the meaning of section 2 of the Sexual Offences Act 2003) and serious financial loss. It is unlikely that a threat to take, make or share an intimate image would convey a threat of such harm.

Application to intimate image threats

12.52 It is likely that a threat to take, make or share an intimate image would be captured by the new harm-based communications offence as currently drafted. The offence would be committed at the point the threat was sent without reasonable excuse. If the defendant intended to cause harm, and there was a real and substantial risk that the threat would cause harm, it does not matter whether they intended to carry out the threat. This would potentially include a threat where the image does not exist, or there is no proof the image exists, as the threat itself is the harmful communication.

12.53 The new harm-based communications offence does not require proof of actual harm. Rather, harm must be likely to occur. That likely harm must be psychological harm amounting to at least serious distress. The evidence from stakeholders and in consultation responses is that a threat to share intimate images would frequently reach that level. However, there will be a small minority of threats to take, make or share an image where the likely harm does not reach the threshold of psychological harm amounting to at least serious distress.

12.54 There are, however, significant limitations on what threats would be captured by the new harm-based communications offence. First, it will only criminalise threats that are sent (like a letter), or sent, transmitted, or published by electronic means, without reasonable excuse. A threat to share an image that is made orally to a victim, for example in the context of an abusive relationship, would not be caught by such an

[34] The current clause in the Online Safety Bill states "the maximum term for summary offences", see Chapter 2 and 7 for further discussion of maximum summary terms.

offence.[35] Secondly, there is a labelling limitation. As we explained in the consultation paper, stakeholders saw the harm caused by intimate image abuse as analogous to sexual offences; to categorise intimate image abuse threats as communications offences would therefore fail to reflect the nature of the harm. These limitations are sufficiently problematic to conclude that the harm-based communications offence would not deal adequately with threats to take, make or share intimate images.

Threatening to disclose private sexual images

12.55 In 2020 the domestic violence charity Refuge launched their campaign The Naked Threat, aimed at reforming the disclosure offence under section 33 of the Criminal Justice and Courts Act 2015.[36] In our consultation paper we outlined the parliamentary debates on the Domestic Abuse Bill, which considered amendments that proposed criminalising threats to disclose. Subsequent amendments proposed in March 2021 broadened the scope of the proposals further, including threats where an image does not exist. They also proposed that the prosecution would not be required to prove that the image if it does exist, is private or sexual.

12.56 The Bill passed into law and section 33 now criminalises threats to disclose, with the key provisions being:

> (1) A person commits an offence if–
>
> > (a) the person discloses, or threatens to disclose, a private sexual photograph or film in which another individual ("the relevant individual") appears,
> >
> > (b) by so doing, the person intends to cause distress to that individual, and
> >
> > (c) the disclosure is, or would be, made without the consent of that individual.
>
> (2A) Where a person is charged with an offence under this section of threatening to disclose a private sexual photograph or film, it is not necessary for the prosecution to prove–
>
> > (d) that the photograph or film referred to in the threat exists, or
> >
> > (e) if it does exist, that it is in fact a private sexual photograph or film.

12.57 There are a number of consent-based and other exceptions that apply to the threat provisions in the same way they apply to disclosure; these have been discussed in Chapter 2.

---

35 For example, the New South Wales case *Jamal v Commissioner for Fair Trading* [2020] NSWCATOD 99 concerned a threat to disclose an intimate image that was made orally during the course of an argument between partners. This is an example that may be common.

36 Refuge, *The Naked Threat* (2020) https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf.

Application to intimate image threats

12.58 The amendments to section 33 constitute a significant step forward in criminalising threats to disclose. They provide a meaningful protection in a fairly wide range of circumstances in which intimate image threats are made. However, there remain some limits. First, there must be an intent to cause distress. Secondly, the provisions are limited to "private sexual" photographs or films. As discussed in Chapter 3, there are intimate images that are not caught by this definition that we consider should be covered by intimate image offences, such as images of people nude or partially nude in a public changing room, or using the toilet. Thirdly, the provisions fail to capture threats to disclose altered images such as "deepfakes". During the passage of the new offence through Parliament, the Rt Hon Baroness Morgan of Cotes noted that the issue of altered images and deepfakes as raised in our consultation paper, still needs to be addressed.[37]

Conclusions: the patchwork of laws and intimate image threats

12.59 The position remains as we stated it in the consultation paper, though with the notable exception of the extension of the disclosure offence. There are some current offences that could be applied in certain intimate image abuse threats cases. The nature of each offence means that they are limited to certain types of threats and would only apply in specific situations. There are some threatening behaviours that would not be caught by any of the current offences. As the existing offences (including the new communications offence) were not designed to target the harm of intimate image abuse and, specifically intimate image threats, they create a patchwork effect and present difficulties in practical application and labelling of this particular harm. While the amended disclosure offence now makes considerable inroads into the gaps, it does not fill those gaps completely.

THREAT OFFENCES IN OTHER JURISDICTIONS

12.60 During the last eight years some jurisdictions have specifically criminalised intimate image threats. In the consultation paper we considered in detail the approaches taken in several of those jurisdictions. Here, we sketch the ways that intimate image threats have been criminalised elsewhere and then set out the key issues that have informed our recommendations.

Comparable jurisdictions

12.61 We gave particular consideration to laws in Scotland and in Australian states and territories. Threats to share intimate images have been criminalised in Western Australia, Queensland, New South Wales, South Australia, the Australian Capital Territory, and the Northern Territory.[38]

---

37 *Hansard* (HL) 10 March 2020, vol 810, col 1730.

38 Only in Tasmania have threats not been criminalised. There is also an Australian commonwealth regime but it uses civil penalties and not criminal offences: Online Safety Act 2021. The consultation paper also considered the laws in Canada where, as in England & Wales, a patchwork of offences exists that may capture some threats: consultation paper 12.106 to 12.108. The amending statutes in Australia were: Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic); Summary Offences (Filming and Sexting Offences) Act 2016 (SA); Crimes (Intimate Image Abuse) Amendment Act 2017 (ACT); Crimes Amendment (Intimate Images) Amendment Act 2017 (NSW); Criminal Code (Intimate Images) Amendment

12.62 Summaries of three jurisdictions illustrate the kinds of approaches that have been taken.

Scotland

12.63 The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 introduced a new offence of disclosing intimate images including threats to do so. The Act criminalises disclosure, but not taking or making intimate images. It has an additional intent element that D intends to cause V fear, alarm or distress, or is reckless as to that. It does not apply where the image has previously been disclosed to the public at large with V's consent.

12.64 The crime statistics data from Scotland indicates that each year there are hundreds of instances of people making threats to share and the offence is actively used by prosecutors.[39]

New South Wales

12.65 Section 91R of the Crimes Act 1900 (NSW) makes it an offence to threaten to record or distribute intimate images. It has an additional intent element that D intends to cause V to fear the threat will be carried out. A threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional. For threats to distribute it is not necessary that the image exists. It is not necessary that V actually fears the threat would be carried out.

Victoria

12.66 In Victoria, section 41DB of the Summary Offences Act 1966 (Vic) criminalises threats to distribute an intimate image where D intends V to believe the threat will be carried out or believes that V believes the threat will probably be carried out, and where the distribution of the image "would be contrary to community standards of acceptable conduct". Those standards will take account of matters including: the nature and content of the image; the age, vulnerability and other circumstances of V; the circumstance in which the image was taken and distributed; and the effects on V's privacy. A threat may be made by any conduct and may be explicit or implicit. The maximum penalty is one year imprisonment.

Themes in comparative law

12.67 There is a variety of approaches to criminalisation, with jurisdictions taking different approaches that will, inevitably, be framed in ways that are consistent with and informed by their wider framework of criminal laws. There are, however, a number of features that have informed our thinking in reviewing the law in England and Wales.

12.68 First, threat offences can be and often are separated from taking, making and sharing offences; that is, they are criminalised by a separate section in the relevant statute, rather than being a subsection of a provision that combines both (for example) sharing

Act 2018 (NT); Criminal Law Amendment (Intimate Images) Act 2019 (WA); Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2019 (Qld).

39 Consultation paper 12.87; see also *Recorded crime in Scotland: 2020-2021* (28 September 2021) available at https://www.gov.scot/publications/recorded-crime-scotland-2020-2021/pages/22/.

and threats to share. In all the Australian jurisdictions there is a separate threat provision.[40]

12.69 Secondly, threats are criminalised even where no intimate image exists or, more broadly, it is impossible for the defendant to carry out the threat. This is expressly included in statutes in six of the Australian jurisdictions.[41] In the other two it is not stated but impossibility is unlikely to be a barrier to prosecution because the elements of the offence focus on the fear of the victim.[42] These offences reflect the reality that sometimes threats are made and the victim does not know whether the image exists. For example, a victim may not know whether an ex-partner still has an intimate image or if it has been deleted; the harm to the victim from the threat is the same whether the image remains or not.

12.70 Thirdly, statutes include provisions that threats may be explicit or implicit.[43] Even where such a provision is not included in a statute, an implicit threat may still be caught because those statutes use phrases such as "any act", "behaviour that may reasonably be regarded", or "in all the circumstances" in the threat offences.[44] We also note that some statutes state that threats may be either unconditional or conditional, which ensures conditional threats are not excluded.[45]

12.71 Fourthly, there are a range of approaches to the mental element. We note two matters in particular. One is that several jurisdictions require an intent to cause the victim to fear or believe the threat will be carried out.[46] A second is that in some jurisdictions an alternative mental element is recklessness as to whether that fear or belief is

---

40 Criminal Code Act (Queensland), s 229A; Criminal Code Act (Northern Territory), s 208AC; Summary Offences Act 1953 (South Australia), s 26DA; Crimes Act 1900 (NSW), s 91R; Summary Offences Act 1966 (Vic), s 41DB; Criminal Code Compilation Act 1913 (Western Australia), s 338B; Crimes Act 1900 (ACT), s 72E.

41 Criminal Code Act (Queensland), s 229A(3)(a); Criminal Code Act (Northern Territory), s 208AC(2)(c); Crimes Act 1900 (NSW), s 91R(4); Criminal Code Compilation Act 1913 (Western Australia), s 338C; Crimes Act 1900 (ACT), s 72E(2)(c).

42 In Victoria and South Australia the statutes do not expressly state that the image need not exist. The Sentencing Advisory Council has suggested it would not be a barrier to prosecution in Victoria because the focus is on the fear of the victim: Sentencing Advisory Council, Victoria State Government, *Sentencing Image-Based Sexual Abuse Offences in Victoria* (October 2020), https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-10/Sentencing_Image_Based_Sexual_Abuse_Offences_in_Victoria.pdf. On the same analysis it would not be a barrier in South Australia.

43 Criminal Code Act (Northern Territory), s 208AC(2)(a); Summary Offences Act 1953 (South Australia), s 26DA(4); Crimes Act 1900 (NSW), s 91R(3); Crimes Act 1900 (ACT), s 72E(2)(a).

44 Criminal Code Act (Queensland), s 229A(1)-(2); Criminal Code Compilation Act 1913 (Western Australia), ss 338, 338C.

45 Crimes Act 1900 (NSW), s 91R(3); Criminal Code Act (Northern Territory), s 208AC(2); Crimes Act 1900 (ACT), s 72E(2)(a).

46 Criminal Code Act (Northern Territory), s 208AC(1)(b); Crimes Act 1900 (NSW), s 91R(1)(b); Crimes Act 1900 (ACT), s 72E(1)(b). In Queensland the test is effectively an objective alternative, referring to threats "made in a way that would cause the other person fear, reasonably arising in all the circumstances, of the threat being carried out": Criminal Code Act (Queensland), s 229A(1)(b).

caused.[47] The recklessness element widens the scope which may overcome some of the evidential issues in proving intent. It would not necessarily capture threats made as a joke, unless it could be proved A was reckless as to whether they caused the requisite fear or belief.

12.72 Fifthly, it is often expressly stated that the prosecution do not need to prove the victim actually feared the threat would be carried out.[48] This mirrors the offences in England and Wales of threats to kill and threats to cause criminal damage.

12.73 Sixthly, there are instances of jurisdictions – notably Western Australia – that have sought to capture different categories of offending with higher sentences for aggravating circumstances.[49]

12.74 Finally, we note also that threats to third parties are expressly criminalised in Queensland.[50] We discuss threats to third parties below from paragraph 12.180.

POTENTIAL NEW THREAT OFFENCE

12.75 As the consultation paper indicated, we agree with stakeholders that the current law does not adequately address the full range of behaviours or the harm that is caused by threats to take, make and share intimate images. We proposed a new offence to address these behaviours. The consultation paper discussed the elements that could be included in a new offence and asked consultees for their views. As explained above, and in Chapter 2, the disclosure offence has been amended since publication of the consultation paper to criminalise some threats to disclose. We consider this in our analysis of these responses, although note that at the time the responses were submitted, no such offence was in place.

12.76 Here, we review the proposed elements, taking account of the information and views provided to us in consultation responses, and set out our recommendations with regard to a new offence.

Separate offence

12.77 We have concluded that a separate, specific offence that criminalises threats is required.

12.78 We consider the best approach to be the creation of a separate offence (as the Australian jurisdictions have done), rather than combining a threat offence with the taking, making and sharing offences (as is the case in Scotland, and in the current threat to disclose offence). We take this approach because threats have a different

---

47 Summary Offences Act 1953 (South Australia), s 26DA(1); Crimes Act 1900 (ACT), s 72E(2); Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(1)(b), which refers to causing the victim "fear, alarm or distress".

48 Criminal Code Act (Queensland), s 229A(3)(b); Crimes Act 1900 (ACT), s 72E(2)(b); Crimes Act 1900 (NSW), s 91R(5); Criminal Code Act (Northern Territory), s 208AC(2)(b).

49 Criminal Code Compilation Act 1913 (Western Australia), ss 338A, 338B, 338C(3), For example, maximum penalties are higher where a threat was made with intent to secure a benefit or detriment to any person (not limited to pecuniary gain or detriment), or where the offender was in a family relationship with the victim, where a child was present when the offence was committed, and where the victim was over 60 years of age.

50 Criminal Code Act (Queensland), s 229A(2).

character to taking, making and sharing; the harm arises from the threat itself rather than the taking, making or sharing that may or may not follow. It is not necessary therefore to include threats in the same substantive offence. This is consistent with the way the law in England and Wales approaches threats to kill or cause criminal damage; they are separate from the offences of murder or causing criminal damage. By separating out a threats offence we are also able to tailor the elements to ensure that they only criminalise the harmful behaviour and are not unduly hampered by a need to fit them within taking, making or sharing offences.

12.79 We consider now which of the threats to share, to take, or to make an intimate image should be encompassed by this new separate offence.

Threats to share an intimate image

12.80 The consultation paper explained our view that there was a strong case for the new offence to cover threats to share an intimate image. We had seen evidence that the threat to share causes harm to the victim, and evidence that threats to share are common. Refuge, for example, have reported that one in seven young women have experienced a threat to share an intimate image.[51] Research undertaken by Professors McGlynn, Rackley and Dr Johnson suggested that threats to disclose intimate images are reported to police but no charges were brought as threatening to share was not understood to be an offence.[52]

12.81 There is now an offence of threatening to disclose a private sexual image where there was intent to cause the person depicted distress, under section 33 of the Criminal Justice and Courts Act 2015 (as amended by section 69 of the Domestic Abuse Act 2021). However, as discussed above at paragraph 12.58, that expansion does not cover the full range of threats to share intimate images.

12.82 In the Summary Consultation Paper we sought views on the general question of whether threats to share should be criminalised. Summary Consultation Question 4 asked:

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

12.83 The full consultation paper at Consultation Question 40 sought views on whether consultees agreed with the form of the offence we proposed. This data is mainly discussed when we turn to the content of the offence but some comments are useful to consider here.

---

51 Refuge, *The Naked Threat* (2020) https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf.

52 Clare McGlynn, Erika Rackley, Kelly Johnson and others “Shattering Lives and Myths: A Report on Image-Based Sexual Abuse” (July 2019) Durham University and University of Kent, p 11, https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf.

Responses and analysis

Responses

12.84 The majority of consultees who responded to these questions agreed with our proposal to criminalise threats to share intimate images (295 out of 314).

12.85 Agreement was expressed by a broad range of stakeholders with relevant expertise and representing wide experience. These included three parliamentarians, four judicial bodies, six academics, ten victim support groups, four policing bodies, and seven legal stakeholders including the Bar Council and the Law Society.

12.86 The reasons for such strong support were most clearly apparent from the harm caused by threats to share, which was comprehensively documented by consultees.

12.87 Responses included four mentions of suicide and contemplation of suicide as a result of threats to share. There were many individual case studies reporting extreme levels of distress and devastating consequences for personal and professional lives. In their joint response, the Office of the Police, Fire and Crime Commissioner for North Yorkshire and North Yorkshire Police submitted:

> The consequences are far wider than humiliation and embarrassment, and many victims experience professional consequences, such as having to leave their employment after photos had been shared or because they were frightened by a threat that images would be published. Depression, anxiety, and even suicidal thoughts are also common.

12.88 Muslim Women's Network UK provided powerful testimony of the harm experienced from threats. They urged that the serious harm experienced by victims of threats to share be taken into account when considering law reform in this area. Their Unheard Voices report also explains the prevalence of intimate image blackmail involving shame and honour. In their study, a concerning number of cases were identified involving child victims who had been recorded while being sexually assaulted or coerced into sending sexual images, and were then blackmailed using these images. In the victims' religions and culture, sex before marriage is regarded as "sinful", so they were afraid of their families or communities finding about the sexual activity in the images. The perpetrators exploited this fear by threatening to share them.[53]

12.89 Professors McGlynn and Rackley stated plainly the findings of their Shattering Lives research report, which was based on "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.

---

[53] Shaista Gohir MBE, *Unheard Voices: The Sexual Exploitation of Asian Girls and Young Women* (September 2013) Muslim Women's Network UK, para 7.2, https://www.mwnuk.co.uk/go_files/resources/UnheardVoices.pdf.

Among the examples they provided, one victim explained the "paralysing" effect a threat has had on his life:

> 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.

12.90 Consultees observed that a threat to share may endure. As the West London Magistrates Bench put it:

> …the threat of sharing an image would be just as terrifying (if not more so) than the actual act of sharing. The threat to share could continue indefinitely, with no practical steps that the victim could take to remove the alarm and distress of the prospect of the image being shared to person or persons unknown at some indefinite point in the future.

The response from The Office of the Police and Crime Commissioner for Northumbria (in partnership with four local organisations) made a similar point: "it can be very difficult to confirm that images have been deleted, meaning a threat to share an intimate image could hang over a victim for a significant period of time".

12.91 A significant theme that emerged in the responses was that intimate image abuse threats form part of controlling or coercive behaviour and domestic abuse. The Queen Mary Legal Advice Centre noted that "the primary motivation of perpetrators that we see is control, and threats are a well-used tool in this pattern". ManKind explained that threats may characterise controlling behaviour after a relationship has ended: "this threat and actual sharing is more likely to take place after a couple split and is used to exert control and coercion on a former partner – even more so when the victim is in a position of trust." An anonymous experience reported by Victims of Image Crime ("VOIC") gave a personal perspective: "the threats were what kept me in his control and made me 'behave'".

Analysis

12.92 In light of overwhelming support for criminalisation of threats to share, and the extensive evidence of prevalence and harm, our view is that responses to the consultation place beyond doubt the case for a comprehensive threat to share offence. Given the limitations as to type of image covered, and intent of the perpetrator, the current threat to disclose offence does not satisfactorily address all the wrongful and harmful threat behaviour. We conclude that a new offence, that is separate from a taking or sharing offence, is required.

12.93 What was less clear at consultation, however, was whether a new offence should also cover either or both threats to take and threats to make an intimate image. The consultation sought evidence and views on these types of threats.

Threats to take an intimate image

12.94 We were unaware of any instances where there had been threats to take an intimate image. We recognised that the behaviour could be occurring but may not be reported

to or by stakeholders because it occurs in domestic abuse or other coercive or controlling circumstances that hinder reporting. It may be that victims are not reporting threats to take intimate images because they are made orally and difficult to prove, or they are not considered an offence. Consultation Question 37 sought information about this behaviour:

> We invite consultees to provide examples where threats to take intimate images have been made.

Responses and analysis

Responses

12.95 There were 21 responses to question 37. Of these, 12 consultees provided an example or comment on threats to take. The other nine consultees stated that they did not know of any examples or have any comment.[54]

12.96 The responses that provided comment or examples varied in the extent to which they addressed the very specific evidence that was sought by Consultation Question 37 – that is, examples of threats to take an intimate image where there is not also a threat to share.

12.97 There were two clear examples reported of threats to take. Slateford Law advise that they are aware of such behaviour: "we have seen threats such as these made in the context of relationship breakdowns in order to influence divorce proceedings". One anonymous consultee[55] gave their personal experience of a threat to take: "I have personally been photographed in public as a form of intimidation and further threatened with more images being taken. I am not aware of whether the perpetrator intended to share the image but the harm was already caused".

12.98 Other respondents did not have examples but found a threat to take entirely plausible. Honza Cervenka noted that he had not come across examples in his work (for law firm McAllister Olivarius) but could "imagine a threat to take an intimate picture through voyeurism (eg, 'I can see you change through the window, maybe one day I'll walk by with my camera.'), within or outside a domestic relationship".

12.99 In the majority of the 12 responses offering comment, consultees gave examples or pointed to instances where the threat to take an image was either accompanied by a threat to share or could more accurately have been characterised as a threat to share. While these responses and experiences were not of threats to take absent threats to share as the question sought, they are valuable. They helpfully illustrate the ways that threats to take are commonly either implicitly or explicitly threats both to take and to share.

12.100 Women's Aid suggested that threats to take and share are increasing and described the harm. They stated that their services team have:

---

54 These included: CPS; Bar Council; Magistrates Association; HM Council of District Judges (Magistrates' Court) Legal Committee; and Senior District Judge (Chief Magistrate) Goldspring.

55 Anon 2, personal response.

> Reported an increase in the last year of partners or former partners threatening to take or share intimate images and this is typically used as tool for coercive control – weaponised to keep a woman in the relationship or to continue to control her during the relationship or when the relationship has ended. We regularly hear that survivors feel trapped and isolated when there are threats to take or share intimate images.

12.101 The issue of implicit threats emerged in the responses to Consultation Question 37, and appears in other responses. We heard that threats involving intimate images often occur in the context of controlling or coercive relationships. In these circumstances, and perhaps in any circumstance given the prevalence of intimate image abuse online, an explicit threat to share may not be necessary. That threat to share may be implicit in the threat to take an intimate image because the victim will fear that the image will be shared, and the perpetrator will likely know that.

Analysis

12.102 We have received very limited evidence that threats to take an intimate image are made without an accompanying threat to share. Rather, threats to take are almost always accompanied by, or made as part of, a threat to share. The evidence suggests that the harm is caused by the threat to share, whether that threat is implicit or explicit.

12.103 In the consultation paper the hypothetical circumstance of a threat to take an intimate image related to voyeurism.[56] In these instances, absent the taking of an intimate image (which would be an offence under our proposals) and absent a threat to share, criminal culpability for threats to take may be more appropriately determined under stalking and harassment laws. The personal experience shared of a threat to take photos in public to intimidate may also be better addressed by the stalking and harassment laws. A threat to take intimate images made to "influence" legal proceedings is likely also to involve sharing within the proceedings and so may be addressed as a threat to share.

12.104 On the basis of the very limited evidence we have received of threats to take without accompanying threats to share, we do not recommend an offence of threatening to take an intimate image. However, research into intimate image abuse is ongoing and will continue into the future. We are conscious that publication of our report may prompt more research into the scale and nature of intimate image abuse, and there may also be more reporting of abuse. In this context we think it important to make our view clear: should evidence emerge suggesting threats to take are becoming a prevalent behaviour that causes substantial harm even when there is no accompanying threat to share the image, then we would agree there is a case for an offence of threatening to take an intimate image, especially if such threats are not caught by other laws.

12.105 We note, however, that implicit threats are a significant concern and that they may be made not only with regard to taking intimate images but also, particularly, to sharing them. A new offence should be able to capture implicit threats. We consider implicit threats further from paragraph 12.131 below.

---

[56] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.101.

Threats to make an intimate image

12.106 In the pre-consultation stage we were made aware of examples of threats to make an image that are accompanied by a threat to share that image. These included threats to photoshop an image of a victim's face on to a pornographic image and then upload the altered image to a pornographic website. We consider that this behaviour could be captured by an offence of threatening to share an intimate image, where the definition of image includes altered images. This is discussed further, below.

12.107 However, it was less clear whether threats were made to make an intimate image, unaccompanied by a threat to share. We accepted it was possible that a threat to make an image may of itself cause harm, even where there is no accompanying threat to share it, but pre-consultation engagement did not reveal any examples. Consultation Question 38 sought information about this:

> We invite consultees to provide examples where threats to make intimate images have been made without an accompanying threat to share the image.

Responses and analysis

Responses

12.108 There were 17 responses to Consultation Question 38. Of these, seven consultees provided comments on threats to make unaccompanied by threats to share. The other 10 consultees stated that they did not know of any examples or have any comment.[57]

12.109 Of the seven responses that provided comments, none cited an example. However, it was clear that respondents did not see the absence of examples as evidence that the behaviour is not occurring. South West Grid for Learning were not able to provide an example but stated that: "we see similar sorts of behaviour and suspect that it happens, it just may not be reported to us". Honza Cervenka made a similar comment: "I do not have any such examples through my work, but I don't believe that indicates that this behaviour does not happen". Advocacy organisation #NotYourPorn stated that while they have not had experience of such cases, "this does not mean to say that the aforementioned situation does not happen".[58]

12.110 One consultee who works for a technology firm suggested that threats to make are not that common: "from what I've seen with 'make' behaviour – it tends to get made and then sent out with little regard of prior warning or engagement with the victim".[59]

12.111 As in the responses to Consultation Question 37 there were suggestions that threats occur in the context of abusive relationships. Muslim Women's Network UK noted that often a threat is not carried out because the victim complies with the demands of the perpetrator

12.112 There were also concerns raised about futureproofing any new law. South West Grid for Learning suggested that technological advances increasing the ability to make

---

57 These included: CPS; the Bar Council; Magistrates Association; HM Council of District Judges and Senior District Judge (Chief Magistrate) Goldspring.

58 #NotYourPorn then noted that threats to share a made image are "prevalent".

59 Laura Bloomer, Backed Technologies Ltd.

such images means it is appropriate to criminalise it now: "with technology improving … all the time to make such images, it feels like it would be an oversight and failure to futureproof this legislation if it were not included".

Analysis

12.113 Having received no examples of threats to make an intimate image, unaccompanied by a threat to share, we cannot draw a conclusion that the behaviour is happening. We agree with the stakeholders that it could be happening, but that is not sufficient basis on which to criminalise conduct. We also recognise the force of the point that technological advances means it is becoming easier to make images, but it does not necessarily follow that threats to make, unaccompanied by threats to share, will increase. Given this we do not recommend an offence of threatening to make an intimate image.

12.114 We note, however, that, as with threats to take intimate images, the threat to share may be implicit, and that threats are likely to occur in and be a part of controlling or coercive behaviour in a relationship. These matters are addressed further, below.

NEW OFFENCE OF THREATENING TO SHARE AN INTIMATE IMAGE

The provisional proposals in the consultation paper

12.115 In the consultation paper we made two provisional proposals regarding the foundation of the proposed offence and sought views from consultees in Consultation Question 40, which had two parts. The first part set out the offence:

> We provisionally propose that it should be an offence for D to threaten to share an intimate image of V, where:
>
> (a) D intends to cause V to fear that the threat will be carried out; or
>
> (b) D is reckless as to whether V will fear that the threat will be carried out.
>
> Do consultees agree?

12.116 The second part of Consultation Question 40 addressed the definition of intimate image:

> 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?

12.117 In the following sections, we first address the definition and then move to the elements of the offence, reviewing the provisional proposals in light of the consultation responses.

12.118 We then turn to two further consultation questions that sought views about whether the new offence should criminalise threats to share with third parties, and whether the prosecution should be required to prove the victim did not consent.

The definition of an intimate image

Responses and analysis

12.119 There were 34 responses to part two of Consultation Question 40. All agreed that that same definition of "intimate image" should be used for both the offences of sharing and threatening to share.

12.120 The Bar Council noted that having the same definition is important "to ensure simplicity and consistency". The Crown Prosecution Service ("CPS") suggest it "creates consistency and clarity". Refuge "strongly" agreed with using the same definition, arguing that:

> Using the same definition will ensure that threats to share, which can result in comparable harms to actually sharing an intimate image, are treated the same way by the law, and that the general public, including perpetrators, are aware of the seriousness of these threats.

12.121 Similarly, Women's Aid suggest it is necessary "to ensure the law [is] comprehensive and uncomplicated and provides equal protection for survivors".

Public element

12.122 There was one notable point of contention in some responses, which was whether the "public element" test in the substantive sharing offence should carry through to the threat to share offence. In the consultation paper, we proposed that the sharing of some images taken in public, such as images of a streaker at a sporting event or a naked protestor, should not be criminalised. We make the same recommendation in this report. If sharing such an image would not cause significant harm, threatening to share that image becomes a less serious behaviour.

12.123 Professor Tsachi Keren-Paz argued that "it does not necessarily follow … that a threat to share should not be criminalised". He drew a parallel with Lindgren's 'paradox of blackmail', where a threat to do something legal can be criminalised.[60] He also argued that the threat could be "more culpable than the sharing" where the person making the threat believes that the person in the image would not consent to the sharing. Professor Alisdair Gillespie considered this issue but, having supported the public element components of the substantive sharing offence, took the view that it would be odd if a threat to share were criminalised when sharing would not be. His preferred approach is that where a threat is not captured by the threat to share offence then it could be captured under other offences, such as communications, blackmail or sexual offences. As we noted in the consultation paper on this point, if the content of the threat itself is sufficiently harmful, regardless of the nature of the image, communications or blackmail offences could still apply.

12.124 While we see the point that Professor Keren-Paz makes, the case for consistency is strong – as the supportive comments above note – and should not give way in the face of a specific, narrow issue, especially where there may be alternative criminal offences available on that specific point.

---

60 James Lindgren, 'Unravelling the paradox of blackmail' (1984) 84 *Columbia Law Review* 670-717.

Recommendation 38.

12.125 We recommend that the same definition of "intimate image" is used for both the offences of sharing and threatening to share an intimate image.

The offence

Responses and analysis

12.126 The majority of consultees who responded to part 1 of Consultation Question 40 agreed with the proposed threat offence (32 out of 39).

12.127 Where concerns were raised in the responses these tended to be related to specific issues regarding one or more elements, which are discussed below. In some instances comments related to other consultation questions, including whether there should be a requirement to prove the absence of consent, which we address below in discussing Consultation Question 41.

12.128 Overall, there was strong support for the proposed approach to conduct, fault, and additional intent.

Conduct

12.129 We proposed that the relevant conduct should be that a person threatens to share an intimate image of another. This followed the conduct elements of the current threat offences of threats to cause criminal damage and threats to kill. In those offences, whether a threat has been made, and whether it is a threat to cause damage or to kill are objective questions, will be decided on the facts. The same objective approach should determine whether conduct constitutes a threat to share an intimate image.

12.130 There was general agreement from consultees that the core of the conduct lies in the threat itself, as noted above in the section "threats to share an intimate image" at paragraph 12.80.

Implicit threats

12.131 We have noted at various places in this chapter two recurring points made by consultees. The points have been made in response to different questions, which is understandable as no single question asked about these matters. First, consultees have made it clear that threats to share intimate images are made in the context of abusive relationships. Secondly, threats are not necessarily made in plain or express language. In particular, they may be implicit. As we pointed out above in discussing the mode of threats (paragraph 12.8), a statement by D that he or she possesses or can make intimate images may be sufficient to convey to V a threat that D can and may share those images.

12.132 In the discussion of comparative jurisdictions we considered the approach taken in some jurisdictions to include legislative provisions that expressly state that a threat may be explicit or implicit, or may be conditional or unconditional. In New South Wales the statute includes a subsection that states: "A threat may be made by any conduct,

and may be explicit or implicit and conditional or unconditional".[61] The Northern Territory and Australian Capital Territory provisions are the same: "a threat may be made by any conduct, whether explicit, implicit, conditional or unconditional".[62] In South Australia the provision is more broadly stated: "This section applies to a threat directly or indirectly communicated by words (written or spoken) or by conduct, or partially by words and partially by conduct, and may be explicit or implicit".[63] These provisions give clarity and certainty to the scope of the threat offence.

12.133 A new threat offence of the kind we recommend can capture threats that are implicit or conditional or nuanced in any other way because it will be a question of fact to be decided by the jury or magistrates whether a threat has been made.

12.134 The victims of intimate image threats will in many instances be in abusive relationships and vulnerable to violence, coercion and control. Others will be immediately made vulnerable by a threat. The law should leave these victims in no doubt that the perpetrator is committing an offence when a threat is made to share an intimate image, whether implicit, conditional or otherwise nuanced. If a relevant threat is conveyed in all the circumstances then it is a threat that should be caught by the offence.

12.135 Clarity as to the scope of the threat offence will enable support and advocacy groups to make it clear in their work supporting and advising victims that implicit threats are crimes. Such clarity will also be important for law enforcement so that police can clearly and confidently respond to complaints where a threat may not have been explicitly made.

Recommendation 39.

12.136 We recommend that the offence of threatening to share an intimate image should include implicit and conditional threats.

Where a threat is impossible to carry out

12.137 It is clear from consultation responses that a threat may be made even when it would be impossible for the perpetrator to carry that threat out. The clearest example of this is where the perpetrator threatens to share an image but it is impossible to do so because they do not possess the image. There may, however, be other factors that could make it impossible for a perpetrator to carry out a threat; for example, they may threaten to share an image on a particular online forum or in a particular way but not have the technological expertise, equipment or access to carry out the threat.

---

61 Crimes Act 1900 (NSW), s 91R(3).

62 Criminal Code Act (Northern Territory), s 208AC(2)(a); Crimes Act 1900 (ACT), s 72E(2)(a).

63 Summary Offences Act 1953 (SA), s 26DA(4).

12.138 It is also clear from responses that the effects of the threat are rarely diminished by the fact a perpetrator may not be able to carry it out. The fact the victim does not know whether (for example) the perpetrator possess an image can intensify the threat.

12.139 Provisions in other jurisdictions expressly address this issue. The reasons for including express provisions relating to implicit threats also apply here: even if the offence would capture threats that were impossible to carry out, there are benefits in making it explicit.

Examples of impossibility provisions

12.140 There are two different approaches in other jurisdictions.

12.141 The New South Wales laws refer only to one specific circumstance: "A person may threaten to distribute an image whether or not the image exists".[64] The Queensland Criminal Code takes the same approach: "It is immaterial whether the intimate image or prohibited visual recording exists or does not exist".[65]

12.142 A wider approach is taken in both the Northern Territory and the Australian Capital Territory: "a person may be found guilty even if carrying out the threat is impossible".[66]

12.143 In our view, there is good reason to take the wider approach but also to identify and acknowledge the common and clear position that an image may not exist.

Recommendation 40.

12.144 We recommend that the offence of threatening to share an intimate image should include threatening to share an intimate image that does not exist and other circumstances where it is impossible for the defendant to carry out the threat.

Fault

12.145 It is necessary to distinguish behaviour that is a threat from behaviour where someone is simply making a statement of intent, or a mutual joke. To achieve this, the offence requires a fault element. We provisionally proposed that the fault element of a threatening to share offence should be that

(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.

12.146 Responses were generally supportive of this formulation of the fault element, though there were some concerns raised.

---

64 Crimes Act 1900 (NSW), s 91R(4).

65 Criminal Code Act (Queensland), s 229A(3)(a).

66 Criminal Code Act (Northern Territory), s 208AC(2)(c); Crimes Act 1900 (ACT), s 72E(2)(c).

Intention

12.147 The intention test is modelled on the current offences of threats to kill and threats to cause criminal damage, as well as the intimate image offence in the Australian Capital Territory. These have a similar fault element of intention to cause V to fear that the threat will be carried out. The test does not require any particular motive for the conduct. Importantly, and consistent with the responses that made it clear the harm is caused by making the threat, this fault element does not require that the threat is carried out, or that it is capable of being carried out. It is not necessary that the victim believed the threat would be carried out, or that they were actually in fear; it requires only that the defendant intended the victim to fear the threat would be carried out. It would therefore apply even where the victim knows with certainty that it is impossible for the threat to be carried out (as opposed to believing it is impossible). This is important for two reasons. First, the defendant may not know the victim is aware it will be impossible (for example, if the victim has earlier deleted the relevant image from the defendant's phone, unbeknownst to the defendant) but the defendant may nonetheless intend to instil fear in the victim. Secondly, the threat may be made as a part of coercive or controlling behaviour, for example where the victim is made to doubt themselves as to whether an image actually exists. The culpability of the defendant is the same. It is appropriate that the impossibility is cast clearly and broadly so as not to leave gaps in protection for victims.

12.148 Including this intention requirement will avoid overcriminalisation in situations where a statement was made as a mutual joke, or was a simple statement of intent. That is, there must be conduct of some kind that objectively constitutes the making of a threat.

12.149 It was suggested by Marthe Goudsmit that the requirement that D intended V to fear the threat would be carried out sets the bar too high and that an intent to make a threat should be sufficient. In particular, where V does in fact fear the threat will be carried out then that should attract liability, regardless of whether D claims it was (for example) a joke. In our view, that situation will be captured by the recklessness test.

Recklessness

12.150 The recklessness test was proposed so that the criminalisation would not be limited to circumstances where there was evidence of intent. This was important because harm can occur even where the defendant did not intend the victim to fear the threat would be carried out, but was aware it was a risk and made the threat anyway. Accordingly, the recklessness test would mean that a defendant who does not intend a victim to fear the threat would be carried out, but is aware that there is a risk that they would fear that, is also guilty of the offence. For further discussion of recklessness see Chapter 5. A similar recklessness element is included in the offence of assault (see paragraph 12.11 above) and the threatening to disclose offences in some other jurisdictions (see from paragraph 12.61 above).

12.151 The CPS queried whether "reckless" is an appropriate threshold for criminalisation in this regard and thought it unclear what additional behaviours "reckless" would capture. The CPS submitted that "the inclusion of recklessness will significantly expand the scope of this offence and creates the risk that the offence criminalises behaviours which were never envisaged to be caught by this offence."

12.152 The point about what additional behaviours may be caught is important, as is the scope of the offence. On the former, statements made in jest provide one clear example. In the consultation paper we acknowledged that some threats to share intimate images may be made in jest. Where the joke is mutual, shared by both defendant and victim, then there would be no intent and it would be difficult to see the defendant's conduct as reckless; the mutuality would indicate that the defendant did not see a risk that the victim would fear the threat. As far as they are concerned both parties think it is a joke and would not be acted on. Where the defendant sees no such risk then the behaviour should not be criminalised. However, where a joke was not mutual then it may be that a defendant would be liable under the recklessness test. A threat to share, made in jest, warrants criminalisation if the defendant realised there was a risk that the victim would fear the threat would be carried out. It will be a matter of evidence as to whether the statement was really made in jest or whether it was really made with intent; clearly, sometimes a defendant might claim a statement was made in jest when it was made seriously. Where it was made in jest then it will also be a matter of evidence as to whether the joke was or was not mutual, or if not mutual then whether the defendant realised there was a risk the victim would fear the threat would be carried out. However, where the defendant realises there is such a risk then the conduct warrants criminalisation. The culpability may be less than where there is intention, but that is a matter than can be taken into consideration in sentencing.

12.153 With regard to the CPS's concern that the offence may capture conduct beyond what was envisaged, we do not think this will arise. Rather, the offence – with the recklessness test – would capture conduct that warrants criminalisation. Harm arises whether the defendant making a threat intends the victim to fear the threat will be carried out or is reckless as to that fear.

Recommendation 41.

12.154 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.

Additional intent: controlling or coercive behaviour

12.155 In the consultation paper we did not propose any additional intent as part of the offence. In particular, we considered that additional intent requirements such as the intent to cause distress would be superfluous because the nature of a "threat" (as opposed to a statement) implies a malicious intent. We received no evidence that threats are made to obtain sexual gratification (where the sexual gratification is obtained by the making of the threat itself; this is different from threats made with the intent of coercing sexual activity). We noted, however, that threats may be made in the context of an abusive relationship, including as "sextortion" or coercion to engage in sexual activity. Consultation responses made it clear that these contexts warrant attention.

12.156 Section 76 of the Serious Crime Act 2015 created an offence of controlling or coercive behaviour in an intimate or family relationship. A number of responses identified threats to share intimate images as conduct that might be a part of controlling or coercive behaviour, including behaviour that is caught by section 76 or which might not be caught by section 76 but which warranted criminalisation and which should be understood and criminalised in that context.

12.157 A number of consultees submitted that the image that is the subject of a threat in a controlling or coercive relationship may have been coerced from the victim initially. However, with regard to threats specifically there were numerous further points.

12.158 The Queen Mary Legal Advice Centre wrote: "the primary motivation of perpetrators that we see is control, and threats are a well-used tool in this pattern." Lawyer Ann Olivarius noted threats can be "psychologically devastating … especially when … linked to coercion, stalking, and/or other forms of harassment". ManKind made the observation that:

> Threat[s] and actual sharing is more likely to take place after a couple split and is used to exert control and coercion on a former partner – even more so when the victim is in a position of trust.

They suggested that threats should therefore be linked to domestic abuse offences of psychological and economic abuse and controlling or coercive behaviour, as well as being a separate offence. Julia Slupska from the Oxford Internet Institute, University of Oxford, made a similar point.

12.159 Some groups may be particularly vulnerable to abuse. The Angelou Centre and Imkaan noted:

> Black and minoritised women and children with insecure immigration status and no recourse to public funds (NRPF) may be particularly vulnerable to these types of threats when perpetrated as a form of immigration abuse or so-called honour-based violence. Their destitution and exclusion from various mainstream support services would also make Black and minoritised women and children more likely to experience threats for a longer period of time without access to support, safety and protection.

12.160 Dr Bishop expanded on the contextual issues and considered what this might mean for criminalising conduct. Threatening conduct, she argued, is:

> …incredibly harmful and often leads to a loss of autonomy and inability to leave an abusive/coercive relationship (or stop engaging with someone sexually or be involved in a relationship that falls short of an 'intimate relationship' but is of that nature.

12.161 She then queried whether a threat offence for the intent to control or coerce is appropriate:

> I wonder if there is a different offence to articulate here, where D threatens to share an image with the intention of controlling or coercing V. This seems to make D more culpable than where they intentionally or recklessly threaten to share an image

without comprehending how much harm might be caused to V through apprehending this will happen.

12.162 In respect of the utility of the existing offence of controlling or coercive behaviour, Dr Bishop submitted that a new threat offence would be preferable to charge "due to the provision of anonymity" for the victim.

12.163 In considering the contextual issues we are not of the view that a separate offence or any additional intent is warranted with respect to threats to share as controlling or coercive behaviour. The recommended offence captures that conduct. As we conclude in Chapter 6 when considering a taking or sharing offence with the specific intent of controlling or coercing the victim, the offence of controlling or coercive behaviour in section 76 of the SCA 2015 is the more appropriate one to reflect this specific context. A single incident of threatening to share could still be charged separately. However, although we do not recommend an additional intent offence, the evidence has made it clear that intimate image abuse is so often a part of controlling or coercive behaviour. In light of that evidence, the appropriate body – the Sentencing Council – should consider whether an intent to control or coerce should be an aggravating factor at sentencing for the offence of threatening to share an intimate image.

12.164 Where prosecutors may have the option of charging either controlling or coercive behaviour or the new offence of threatening to share an intimate image, the usual selection of charges will be decided according to the guidance in the Code for Crown Prosecutors.[67]

Recommendation 42.

12.165 We recommend that the Sentencing Council consider whether an intent to control or coerce should be an aggravating factor at sentencing for the offence of threatening to share an intimate image.

Should the prosecution have to prove the victim did not consent to the threat?

12.166 In the consultation paper, at Consultation Question 41, we invited consultees' views as to whether the prosecution should be required to prove that the person depicted did not consent to the threat to share an intimate image.

12.167 Among the reasons for seeking views was that in the face of a threat, some victims may respond with words to the effect of "well go on then and do it" in an attempt to defuse the situation. This could be construed as giving their consent to the threat and the threatened sharing. If we were to require the prosecution to prove that the person depicted did not consent, there is a risk that victims who have tried to defuse a threatening situation in such a way would lose the protection of the law.

---

67 Crown Prosecution Service, *The Code for Crown Prosecutors* (26 October 2018), Part 6 https://www.cps.gov.uk/publication/code-crown-prosecutors .

Responses and analysis

12.168 The majority of consultees who responded to this question did not support including a requirement that the prosecution prove the absence of consent (22 out of 31).

12.169 In the responses there was some variation and uncertainty about what was in issue: that the victim did not consent to sharing, or that the victim did not consent to the threat. To be clear, the relevant requirement for the threat offence would be that the victim did not consent to the threatened sharing; that is, the act of sharing that was the subject of the threat.

12.170 There were several themes that arose in the responses, including from the five consultees who supported a requirement to prove consent. First, several responses drew attention to the fact that the offence lies in the making of a threat, and so consent is irrelevant. The Bar Council considered the position where the victim consented but the defendant had not anticipated this: "the fact that no harm was in fact caused would lessen the seriousness of the offence but would not negate the criminality of the offence itself". Muslim Women's Network UK made the same point:

> The fact that a threat was made by the defendant and with the defendant having the intention of causing harm to the victim, should mean that an offence has been committed. Whether it transpires that the victim had consented or not is irrelevant to the point that the offence (of threatening to share with ill intent) has taken place.

12.171 Cease UK argued that because of the intent of the perpetrator to cause the victim to fear, to make them feel threatened, whether the victim happens to consent does not alter the criminality of the behaviour. The Centre for Women's Justice also noted that the perpetrator of the threat "still clearly had intent (even if only reckless intent) to threaten/cause harm", even if they may then be able to rely on that consent for mitigation.

12.172 Secondly, consultees submitted that where consent to sharing is given as a result of the threat, that will not constitute genuine consent. For example, Professor Gillespie (who took the view that for a threat to be criminal it must necessarily be made without the victim's consent) noted that:

> Where a victim says, 'well, go ahead', it is far from clear that this is consent in law. If the definition contained in s.74 of the Sexual Offences Act 2003 is to be adopted, then it is not clear that it can be said that a person threatened has the 'freedom' to give consent.

12.173 Cease UK referred to consent in the light of a threat as "acquiescence", rather than consent.

12.174 Thirdly, several responses argued that a requirement that the prosecution prove an absence of consent is an unnecessary barrier to prosecution. The Centre for Women's Justice considered that the risk of overcriminalisation by not including such an element is "fairly slim". Professors McGlynn and Rackley considered it an unnecessary threshold. Numerous responses pointed to the difficulty of proving lack of consent, which would create a barrier to prosecution.

12.175 The strongest rationale for requiring the prosecution to prove an absence of consent was provided by the Law Society, who argued that "obtaining evidence as to consent will add certainty to the investigation and prosecution of such cases".

12.176 Overall, there is not a strong case for requiring the prosecution to prove the victim did not consent to the threatened sharing. The most significant factor in reaching this conclusion is that the criminality lies in the making of the threat itself and so consent is irrelevant. Where the defendant acted with the required fault (that is, intending the victim to fear that the threat would be carried out, or being reckless as to whether the victim would so fear) it does not matter whether there was consent to the threatened sharing; the defendant's fault makes them criminally culpable. The offence is complete when the threat is made, which provides legal certainty. As we said in our report Modernising Communications Offences, "a person should be able to foresee whether their actions will be criminal."[68]

12.177 In the event that a threatened sharing has genuinely been consented to then it may be in circumstances where the threat is made as a mutual joke (and so, as discussed above, the fault element is unlikely to be established). In circumstances where there was genuine subsequent consent then there is likely to be an absence of harm and this will diminish the seriousness of the offence.

12.178 Consent is irrelevant to the culpability of the defendant, therefore it would be an unnecessary barrier to require the prosecution to prove that consent was absent.

Recommendation 43.

12.179 We recommend that the prosecution should not have to prove that the person depicted did not consent to the act of sharing that is the subject of the threat.

Threats made to third parties

12.180 At Consultation Question 39, we sought to explore whether there was a case for including threats made to a third party in a threat offence:

> 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.

Responses and analysis

12.181 We received 19 responses to this question. Of these, 10 provided comments and/or an example of a threat being made to a third party. The remainder confirmed they had no comments or examples.

12.182 It was clear from the responses that threats to third parties are a live issue. Several categories of cases emerged.

---

68 Modernising Communications Offences: A final report (2021) Law Com No 399, para 2.91.

12.183 First, a former partner of the person depicted in the image may threaten that person's current partner. South West Grid for Learning reported that their Revenge Porn Helpline had received reports of such cases.

12.184 Secondly, a threat may be made to family, friends or colleagues of the person depicted. Ann Olivarius described examples seen at McAllister Olivarius, and suggested that involving a third party is a tactic used to exploit knowledge of the victim's social circle and exert pressure:

> My firm has served several victims who reported that the perpetrator initially contacted a co-worker, friend, or family member and threatened to share an intimate image of the victim. The perpetrator's strategy was to force these other people to pressure the victim to accede to the perpetrator's demands. It was also a warning to the victim that the perpetrator was familiar with his/her social circle and could further disseminate the images and cause additional harm.

12.185 Honza Cervenka, also of McAllister Olivarius, described examples where the intended victim of the behaviour remains the same, but the defendant changes which image they threaten to share. The first threat is to share an image of the victim, and then the defendant threatens to share images of the victim's friends or family. The aim seems to be to threaten or coerce the first victim, but the first victim then becomes the third party. He explained:

> I have come across examples where A first threatened to share B's intimate images but then, perhaps because B did not give in to A's threats, A threatened to share intimate images of others close to B, such as their family members or indeed their partner.

He also noted that "an ex-partner could try to coerce a victim by threatening to share an intimate image of their child." His view was that threats to third parties should be criminalised.

12.186 Muslim Women's Network UK explained that threats made to third parties are a "notable issue within Muslim and South Asian communities, though the exact prevalence of the situation is largely unknown due to under-reporting". They noted that though the "vast majority" of cases involve a threat made to the victim, threats are also made to family members. In one case they described, the perpetrator held intimate images of the daughter of an acquaintance. The images had been taken while the daughter was at university and (unknown to the family) in a relationship with the perpetrator. That relationship ended and, some time later, the family arranged their daughter's marriage. At this point the perpetrator approached the daughter and then her mother. He threatened the mother that he would share the photographs with the father and also the prospective in-laws. He demanded money, and the mother met the demands.

12.187 Thirdly, there was a specific mention of cases involving children and young people. The Law Society reported that its members who represent young people in intimate images cases had seen:

> …multiple examples of this occurring in teenager and young person peer groups, where either a member of the peer group, or someone known to the group, is

targeted and subject to these threats. As a result, the victim's peers or associates can be targeted and told that such images exist, even if they do not.

12.188 In addition to the known instances, other consultees presented hypothetical examples where, based on their experience, they thought it clear third parties could be threatened. The Lucy Faithfull Foundation suggested threats can be made to a third party "such as a friend, sibling or parent of the depicted person, eg 'I have got a picture of your sister, I am going to send this to the whole school'". The Centre for Women's Justice were not aware of examples themselves but stated that they are aware of threats to share used "as a means of humiliating not just the victim but also her family" and could imagine in such cases that the threat could be directed at the family instead of the person depicted. An anonymous response suggested sometimes the purpose of threatening a third party is that the third party will then convey the message to the intended victim. South West Grid for Learning suggested that threats can be made to a friend or family member when the person depicted may have blocked the perpetrator from contacting them.

12.189 Across all of these categories it is evident that threats are made to third parties because, as Honza Cervenka puts it "human beings have more 'pressure points' than just their own bodies and image".

12.190 We noted in the consultation paper that other threat offences include the possibility that the threat is made to a third party.[69] No consultees suggested that it would be inappropriate to allow for that in an offence of threatening to share intimate images.

12.191 There are three types of rationale for criminalising threats made to third parties:

(1) Where a threat cannot be made to the person depicted so a third party is threatened. Where someone has blocked the perpetrator from contacting them, it seems undesirable for the perpetrator to avoid liability for the offence by directing the threat to a third party instead.

(2) Where the inclusion of the third party is a tactic to achieve the purpose of the threat. This also appears to provide a strong rationale for including threats made to third parties in the offence.

(3) Where the third party is the intended victim of the threat. This may arise where D seeks to harm V1 by threatening to share an intimate image of V2, who is someone V1 is close to. In this case, the harm to V1 is caused by the threatening communication, not the threatened violation of their bodily privacy and sexual autonomy. However, in relation to V2, this is a threat to share their intimate image that is both wrongful and harmful in the ways we set out above at paragraph 12.86.

We conclude that it is appropriate for such threats to be included in the offence of threatening to share an intimate image.

---

[69] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 12.136.

12.192 Threatening a third party to share an intimate image of another is suitably criminal conduct. As we discuss from paragraph 12.166 above, consent is irrelevant to the culpability of a defendant who makes such a threat (with the required fault). Where a defendant intentionally chooses to threaten to share an intimate image (instead of, for example, a non-intimate but otherwise embarrassing image), they are exploiting the harm caused by intimate image abuse. This is still the case where the threat was made to the third party. For clarity, we think the consent of the third party, the recipient of the threat, is also irrelevant. A third party cannot give valid consent to the sharing of another person's intimate image, therefore they also cannot consent to a threatened sharing. We recommend that, where a threat is made to a third party, the prosecution should not have to prove that the recipient of the threat did not consent to the act of sharing that is the subject of the threat.

Recommendation 44.

12.193 We recommend that it should be an offence to threaten to share an intimate image of V, whether the threat is made to V, or to a third party.

Recommendation 45.

12.194 We recommend that, where a threat is made to a third party, the prosecution should not have to prove that the recipient of the threat did not consent to the act of sharing that is the subject of the threat.

THREATS UNDER THE SEXUAL OFFENCES ACT 2003

12.195 Where threats to take, make or share an intimate image are made to induce a person to engage in sexual activity then offences under the Sexual Offences Act 2003 ("SOA 2003") may apply. In the consultation paper we identified two aspects of sexual offences that engaged such threats: threats intended to coerce sexual activity in section 4 and evidential presumptions around consent, and offences relating to procuring sexual activity with a person with a mental disorder in sections 34-37.

Threatening to take, make or share an intimate image with the intent to coerce sexual activity

12.196 Section 4 of the SOA 2003 creates an offence of intentionally causing a person to engage in sexual activity without consent. In the consultation paper we explained the offence and the issues relating to intimate image abuse.[70] The means of "causation" could include threatening to share an intimate image unless the victim has sexual intercourse with the perpetrator, or "sextortion" where a perpetrator threatens to share an intimate image online unless the victim sends them more images. Stakeholders

[70] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 12.16.

reported instances of such conduct and we considered it to be serious sexual offending.

12.197 A threat made to take, make or share an intimate image, where that threat is made to induce the victim to engage in sexual activity, could be prosecuted under section 4 – but only if the victim did in fact engage in sexual activity. Where a victim does not engage in sexual activity then an offence of attempt may have been committed: that is, D has attempted intentionally to cause a person to engage in sexual activity without consent. However, the section is still limited in scope; unless a threat to take, make or share is made to induce the victim to engage in sexual activity then section 4 will not apply. Threats are sometimes made to induce the victim to take or share more intimate images. Some of this induced behaviour may be considered "sexual activity", but not all.

Evidential presumptions about consent

12.198 In sexual offences where lack of consent marks out criminality (including section 4), evidential presumptions about consent under section 75 of the SOA 2003 apply. The salient features of such offences are:

- An element of the offence is the absence of consent to sexual activity.
- "Consent" is defined as a person agreeing by choice, where that person has the freedom and capacity to make that choice.[71]
- In certain specified circumstances, set out in section 75(2), it will be presumed that the complainant did not consent, and that the defendant did not reasonably believe that the complainant had consented. In those circumstances, a defendant who wishes to rely on consent or a belief in it will need to rebut that presumption. They will bear an evidential burden, which under section 75(1) requires the defendant to adduce "sufficient evidence … to raise an issue as to whether [the complainant] consented" or "whether [the defendant] reasonably believed [that the complainant had consented]". Then, if that burden is met the prosecution, which bears the legal burden, must prove beyond reasonable doubt that the complainant did not consent, and that the defendant had no reasonable belief in consent.

12.199 Section 75(2) does not include a threat to take, make or share intimate images as a circumstance that triggers a presumption against consent. The section would only capture threats to use violence or causing the complainant to fear immediate violence against them or another person. Thus, a threat that triggers a presumption against consent to sexual activity is limited to a threat of physical harm. Prosecutors may still argue that consent was vitiated because of a threat to take, make or share an intimate image, but there is no evidential presumption in the same way that there is for threats of violence.

12.200 Consultation Question 35 sought views on this issue:

---

71 Sexual Offences Act 2003, s 74.

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.

Responses

12.201 The majority of consultees who responded to this question provided views in support of intimate image threats raising an evidential presumption that there was no consent to sexual activity (24 out of 31). No respondents opposed the proposal.[72] Respondents in favour included seven victim support groups, as well as judges, academics, policing bodies, and legal stakeholders.

12.202 There was strong support for recognising that a threat to take, make or share intimate images to coerce sexual activity impacts on the validity of consent. Consultees shared views that coerced consent is not consent, or that coercion would "void" consent. Responses also suggested that threats are being used in this way.

12.203 Parallels with threats of violence were observed. The Centre for Women's Justice saw intimate image threats as similar to threats of violence, stating:

> The threat that an intimate image might be disclosed as a means of public humiliation is likely to be just as effective a means of coercion as the threat of violence, not least because an image – once taken, made or shared – may exist forever.

12.204 Marthe Goudsmit saw threats to disclose intimate images as "so similar to torture (threats of torture are torture) that the victim cannot consent under those conditions". HM Council of District Judges (Magistrates' Court) Legal Committee stated they assumed that there would be a similar temporal link from threat to act as there is for threats of violence. They commented that they could see how threats to share an existing image, and to a lesser extent, a threat to make a sexual image could be used to coerce sexual activity. They were less clear how threats to take could coerce sexual activity but concede that they could have the same effect.

12.205 Women's Aid described the impact of such threats in the context of controlling or coercive relationships:

> A survivor experiencing any form of coercive and controlling behaviour is not able to consent to any form of intimate image or sexual activity – we hear from survivors that threats to share intimate images and other means of intimidation are central to their experience of coercive control, and enable perpetrators to oppress and exert almost complete control over them through fear.

12.206 Muslim Women's Network UK stated that they have been concerned for some time about the omission of intimate image threats from section 75. The Bar Council said intimate image threats are a "notable omission to s75 SOA 2003 and [inclusion] would achieve consistency with the other purposes of the proposed new offences to add this to the presumptions". Dr Charlotte Bishop strongly supported the inclusion of intimate

[72] Seven consultees provided neutral views.

image threats in section 75, though stated that the provisions under section 75 are rarely used in practice so the inclusion may not have much practical effect.

Analysis

12.207 Although there is variation in the form of responses it is clearly common ground that where consent is obtained by coercion or threat then it is not to be regarded as consent that is freely given as a matter of choice. The large majority of responses take the view that a threat to take, make or share an intimate image constitutes a threat or coercion that vitiates consent. There was strong support for the proposition that such a threat should raise an evidential presumption that there was no consent. The support was from a wide range of stakeholders, was well-reasoned, and there is clear evidence that threats are being used to coerce sexual activity.

12.208 We note the one concern that section 75 of the SOA 2003 is not used regularly. However, that does not seem a reason for excluding intimate image threats from the section.

12.209 The majority of responses referred to threats to share made with the intent of coercing sexual activity. This reflects the discussions throughout this chapter that threats to share are the most prominent and harmful type of threatening behaviour regarding intimate images. We recommend an offence of threatening to share (and not of threatening to make or take) an intimate image only. It is therefore consistent with the evidence on this issue, the evidence considered throughout this chapter, and the approach we take to the threat offence, to recommend that threats to share an intimate image should be included in section 75.

12.210 In the consultation paper we asked about threats made with the intent of coercing sexual activity. On further reflection, we do not think this intent element is required for the purposes of section 75. It is not an element of our recommended threat offence and it is not a required intention of the other circumstances listed in section 75. It is sufficient that the threat was made in circumstances that led to sexual activity without consent. Coercing sexual activity is a specific offence. We acknowledge that threats may be made with the intent of coercing sexual activity. Where they are, they could be prosecuted as the offence of coercing sexual activity.

Recommendation 46.

12.211 We recommend that section 75 of the Sexual Offences Act 2003 be amended so that a threat to share an intimate image made by the defendant or another triggers an evidential presumption that there was no consent to sexual activity and that the defendant had no reasonable belief in consent to sexual activity, provided that if the defendant did not make the threat, they knew that it had been made.

Sections 34 - 37: Procuring or engaging in sexual activity with a person with a mental disorder by use of threats

12.212 Sections 34 to 37 of the SOA 2003 criminalise procuring or engaging in sexual acts with a person with a mental disorder by use of threats, inducement or deception. The

sections capture a range of potential conduct that include instances where D touches V and instances where there is no touching but V is induced to do or watch a sexual activity. Threats are not defined in these provisions.

12.213 In the consultation paper we noted it was not clear whether intimate image threats were being used in these circumstances or, if so, whether the conduct was being satisfactorily prosecuted under those sections. Consultation Question 36 sought evidence on these matters:

> We seek information from consultees on whether threats to take, make or share images are being used to procure or engage in sexual acts with a person with a mental disorder and if so, whether they can be and are being prosecuted under sections 34 to 37 of the SOA 2003.

Responses and analysis

12.214 There were 16 responses to question 36. Of these, four consultees provided comment, with one referring to instances of the behaviour. The other 12 consultees stated that they did not know of any examples or have any comment.

12.215 The only consultee that confirmed they had examples of such behaviour was the South West Grid for Learning, who stated that: "the Helpline has seen cases where someone with a learning difficulty or mental disorder has been threatened/coerced into sexual activity". They did not comment on the use of sections 34-37.

12.216 Honza Cervenka of McAllister Olivarius, while not having seen such cases in his practice, took the view that using an intimate image threat in such circumstances would amount to a criminal offence.

12.217 The other two respondents who offered comment addressed sentencing concerns. One anonymous consultee[73] suggested that people with "autism, ADHD, PTSD, previous histories of sexual violence" would be more vulnerable to intimate image abuse and that should be reflected in stronger sentences if such or similar vulnerabilities were present. Muslim Women's Network UK stated that while they did not have cases to mention from their work they did "consider this to be a real and serious concern which does need to be taken into account as part of the law reform proposals" and suggested harsher sentences when the victim has such vulnerabilities.

12.218 Overall, the information we have received does not allow us to draw conclusions as to how common this behaviour is, or whether sections 34 to 37 are being used to prosecute it, and if not, why not. Accordingly, we make no recommendation in regard to these matters.

CONCLUSION

12.219 This chapter has drawn on the literature, stakeholder engagement, and responses to the consultation to identify and make recommendations in relation to threats to take, make or share intimate images.

---

[73] Anon 5, personal response.

12.220 The most significant conduct arises in relation to threats to share intimate images, including altered images. Such threats are prevalent. Such threats cause harm, whether or not they are carried out or are capable of being carried out. They are not adequately captured by the patchwork of existing laws. Accordingly, our main recommendations in this chapter – including the creation of a new offence – are centred around those threats with a view to criminalising prevalent, harmful conduct.

Chapter 13: Ancillary provisions and special measures

INTRODUCTION

13.1 In this chapter we consider a range of orders that could apply in cases of intimate image abuse. First, we explain how intimate image abuse is best understood as part of a continuum of sexual offending. Against this background, we address the availability of special measures and ancillary orders in respect of our recommended offences. We consider the need for complainants of intimate image offences to be entitled to automatic lifetime anonymity and automatic eligibility for special measures at trial, and whether there should be restrictions on the cross-examination of witnesses in those proceedings. Finally, we consider the imposition of notification requirements and Sexual Harm Prevention Orders ("SHPOs") on offenders where their conduct is sufficiently serious and sexual.

13.2 In the consultation paper we provisionally proposed that each of these measures should be adopted in order to ensure an appropriate response to intimate image abuse. We received a large number of responses from consultees to each question addressed in this chapter. A significant number were from organisations that work with victims. We also received responses from individuals who indicated that they had experienced intimate image abuse themselves.[1] Consultees generally agreed with our provisional proposals, with some receiving almost unanimous support. Commonly, they justified their support on the basis that these measures are available to complainants of sexual offences, thus they should apply to intimate image offences to ensure consistency and equal protection. A number of responses identified problems with the wider sexual offences regime or criminal justice system. Some of these concerns go beyond the scope of this review and may be more appropriately dealt with in the Law Commission's current project on evidence in sexual offence trials.[2]

13.3 We conclude that each of the special measures and ancillary orders on which we consulted should be made available in the relevant circumstances, given consultees' overwhelming support.

13.4 In the second part of this chapter, we discuss ancillary provisions on which we did not consult specifically but consider appropriate to address. This includes the use of deprivation and forfeiture orders, on which consultees commented in their responses. In addition, we consider the new provisions in the Online Safety Bill (at the time of writing) that impose obligations on platforms to remove illegal content, including private sexual images that fall within the existing disclosure offence. While platform liability is out of the scope of our review, it warrants discussion here as our

---

1 In this chapter we refer to responses from individuals; some have requested anonymity, and some have not. Not all personal responses in this chapter come from individuals who have indicated they have personal experience of intimate image abuse.

2 Law Commission, "Evidence in Sexual Offences Prosecutions"', available at: https://www.lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/.

recommendations would replace the existing disclosure offence to which the Bill would attach platform liability.

Continuum of sexual offending

13.5 The orders we provisionally proposed in the consultation paper are generally available in relation to sexual offences. Many of the responses we received drew parallels between intimate image and sexual offences. For many, the similarity between the two is an important rationale for making available the same ancillary orders and special measures. In this section, we explore this issue separately before looking at the question of the availability of ancillary orders and special measures.

13.6 In Chapter 1 we explain why we deliberately chose not to use the term "image-based sexual abuse" to refer to the conduct with which we are concerned throughout this paper, instead opting for intimate image abuse. This choice reflects the fact that the type of image taken or shared, the motivation of the offender, or the experience of the victim may render some instances of intimate image abuse non-sexual. For example, an image of someone using the toilet shared as a joke between friends without the consent of the person depicted will, in some cases, have no sexual connotation. Such conduct is included in our offences as the harm arises from the intimacy of the image coupled with the fact the behaviour was non-consensual.

13.7 We do understand that a large volume of intimate image abuse is sexual. Some cases involve extreme sexual offending. For example, the National Crime Agency ("NCA") has recently investigated a man who coerced, threatened and blackmailed over 2,000 victims to take and share with him sexually explicit and sexually abusive images. The Revenge Porn Helpline assisted the NCA with the case and has successfully managed to remove 135,000 images of the victims from the internet. The perpetrator has been jailed for 32 years. Tony Cook of the NCA described the perpetrator as "a depraved sadist who got sexual gratification through power and control over his victims whom he often goaded to the point of wanting to kill themselves".[3] This is an extreme case of highly sexually harmful conduct.

13.8 The current voyeurism, upskirting and breastfeeding voyeurism offences are committed where there is an intent to obtain sexual gratification. These offences sit in the Sexual Offences Act 2003, in recognition that voyeurism is considered to be sexual offending. However, as we noted in the consultation paper, and explore again further in Chapter 6 of this report, sexual gratification is not always a defining feature of sexual abuse:

> Sexual violence is rarely committed solely for the purpose of obtaining sexual gratification; often it is committed with a desire to exert power or control, particularly of men over women.[4]

---

3 BBC News "Abdul Elahi: Sexual blackmailer jailed for 32 years" (10 December 2021), available at: https://www.bbc.co.uk/news/uk-england-birmingham-59614734.

4 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 14.49.

This was reflected in stakeholders' views of intimate image abuse:[5]

> Academics have made reference to these behaviours as gendered phenomena which are often experienced by women.[6] McGlynn, Rackley, Johnson and others produced findings that many perpetrators of what they term "image-based abuse" are motivated by power and control.[7] Citron has noted the way in which what she terms "non-consensual pornography":
>
> > denies women and girls control over their own bodies and lives. Not only does it inflict serious and, in many cases, irremediable injury on individual victims, it constitutes a vicious form of sex discrimination.[8]

13.9 Additionally, we heard from stakeholders that victims of intimate image abuse often experience it as sexual abuse:

> Lawyers from McAllister Olivarius said that victims they worked with would identify themselves as sexual offence complainants. Sophie Gallagher also told us that in her discussions with victims it was clear that the impact is akin to other sexual offences, including experiences of PTSD, shame and feelings of violation.[9]

13.10 The Lambeth Anti-Harassment Campaign explained in their response the similarities between intimate image abuse and sexual offences:

> The images usually relate to parts of the body that are considered to be sexual or used to engage in sexual activity. The exploitation of images of this kind are usually for sexual interest/gratification or to sexually humiliate the victim. The offence is even premised on lack of consent which mirrors so many other sexual offences. Intimate image abuse clearly is, and should be considered by law to be, a sexual offence.

13.11 Intimate image abuse includes a range of conduct, much of which sits on a continuum of sexual offending. Some intimate image abuse involves serious sexual offending, such as the NCA case described above; some involves non-sexual conduct, such as taking or sharing toileting images as a joke. Consultees' responses as to the range of motivations, harms and conduct have further illustrated this. It is in this context that we now turn to consider special measures and ancillary orders.

---

5 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 14.49.

6 For example, Nicola Henry and Anastasia Powell, 'Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women' (2015) 48 *Australian and New Zealand Journal of Criminology* 104; see also Samantha Bates "Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors" (2017) 12 *Feminist Criminology* 22, 39.

7 Clare McGlynn, Erika Rackley, Kelly Johnson and others "Shattering Lives and Myths: A Report on Image-Based Sexual Abuse" (July 2019) Durham University and University of Kent, pp 10-11 https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf.

8 Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345, 353.

9 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 14.46.

AUTOMATIC COMPLAINANT ANONYMITY

13.12 As the law stands, complainants of certain offences are entitled to automatic lifetime anonymity under the Sexual Offences (Amendment) Act 1992.[10] These include offences contained in the Sexual Offences Act ("SOA") 2003[11] – such as voyeurism, upskirting and breastfeeding voyeurism – but not the disclosure offence under section 33 of the Criminal Justice and Courts Act ("CJCA") 2015. Though anonymity orders are also available to victims of non-sexual offences by application to the court,[12] in the pre-consultation phase stakeholders highlighted that such applications are rarely made.[13] This creates an inconsistency in the protection offered to complainants of intimate image offences.

13.13 In the consultation paper we provisionally concluded that victims of our intimate image offences should be afforded automatic lifetime anonymity.[14] This would extend the current protections to complainants of sharing and threat offences, filling the gap described above:

> A waivable guarantee of anonymity would undoubtedly be more effective than a little-used discretionary power in persuading complainants to report their abuse. Extending anonymity to the sharing offence would also ensure a consistent approach towards anonymity in all cases of intimate image abuse.[15]

13.14 Consultation Question 43 and Summary Consultation Question 16(i) asked the following:

> We provisionally propose that victims of the new intimate image abuse offences should have automatic lifetime anonymity. Do consultees agree?

Consultation and analysis

13.15 Consultees overwhelmingly supported this proposal. The majority of those who responded to this question agreed that complainants of our offences should be granted automatic lifetime anonymity (280 out of 293).

13.16 Dame Maria Miller MP welcomed our proposal, "which for the first time recognises the highly sensitive and sexualised nature of these actions".

---

10 Sexual Offences (Amendment) Act 1992, ss 1(1) and 2.

11 Sexual Offences (Amendment) Act 1992, s 2(1)(da).

12 Youth Justice and Criminal Evidence Act 1999, s 46.

13 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 14.75.

14 In its recent report, the Victorian Law Reform Commission made a similar recommendation that the definition of "sexual offences" in the Crimes Act 1958 (Vic) should include image-based sexual abuse offences to extend the same protections for suppressing identities: Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (September 2021), recommendation 53, https://www.lawreform.vic.gov.au/wp-content/uploads/2021/11/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf.

15 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 14.84.

13.17 The key points raised by consultees included:

(1) intimate image abuse is a type of sexual offending, and therefore its complainants should have the same protections afforded to those of other sexual offences; and

(2) the current lack of automatic lifetime anonymity for complainants of the disclosure offence deters them from reporting intimate image abuse.

13.18 Some responses indicated that the anonymity afforded to complainants of our offences should be more restricted than proposed.

Intimate image abuse as a sexual offence

13.19 As we explained above, many consultees responded to these questions by drawing parallels with sexual offences where such orders are already available. Dr Aislinn O'Connell and B5 Consultancy Ltd labelled intimate image abuse as a "sex crime"; others considered it akin to rape.[16]

13.20 Several consultees therefore argued that this approach is logical and would create consistency and "ensure there is no unjustified disparity across intimate image offences".[17] HM Council of District Judges (Magistrates' Courts) Legal Committee argued that it is appropriate to extend automatic lifetime anonymity protections to complainants of our offences, just as they have been extended to victims of offences under the Modern Slavery Act 2015:[18] "The case for the victims of intimate image offences benefitting from anonymity is equally compelling."

Anonymity necessary to encourage reporting

13.21 A significant number of consultees recognised the need for automatic lifetime anonymity in order to encourage complainants to report their intimate image abuse to the police and engage with legal proceedings.[19] The Suzy Lamplugh Trust, Equity Women's Committee, and End Violence Against Women Coalition and the Faith and VAWG Coalition all stated that "[a]utomatic anonymity is vital in order to encourage victim-survivors to report their abuse and continue cases". The Crown Prosecution Service ("CPS") commented that our proposal "will provide additional safeguards to victims increasing their confidence to report and eventually give evidence in such cases".

13.22 Several responses cited research findings in support of these arguments. Consultees referenced research conducted by the Office of the Police and Crime Commissioner for North Yorkshire,[20] which they reported found that 94% of the public would expect

---

16 Linda Mooney and Anon 23, personal responses.

17 Refuge, Consultation Response. Others shared similar responses, including: Women's Aid; Ann Olivarius; Professor Tsachi Keren-Paz; Slateford Law; ManKind; Ruth Bradshaw, personal response.

18 Sexual Offences (Amendment) Act 1992, s 2(1)(db), inserted by Modern Slavery Act 2015, s 4.

19 Magistrates Association; Centre to End All Sexual Exploitation (Cease UK); ManKind; Honza Cervenka, and personal responses from Dianne Murphy; Lionel Harrison; John Page; Rodney Smith; Kelsey Duncan; Anon 136; Anon 46.

20 Cited in responses from the Police and Crime Commissioner for North Yorkshire, and Ksenia Bakina.

to remain anonymous if they reported a so-called revenge porn offence, and 67% said they would not want to continue with prosecution because of the lack of anonymity.[21] One complainant told Professors McGlynn and Rackley that:

> 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.[22]

13.23 Consultees generally recognised that victims are discouraged from reporting intimate image abuse without automatic anonymity for two reasons: to avoid being shamed and blamed by others; and fear that the image will be seen by more people if it gains attention during an investigation or trial. These concerns are reflected in the results of the opt-in survey Bumble conducted of its service-users in 2021: respondents who had experienced non-consensual taking/sharing cited fear that family, friends or colleagues would find out, and feeling too ashamed or embarrassed to tell anyone as reasons for not seeking help.[23] ManKind argued that anonymity would, for male victims, "mitigate issues around embarrassment, humiliation and emasculation that they feel". Dr Charlotte Bishop and Professor Andy Phippen considered these barriers:

> There is so much victim-blaming in the context of sexual offences and domestic violence and abuse that anonymity is essential – generally speaking the victim will be condemned and blamed and seen as culpable or responsible for their own misfortune, rather than sympathised with.[24]

And:

> Given the educational messages still delivered in schools (e.g. "you shouldn't have taken the images in the first place", "by taking the image you are breaking the law") and the majority media narrative around shaming, many victims will not come forward for fear of identification and judgement. Of course, this compounds isolation and feelings of not having anyone to turn to, and allows abusers to retain power. Anonymity would undoubtedly help more victims come forward to disclose abuse.[25]

13.24 Several consultees highlighted the particular experiences of female complainants from minoritised ethnic groups. The Angelou Centre and Imkaan stated that many Black and minoritised women are reluctant to disclose their experiences to police or others

---

21 An updated survey completed in 2018 found that 97% of victims said that anonymity is important, and 60% of those who made a police report "were still concerned by a lack of guaranteed anonymity and this had an impact on how strongly they pursued their case": North Yorkshire Police, Fire and Crime Commissioner, *Suffering in Silence*, (2018), https://www.northyorkshire-pfcc.gov.uk/content/uploads/2018/11/Suffering-in-Silence-Report.pdf.

22 Clare McGlynn, Erika Rackley, Kelly Johnson and others "Shattering Lives and Myths: A Report on Image-Based Sexual Abuse" (July 2019) Durham University and University of Kent, https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf.

23 Bumble conducted an opt-in survey of users of its application in April and May 2021, producing over 1000 responses. They included findings in their written response to our consultation.

24 Dr Charlotte Bishop, Consultation Response.

25 Professor Andy Phippen, Consultation Response.

"[d]ue to structural inequalities, the hostile environment and discriminatory responses from agencies". Women's Aid recognised that "for Black and minoritised women there is the real risk of being disowned, ostracised and even killed".[26]

13.25 Muslim Women's Network UK similarly noted fears among its service-users that their families and communities would find out about the abuse, leading to relationship breakdown and financial hardship. These experiences are compounded by the difficulties they often experience in trying to receive adequate support from authorities. During the APPG on Muslim Women AGM in February 2022, Muslim Women's Network UK highlighted its research findings that its service-users are not dealt with properly by the police.[27] This includes complainants having to chase up police about their crime report, a failure among police to understand honour-based abuse, and police inaction in arresting perpetrators. While these issues are not specific to intimate image abuse, they speak to the complexity of the challenges faced by complainants from minoritised ethnic groups. This highlights the importance of providing anonymity to ensure that complainants are better supported, thus reducing some of the barriers.

13.26 Moreover, consultees emphasised victims' concerns about drawing greater attention to the intimate image itself by pursuing legal proceedings, and considered that such concerns may be mitigated by providing anonymity.[28] Dr Ksenia Bakina stated:

> Anonymity orders would prevent further harm being caused to victims because a prosecution may generate more public interest in the images. Granting the victims anonymity would therefore reduce the likelihood of their private sexual images going viral online.

13.27 This was also raised by Ruby Compton-Davies, personal response, who is a victim herself. She shared that she knows several other victims who have not felt comfortable speaking about their experience for this reason:

> The others are too traumatised to talk about the fact their image has been stolen/shared because it draws attention to the very thing they want to remove – them and their image. Victims needs to be able to report this kind of abuse without fear that more people will 'see the offence' and be able to identify them as a result.

13.28 Not only are complainants concerned about the circulation and discovery of their intimate images during the investigation or legal proceedings, but also in the future: Muslim Women's Network highlighted that "the mental health impact of being 'exposed' one day can and does have a heavily toll on victims of abuse". Ann Olivarius stated that "[f]or victims, the single greatest fear after legal resolution is that the disclosed images will re-surface some years down the road". This suggests it is

---

26 See Clare McGlynn and Erika Rackley, *Image-Based Sexual Abuse: More than just 'Revenge Porn'* (2016) University of Birmingham, https://www.birmingham.ac.uk/Documents/college-artslaw/law/research/bham-law-spotlight-IBSA.pdf.

27 Shaista Gohir, *Muslim Women's Experiences of the Criminal Justice System* (June 2019), https://www.mwnuk.co.uk/go_files/resources/Muslim_Women_and_Criminal_Justice_FINAL.pdf.

28 Including: Refuge; B5 Consultancy Ltd; Lambeth Anti-Harassment Campaign; Dr Aislinn O'Connell; Dr Charlotte Bishop.

important that anonymity is granted for the complainant's lifetime in order to ease these concerns.

13.29 Refuge stated that "[e]ven if the image does not actually exist… the stigma attached to the idea of the intimate image may still cause significant psychological and social harm to victim-survivors". As Dr Bishop noted, people make "assumptions… about the nature of the images even if they were not particularly explicit". These responses suggest that an image does not need to be seen by others or even exist in order to cause harm; simply being known about is sufficient. This also highlights the importance of extending anonymity to complainants of a threatening to share offence where an image need not even have been taken or shared.

Restrictions on granting anonymity for complainants

13.30 Greg Gomberg, personal response, submitted that "[t]here should be a presumption for anonymity, but orders given at the Court's discretion". In contrast, the Magistrates Association and the Centre to End all Sexual Exploitation (CEASE UK) criticised a discretionary approach on the basis that it deters victims from reporting intimate image abuse.

13.31 Law firm Corker Binning rejected a "blanket approach" to granting anonymity orders, arguing that they should only be available where the case involves a 'sexual' intimate image:

> Extending the provision of anonymity to 'all' complainants of this broad range of offences would be a radical departure from current practice, and potentially runs in contravention to the principles of open justice. Anonymity should be reserved to the 'sexual' category only.

13.32 Our proposal is not a radical departure from current practice; it simply creates greater consistency across intimate image offences by affording equal protections to all complainants. While this expands the pool of complainants granted automatic lifetime anonymity, consultees' responses have indicated that this is appropriate and necessary. This proposal would bring our offences in line with the current sexual offence regime, rather than radically departing from it. Further, automatic anonymity is also granted to complainants of other offences even where there is no sexual purpose or intent (or sexual conduct in some cases).[29]

13.33 We share Corker Binning's concern about preserving the principle of open justice. We recognised its importance in the consultation paper and explored the arguments for and against interfering with it.[30] In our view, we have adequately balanced these concerns against the need for greater protection and support of victims. Corker Binning's response did not raise any new issues that we had not already considered. Furthermore, Corker Binning ultimately argued that anonymity should only apply to

---

[29] Automatic lifetime anonymity is granted for complainants of the exposure offence in section 66 of the SOA 2003, which requires that the perpetrator intends the victim to be caused alarm or distress. It is also granted for complainants of human trafficking offences in section 2 of the Modern Slavery Act 2015, which covers forced labour, sexual exploitation, removal of organs, and more.

[30] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 14.68 to 14.74.

images that fall within the 'sexual' category of our definition of intimate. It would be inconsistent and inappropriate to recommend an approach that criminalises the non-consensual taking and sharing of all intimate images, but only extends automatic anonymity to one of three types of intimate images. The range of harms and motivations can exist for all categories of images. It is not just the image that makes conduct sexual. Additionally, if anonymity only applied to sexual images the prosecution would need to categorise the relevant image in each case. This would impose an additional and unnecessary burden on the prosecution.

13.34 Some consultees suggested that anonymity protections should be withdrawn where the defendant is not convicted[31] or where the complainant is later convicted of making a false report in respect of the intimate image abuse. Section 1 of the Sexual Offences (Amendment) Act 1992 provides for automatic lifetime anonymity for those who allege that they have been the victim of an offence to which the statute applies. Consequently, a person "alleged to have made a false allegation of a sexual offence nonetheless is the lifelong beneficiary of this anonymity unless and until it is displaced."[32] Lifetime anonymity can be displaced by the court via the mechanism set out in section 3 of the Sexual Offences (Amendment) Act 1992, which we consider to be the appropriate way to proceed in such cases, rather than implementing a bespoke approach for intimate image offences.

13.35 Additionally, a few consultees argued in favour of extending anonymity to defendants.[33] While we recognise these consultees' concerns, the withdrawal of anonymity from complainants and the lack of anonymity for defendants are issues that are not specific to the intimate image offence context; rather, they relate to the sexual offence regime more broadly. Our proposal was intended to address the inconsistencies in the anonymity protections afforded to complainants of intimate image abuse. We have not heard significant evidence of the need to extend anonymity to defendants specifically in intimate image abuse cases. Consequently, that issue would be better addressed as part of a wider review of anonymity in the sexual offences regime.

Conclusions following consultation

13.36 Consultees overwhelmingly supported our proposal. This was largely because they considered it necessary to provide equal support to complainants of intimate image offences and sexual offences, and recognised the importance of automatic lifetime anonymity in encouraging victims to report their experiences.[34] These views extended to complainants of the sharing and threats to share offences, who are not automatically granted anonymity under the current disclosure offence. The main concerns raised by consultees related to the broader sexual offence regime, rather

---

31 Including: Kingsley Napley LLP; David George Summers, personal response; Anon 118, personal response.

32 Crown Prosecution Service, *Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases involving Allegedly False Allegations of Rape and/or Domestic Abuse* (September 2019).

33 Including: David Scott, Greg Gomberg, personal responses.

34 See David McClenaghan and Emily McFadden, 'Lack of right to anonymity harms victims of revenge porn' (19 May 2022) *The Times*, https://www.thetimes.co.uk/article/lack-of-right-to-anonymity-harms-victims-of-revenge-porn-rffxf6slg.

than the intimate image offence context, and are consequently beyond the scope of this project.

Recommendation 47.

13.37 We recommend that complainants of the new intimate image offences should have automatic lifetime anonymity.

SPECIAL MEASURES AT TRIAL

13.38 In this section of this chapter we deal with automatic eligibility for special measures. Vulnerable and intimidated witnesses can be granted additional assistance to support them giving evidence in proceedings, such as the option to give evidence behind a screen.[35] Eligibility is determined by the witness' characteristics,[36] or whether they would experience fear or distress when giving evidence to the court.[37] Witnesses in cases involving sexual offences, among others, are automatically eligible for special measures.[38] This means that complainants of the disclosure offence face an additional hurdle to establish eligibility, compared with complainants of the voyeurism, upskirting and breastfeeding voyeurism offences.

13.39 Once it is established that the witness is eligible, the court must determine whether any available special measures would be likely to improve the quality of their evidence and, if so, which measures would be likely to maximise so far as practicable the quality of such evidence.[39] The prosecution must therefore adduce evidence to satisfy these criteria, which is another barrier to providing the complainant with support.

13.40 In the consultation paper we proposed that automatic eligibility should be extended to complainants of all intimate image offences.[40] This would remove the extra hurdle for victims of non-consensual sharing and threats to share, ensuring consistency with the current treatment of complainants of voyeurism, upskirting and breastfeeding voyeurism.

13.41 Consultation Question 44 asked consultees the following:

> We provisionally propose that victims of the new intimate image offences should automatically be eligible for special measures at trial. Do consultees agree?

---

35 Youth Justice and Criminal Evidence Act 1999, ss 23 to 30.

36 Above, s 16.

37 Above, s 17.

38 Above, s 17(4) to (7).

39 Above, s 19(2).

40 The Victorian Law Reform Commission similarly recommended that the protections for giving evidence in respect of "sexual offences" be extended to apply to image-based sexual abuse offences: Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (September 2021), recommendation 53, https://www.lawreform.vic.gov.au/wp-content/uploads/2021/11/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf.

Consultation and analysis

13.42 Almost all consultees who responded to this question supported our proposal (39 out of 40).[41]

13.43 As with Consultation Question 43, consultees in their responses considered intimate image abuse to be a form of sexual offending.[42] Consequently, consultees argued that it is necessary to provide complainants of both types of offences with equal access to special measures. Refuge stated:

> Given that intimate image abuse is often experienced by women as a form of sexual offence, it is absolutely vital that victim-survivors are given the same protections and support in court as complainants in sexual offence cases …. This includes automatic eligibility for special measures to assist and support them in providing evidence.

13.44 These responses generally cited "reasons similar to those dealt with under the anonymity section,"[43] such as the need for parity of treatment[44] and the recognition of the vulnerability of intimate image abuse victims.

13.45 Additionally, consultees recognised the vulnerability of complainants of these offences and submitted that automatic eligibility for special measures is crucial to support them during the legal process.

Complainant vulnerability

13.46 Slateford Law commented that "going to trial is a difficult process for a victim." Many responses identified the challenges faced by complainants during legal proceedings concerning offences of a sensitive nature. Refuge drew on their experience supporting victim-survivors of domestic abuse in family court proceedings, and illustrated the contrast in their sense of safety and comfort depending on whether they were granted special measures:

> [Complainants] have reported the fear, dread, and trauma of having to give evidence in direct view of the perpetrator, having to wait for a hearing in the same waiting room as the perpetrator, and constantly being afraid that they would bump into the perpetrator when leaving or entering court. Women have told us that when they were able to give evidence behind a screen or via video link, they felt far less distressed, and felt they were able to give better quality evidence than if they had to deliver their evidence when the perpetrator was in full view. In contrast, some survivors who were not granted separate entrance or exit times into court or were not provided a separate waiting room reported being subject to harassment, intimidation, and physical attacks.

13.47 Similar concerns were raised by Amber Daynes, personal response, who shared her experience of legal proceedings as a complainant:

---

41 The Bar Council neither agreed nor disagreed.

42 Including: Muslim Women's Network UK; Slateford Law.

43 HM Council of District Judges (Magistrates' Courts) Legal Committee, Consultation Response.

44 Including: CPS; Magistrates Association.

> I found it very uncomfortable standing infront of an all male court room having to talk about personal and sexual information.[45]
>
> I was not prepared by the CPS on what would be discussed. I felt intimidated by the defendant …. This experience has caused me to want to take my own life, where is the justice for me? ... I would not recommend anyone to take their case to court, it's not worth the worry and anxiety for the result you get.[46]

13.48 This response illustrates the significant and damaging impact the legal process can have on complainants, highlighting the need for special measures in order to mitigate additional harm caused by the trial process.[47] Further, this experience reflects the comment made by HM Council of District Judges (Magistrates' Courts) Legal Committee that automatic eligibility "permits the police to provide the complainant with earlier information and assurance about the process of giving evidence".

13.49 Indeed, some consultees noted that this negative experience often leads complainants to withdraw their complaints or refuse to engage with the prosecution:

> [Special measures] are so important for victims of sexual and domestic violence to help them feel better supported and less likely to withdraw their support for the case due to the traumatic nature of the court process. It is known that fear of the court process often leads victims of sexual offences and domestic violence-related offences to withdraw their complaints, and that [special measures] and [Independent Domestic/Sexual Violence Advocates] can help, so the same issue needs to be avoided here by providing support and [special measures].[48]

13.50 Furthermore, consultees noted that these fears and challenges can cause the complainant to provide lower quality evidence as they are in a state of heightened distress. Professor Alisdair Gillespie and Muslim Women's Network UK considered that special measures are important in ensuring complainants provide the best evidence they can. The CPS stated that our proposal would "increase[e] their confidence to report offences and improve the quality of their evidence before the court".

13.51 While the provision of automatic eligibility will not guarantee that complainants are granted special measures, it at least removes the extra burden of having to show that the complainant is eligible on the basis that they would suffer fear or distress when giving evidence. Consultees argued this is particularly important for Muslim women and women from other minoritised communities as they already face "additional hurdles… in terms of stigma and risks around honour based abuse".[49]

---

45 Consultation Response to Consultation Question 44.

46 Consultation Response to Consultation Question 48.

47 Note that it is not clear whether she was automatically eligible for special measures as the offence was not specified in the consultation response.

48 Dr Bishop, Consultation Response. Related concerns were also raised by consultees in response to Consultation Question 43: many argued in favour of automatic lifetime anonymity for complainants of our recommended offences on the basis that it would encourage reporting and prevent complainant attrition.

49 Muslim Women's Network UK, Consultation Response.

The test

13.52 HM Council of District Judges (Magistrates' Courts) Legal Committee indicated that requiring complainants of intimate image offences to show that they qualify as eligible for special measures is an unnecessary burden as they are likely to satisfy this test in most cases:

> The nature and circumstances of any of these offences will invariably be such that it is highly likely that complainants would qualify as vulnerable or intimidated witnesses in any event and so be eligible for special measures directions… There should not be an additional procedural and evidential hurdle to overcome before a special measures direction can be made.

13.53 However, the Bar Council (the only consultee that did not support the proposal) considered it appropriate to retain this test, given the ease with which it is satisfied:

> In practice, the additional evidential and procedural hurdles which apply if the charge is not a sexual offence are relatively easily met and would almost certainly be so if the intimate image abuse offences did involve a sexual element. The availability of special measures of itself may not justify the categorisation of the offence as a sexual offence.

Regarding their latter point, it is not necessary for an offence to be categorised as a sexual offence to offer automatic eligibility for special measures. Instead, we consider automatic eligibility necessary for these complainants because complainants experience intimate image abuse similarly to sexual offending.

13.54 It is clear from consultees' responses that complainants face significant challenges during proceedings. Though they may easily clear the hurdle to become eligible for special measures, it makes little sense to retain additional barriers that have limited practical benefit, while adding to complainants' distress. It is also an inefficient use of court resources. Furthermore, complainants who are automatically eligible must still overcome the hurdle of proving to the court that special measures would likely improve the quality of their evidence and that the measure in question would likely maximise that quality so far as practicable.[50] As Muslim Women's Network UK indicated:

> Complainants in sexual offence cases are automatically eligible for special measures but there does nevertheless need to be an assessment that the implementation of special measures will improve the quality of the evidence. Therefore we see no reason why victims of intimate image based abuse cannot similarly become automatically eligible and it is then for the courts to decide whether special measures are necessary.

The courts still retain the ability to filter access to special measures. Automatic eligibility is simply eligibility, not automatic application.

13.55 Women's Aid criticised this evidential requirement imposed on automatically eligible complainants to adduce evidence that the measure will improve and maximise so far

---

[50] See para 13.39.

as practicable the quality of their evidence. Their response suggests that complainants should be entitled to special measures automatically, rather than merely eligible to apply:

> Victims should not be required to provide evidence that special measures will improve the quality of their evidence, as this will not protect all survivors. We know that survivors fall through the gaps when evidence tests are applied; evidence requires disclosing domestic abuse to another professional or service, which many women will never do. Ministry of Justice research has also shown that many survivors face barriers to evidencing domestic abuse – including language barriers, and the unwillingness of organisations to write supporting letters…[51] This abhorrent practice prolongs the impact and trauma caused by abuse and diminishes the quality of evidence that survivors can provide.

13.56 This response suggests that this evidential requirement can cause distress to complainants in the same way that discretionary eligibility can. We recognise this concern but note that it relates to the wider sexual offence regime, whereas our review is limited to intimate image offences only. Consequently, we consider that this concern will be better addressed in the Law Commission's project on evidence in sexual offence prosecutions.[52] The recommendations made in this report will ensure consistency for victims of intimate image abuse and sexual offences; any reform required in these areas should be considered holistically.

13.57 A final point to note is that some consultees, such as the Youth Justice Board, argued that it would be helpful for children to have access to special measures. This is already the case: witnesses under 18 years old are automatically eligible under the existing law.[53]

Conclusions following consultation

13.58 Consultees almost unanimously supported this proposal, largely justified by the sexual nature of intimate image offences and the vulnerability of such complainants. This led consultees to conclude that intimate image offences complainants should receive similar assistance during the legal process as victims of sexual offences.

13.59 We agree and conclude that, like complainants of sexual offences, complainants of intimate image offences should be treated as intimidated witnesses. It is unnecessary and inappropriate to require complainants of intimate image offences to demonstrate eligibility for special measures.

---

51 See Ministry of Justice, *Research investigating the domestic violence evidential requirements for legal aid in private family disputes* (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719408/domestic-violence-legal-aid-research-report.pdf.

52 Law Commission, 'Evidence in Sexual Offence Prosecutions' available at: https://www.lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/.

53 Youth Justice and Criminal Evidence Act 1999, s 16(1)(a).

Recommendation 48.

13.60 We recommend that complainants of the new intimate image offences should automatically be eligible for special measures at trial.

RESTRICTIONS ON CROSS EXAMINATION

13.61 This section examines whether the restrictions on cross-examination in sexual offence trials should also be available in proceedings involving intimate image offences. These restrictions include:

(1) the prohibition on anyone charged with a sexual offence, where unrepresented, from cross-examining the complainant themselves;[54] and

(2) restrictions on adducing evidence of or questioning the complainant about their sexual behaviour.[55]

13.62 Alongside other special measures, these restrictions aim to protect complainants from added distress, improve the quality of their evidence, and "achieve the right balance between protection of the complainant and a defendant's right to a fair trial".[56] They can also minimise the perpetuation of rape myths, and may increase complainants' willingness to report their intimate image abuse.

13.63 Restrictions can be imposed in trials that do not involve sexual offences. For example, the court can prevent a defendant from cross-examining a complainant if it appears that the quality of the complainant's evidence is likely to be diminished and would be likely to be improved if such a direction were made, and that it would not be contrary to the interests of justice to do so.[57] However, this imposes a burden on the prosecution to illustrate that being cross-examined by the defendant would have such an effect on the complainant.

13.64 As with the provision of automatic lifetime anonymity and special measures, these restrictions on cross-examination apply in trials for offences of voyeurism, upskirting and breastfeeding voyeurism, but not the disclosure offence.[58] In the consultation paper we again took the view that complainants of all intimate image offences should receive the same protections as complainants of sexual offences in this respect.

13.65 Consultation Question 45 asked consultees the following:

---

54 Youth Justice and Criminal Evidence Act 1999, s 35.

55 Above, s 41.

56 Crown Prosecution Service, *The Sexual History of Complainants, Section 41 YJCEA 1999* (21 May 2021), https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-10-sexual-history-complainants-section-41-yjcea.

57 Youth Justice and Criminal Evidence Act 1999, s 36(2) to (3).

58 These restrictions apply to Part 1 of the SOA 2003 but not to the CJCA 2015, in which the disclosure offence is contained: Youth Justice and Criminal Evidence Act 1999, ss 35(3)(a)(vi) and 62(1)(a).

We provisionally propose that restrictions on the cross-examination of victims of sexual offences should extend to victims of the new intimate image offences. Do consultees agree?[59]

Consultation and analysis

13.66 Almost all consultees who responded to this question supported our proposal (38 out of 39).

13.67 Again, consultees argued that intimate image abuse is a form of sexual offending.[60] HM Council of District Judges (Magistrates' Courts) Legal Committee considered that complainants of these types of offences may experience the same challenges and should thus be protected similarly:

> The offences which are the subject of this consultation will always concern matters of an intimate nature and most usually matters of a sexual nature. A complainant in such a case may feel violated, humiliated and distressed by the offence. The impact on that complainant may easily be equivalent to that felt by the complainant in a sexual offence. Such a complainant should be entitled to protection from further potential humiliation and distress in the court process.

13.68 Some consultees argued that complainants of intimate image offences and sexual offences should be treated equally to ensure consistency and prevent confusion. Muslim Women's Network UK recognised that because cases involving intimate image abuse may also involve other sexual offences "it would be useful that the availability of special measures are streamlined so as to avoid any confusion (whether on the part of the victim or on the part of criminal justice agencies) as to what support is and is not available." Furthermore, HM Council of District Judges (Magistrates' Courts) Legal Committee also considered the fact that complainants of the existing disclosure offence do not benefit from these restrictions on cross-examination to be "an unwarranted gap in the protection for complainants of what are clearly sexual offences." This recognises a lack of consistency in the treatment of different types of intimate image abuse, all of which are forms of sexual offending, and their complainants.

13.69 In addition, consultees raised the following key arguments in their responses:

(1) allowing a defendant to question complainants in these circumstances will re-traumatise them, diminish the quality of their evidence, and may discourage reporting; and

(2) allowing questions about the complainant's sexual behaviour encourages misogyny and the exploitation of rape myths.

Complainant vulnerability

13.70 Consultees raised similar concerns about complainant vulnerability in response to this question as they did in response to the previous question on special measures. They

---

[59] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 14.93.

[60] Including: Honza Cervenka; Refuge; Magistrates Association.

argued that restrictions on cross-examination are necessary in intimate image offence proceedings because "it will be extremely traumatic for a victim to be cross-examined about issues around consent by the person who took or shared the image".[61] Some consultees warned that this is likely to reduce the quality of evidence given by the complainant.[62] Dr Bishop highlighted that cross-examining a complainant relating to their sexual conduct (which could be relevant in some cases of intimate image abuse) may cause them to "experience post-traumatic symptoms or to dissociate while giving evidence, thus making them seem unreliable witnesses lacking in credibility". These responses suggest that restrictions on cross-examination are important to support complainants throughout proceedings and ensure they can provide the best quality evidence.

13.71 One consultee shared that "it feels like a rape in itself to be cross-examined". Amber Daynes, personal response, explained that her experience of being cross-examined involved feeling "belittled" by the defence barrister and portrayed as promiscuous. Though both consultees discussed cross-examination generally, rather than by the defendant, their responses nevertheless demonstrate the concerns.

13.72 Some consultees noted that cross-examination of the complainant by the defendant "is used as a tactic to continue the abuse".[63] The Bar Council (who neither agreed nor disagreed with our proposal) recognised that "there is a significant risk that a defendant so charged may dispense with representation in order specifically to increase the distress of the victim and so compound the gravity of the offence". Consultees also noted that a lack of restrictions on cross-examination may deter victims from reporting[64] and complainants from giving evidence in proceedings.[65] Muslim Women's Network UK warned that defendants may utilise the opportunity to cross-examine the complainant "potentially because they believe doing so would make it more likely that the victim will ask for charges to be dropped". These responses illustrate that a lack of restrictions on cross-examination can have significant negative effects on complainants' willingness to engage in the legal process, and on the effectiveness of the criminal justice system more widely.

Rape culture and misogyny

13.73 Consultees argued that permitting the defendant to adduce evidence of or question the complainant about relevant sexual behaviour reinforces misogyny and rape myths; such evidence and questioning "only seeks to shame victims".[66] Refuge thus considered it necessary to impose restrictions on cross-examination "to avoid the perpetuation of misogynistic and sexist myths surrounding women's sexual behaviour and to avoid a culture of victim-blaming".

---

61 Professor Gillespie, Consultation Response. Other consultees who shared a similar view included: South West Grid for Learning; Dr Bishop.

62 Including: Professor Gillespie; Dr Bishop.

63 Refuge, Consultation Response.

64 Including: Professors McGlynn and Rackley; Bumble.

65 Including Professor Gillespie.

66 Bumble, Consultation Response.

13.74 Some consultees, including Ann Olivarius and Professors McGlynn and Rackley, emphasised that evidence relating to a complainant's sexual history is irrelevant to the issue of whether there was consent in the particular case before the court. HM Council of District Judges (Magistrates' Courts) Legal Committee explained: "the fact that a complainant has consented to the taking of an intimate image in the past does not mean that the complainant will consent to the taking of an intimate image in the future". Refuge argued that "banning questioning of this nature will help ensure that the prosecution focuses on the core 'wrong' of [the complainant's] lack of consent, rather than superfluous and speculative assertions about [their] personal conduct".

13.75 HM Council of District Judges (Magistrates' Courts) Legal Committee also noted that difficulties may arise when applying section 41 of the Youth Justice and Criminal Evidence Act 1999 (restrictions on adducing evidence of or questioning the complainant about their sexual behaviour) in cases "where there might have been consent to the taking of an image but no consent to the disclosing of that image".

13.76 These responses indicate that consultees consider that restrictions on adducing evidence or questioning a complainant about their sexual behaviour should apply to intimate image offences, just as the prohibition on a self-represented defendant cross-examining the complainant should. In our view, this is necessary to ensure consistency across intimate image and sexual offences. A holistic review of evidence in sexual offence prosecutions is currently being undertaken by the Law Commission, which can better address any wider issues with section 41 as it applies to sexual offences.

Conclusions following consultation

13.77 Consultees expressed very strong support for this proposal. As with responses to the previous questions in this chapter, consultees argued that proceedings involving intimate image offences should be treated similarly to sexual offences. Furthermore, consultees considered it necessary to impose restrictions on cross-examination to ensure that victims feel supported in reporting intimate image abuse to police and giving evidence at trial, and to minimise the perpetuation of rape myths and misogyny. We agree with the rationales provided.

13.78 We note the submission from Professor Gillespie who considered the impact these proposals would have on defendants. He concluded that defendants are adequately protected and therefore it would not lead to unfairness:

> There are sufficient safeguards within the [Youth Justice and Criminal Evidence Act 1999] to ensure that there is no unfairness to defendants by such a bar, including where the defendant is ineligible for legal aid.[67]

13.79 The Bar Council argued that the justification for imposing restrictions on cross-examination for the base and threat offences is "not so clear-cut". We do not agree

---

67 These safeguards include the provisions in ss 38 to 40 of the Youth Justice and Criminal Evidence Act 1999. Where a defendant is prevented from cross-examining a witness in person by virtue of ss 34 to 36 of the same Act, defence representation for the purposes of cross-examining can be arranged and funded under ss 38 and 40. Section 39 provides for judges in such cases to give juries an appropriate warning to ensure the defendant is not prejudiced by any inference drawn from the fact the defendant is prevented from cross-examining a witness in person.

that such a distinction is appropriate. First, the sense of violation, humiliation, and distress experienced by the complainant does not necessarily depend on the offence committed. Secondly, a defendant charged with the base or threat offence is just as capable of using the court process to harass the complainant further. Thirdly, applying cross-examination restrictions only to the specific intent offences may risk incentivising prosecutors to charge defendants with the more culpable offences purely to ensure that these measures are available to complainants. This would be undesirable. Finally, extending cross-examination restrictions to some of our recommended offences but not others may be taken to indicate that only those offences are sufficiently severe or only those complainants are sufficiently vulnerable to warrant such protections. This is inconsistent with the fact that our tiered framework of offences does not reflect harm to the victim, but rather culpability.[68]

13.80 We therefore recommend that restrictions on the cross-examination of complainants of sexual offences should extend to complainants of all intimate image offences.

Recommendation 49.

13.81 We recommend that restrictions on the cross-examination of complainants of sexual offences should extend to complainants of the new intimate image offences.

NOTIFICATION REQUIREMENTS

13.82 In this part of the chapter, we consider whether, and in which circumstances, notification requirements should be triggered upon conviction of intimate image offences. Notification requirements are used to protect the public and assist the police in monitoring and locating offenders, and deterring re-offending.[69] They are automatically triggered for offenders convicted of an offence contained in Schedule 3 to the SOA 2003,[70] including voyeurism, upskirting and breastfeeding voyeurism, where certain conditions are met. In England and Wales, courts cannot exercise discretion in respect of notification requirements once triggered or the notification period.[71] The intrusion into an offender's life by imposing notification requirements is justified on the basis that, given the sexual nature and seriousness of the offence, there is a need to monitor their location to avoid reoffending and protect the community.[72]

13.83 For the voyeurism offence, notification requirements will be imposed where: the victim was under 18; or the offender has been sentenced to a term of imprisonment,

---

68 See Chapter 7.

69 See for example, *Hansard* (HL), 14 March 1997, vol 579, col 546.

70 SOA 2003, s 80. Note that an offence does not have to be in the SOA 2003 to be included in Schedule 3: see for example, section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988, which are both found in Schedule 3 of the SOA 2003.

71 Section 82 of the SOA 2003 sets out the corresponding notification periods for different types of offenders and their circumstances.

72 *Hansard* (HC), 12 July 2018, vol 644, col 42.

detained in hospital, or made the subject of a community sentence of at least 12 months.[73] The same conditions apply to the upskirting and breastfeeding voyeurism offences, where the offender's purpose was to obtain sexual gratification.[74]

13.84 In the consultation paper we considered it appropriate for notification requirements to be triggered automatically upon conviction for the provisionally proposed taking and sharing offences where the offender's purpose was to obtain sexual gratification. This would expand the existing notification regime, which does not cover the current disclosure offence. In our view, this behaviour is sufficiently sexual and serious in nature to warrant notification requirements.

13.85 Consultation Question 46 and Summary Consultation Question 16(ii) asked:

> 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?

Consultation responses

13.86 Most of the consultees who responded to this question supported our proposal (185 out of 238), and only five disagreed.[75] Many justified their support of our proposal on the basis that notification requirements are necessary to manage offenders and deter (re)offending.[76] A number of responses argued for wider application, suggesting that notification requirements should not be restricted to cases where the offender's purpose was to obtain sexual gratification.

13.87 A number of consultees emphasised the need to avoid imposing disproportionate restrictions on young people, leading the Youth Practitioners Association to "urge against the ancillary orders proposed for these offences" for children. While these issues are discussed in more depth in Chapter 14, it is worth noting here that children are already subject to notification requirements under the current law. However, higher thresholds and shorter notification periods apply to those who are under 18,[77] indicating that the difference in culpability between adults and children is taken into account.

Seriousness threshold

13.88 Consultees agreed that an appropriate seriousness threshold should be met before notification requirements are triggered.[78] Several suggested that it must be high, given

---

73 SOA 2003, Sch 3, para 34.

74 SOA 2003, Sch 3, para 34A.

75 31 of the 48 consultees who neither agreed nor disagreed commented that they did not understand the question or had insufficient knowledge to provide an answer.

76 Including: Magistrates Association; Muslim Women's Network UK; and personal responses from Anon 78; Anon 121; Con Cahill; and Peter Greenwood.

77 Some offences do not have notification requirements attached where the offender is under 18, and others impose higher sentence thresholds for such offenders. Further, the notification period is halved where the offender is under 18: SOA 2003, s 82(2).

78 Including: Senior District Judge (Chief Magistrate) Goldspring; David Harris, personal response.

that notification requirements are "very serious, and quite draconian."[79] Professor Gillespie and the Queen Mary Legal Advice Centre recognised that notification requirements should not serve as additional punishment as "they are purely ancillary",[80] which is also highlighted in relevant government guidance.[81] These responses emphasise the importance of balancing the need to protect the public against the rights of and impact on the offender.

13.89 The Magistrates Association stated that the "seriousness threshold is well laid out". Both Kingsley Napley LLP and the Law Society considered that it should be determined by the length or severity of sentence, as it is currently. The Magistrates Association also noted that "it would be helpful to have guidance available regarding the length of time on the register for different offences to reflect seriousness". As noted above, courts cannot exercise discretion over the length of the notification period.[82]

Sexual gratification

13.90 Most consultees agreed that notification requirements should be triggered where the offender intended that they or another would look at the image for the purpose of obtaining sexual gratification (and a seriousness threshold is met). However, some suggested that they should also be triggered in other circumstances.

13.91 Professor Gillespie considered that triggering notification requirements only where the offender has that intention may risk leaving gaps in protection as is the case with the current upskirting offence. He argued that this approach "raises interesting questions where [the defendant] admits to the activity but denies the motivation" and noted "it is likely that in many instances the CPS will just accept the plea" (suggesting that a plea to the base offence would be accepted, meaning notification requirements would not be available).

13.92 Refuge argued that restricting notification requirements to this specific intent offence "would reinforce the unjustified hierarchy between these proposed offences [and] an unnecessary and confusing two-tier understanding of seriousness and harm in intimate image abuse." This view was supported by other consultees, including Northumbria PCC, Professors McGlynn and Rackley, and Suzy Lamplugh Trust. As discussed in Chapter 7, our recommended tiered approach reflects a hierarchy of culpability, not harm.

13.93 Some consultees argued that where there is a sufficient sexual element to the offence (not just the motivation of the offender), notification requirements should be triggered. The Lucy Faithfull Foundation and Clive Neil, personal response, argued that

---

79 Queen Mary Legal Advice Centre, Consultation Response. Note that a small number of consultees questioned the need for a high threshold, including Keith Allardice, personal response.

80 Professor Gillespie, Consultation Response.

81 "The notification requirements are not a punishment for a sexual offence and are not part of the system of penalties": Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (September 2018), 5, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755142/11.18guidanceonpart2ofthesexualoffencesact2003.pdf.

82 Para 13.82.

triggering notification requirements should depend in part on whether there was a sexual element to the offending behaviour. Professor Gillespie considered the fact that notification requirements do not apply where a person may pose a risk of sexual harm but whose offending was not sexually motivated:

> If their purpose is to control those who pose a risk of sexual harm to others, then does that apply to those who are acting for non-sexual motivations? While they are trading on the sexual autonomy of others, that has traditionally not been the reason for imposing notification requirements.

13.94 Other consultees suggested that notification requirements should be triggered even where they may be no sexual element. Honza Cervenka argued that notification requirements should also apply where the offender intended to humiliate, alarm or distress as this intent "can manifest itself in similarly abhorrent, harmful and criminal behaviour". Backed Technologies Ltd supported attaching them to all sharing offences: "The act of sharing is perhaps even more malicious… It's about power, control and desire to cause distress to a person". A small number of consultees argued that notification requirements should be triggered in all cases, whatever the offender's purpose.[83]

13.95 Queen Mary Legal Advice Centre questioned whether it is necessary to attach notification requirements to the sexual gratification offence because "[o]ffending of this nature is rarely a public safety issue, and more a specified and targeted act of control".

Discretion in applying notification requirements

13.96 Several consultees considered whether notification requirements should be triggered automatically or at the court's discretion. Professor Keren-Paz suggested that it should be presumed that notification requirements will apply but the courts should have discretion to decide differently (in which case the judge must register their reasoning). He considered this flexibility necessary "given the inherent risk of criminal over-reach, mistakes by prosecutors and courts, and the law of unintended consequences". Ann Olivarius argued that "a revised law should indicate that the prosecution has the prerogative to seek such notifications in every criminal prosecution of [intimate] image abuse".

Analysis

13.97 The purpose of notification requirements is to assist in managing those convicted of sufficiently serious sexual offending and who pose a sufficient risk to the public. This means that a particular level of culpability is required to warrant the intrusion into a person's private life caused by notification requirements. This is particularly true given that notification requirements are triggered automatically, and sometimes in the very early stages of engagement with the criminal justice system.[84] We can better ensure that an appropriately high threshold is met by restricting notification requirements to a

---

[83] Fred Campbell and Anon 113, personal responses. Note that it is not clear whether these responses were referring to all intimate image offences, all sexual offences, or even more widely.

[84] In some circumstances, notification requirements may be triggered automatically at the point the offender is cautioned for the relevant offence: SOA 2003, s 82(1) and (6)(c).

more culpable specific intent offence. While the recommended offence that requires an intent to cause humiliation, alarm, or distress also reflects higher culpability and the risk to the public may be comparable, the resources needed to enforce notification requirements are more appropriately reserved for offenders whose behaviour was sufficiently sexual in nature.

13.98 It would be challenging to trigger notification requirements where there was merely a sexual element to the offending, as suggested by some consultees. There is not sufficient clarity in what would count as a sexual element, absent a sexual motivation. It could apply where a defendant is convicted of the base offence but the image fits within the recommended definition of sexual, which would be too low a threshold for such a serious imposition on the rights of the defendant. Additionally, this approach would require the court first to make a finding as to whether there was a sexual element to the behaviour, which would impose an additional burden to categorise the intimate image, or context, in question.

13.99 There are alternative measures that are better suited to protect the public where the offender did not act for the purpose of obtaining sexual gratification. These include Criminal Behaviour Orders ("CBOs"), which may require or prohibit an offender from doing certain acts – for example, a CBO may compel the offender to attend an educational course on the effects of alcohol. To make a CBO the court must be satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused, or was likely to cause, harassment, alarm or distress to any person; and must consider that making the CBO will help prevent the offender from engaging in such behaviour.[85] These orders are available on conviction for any offence and do not target offending involving sexual behaviour, which means they are appropriate for offenders convicted of any intimate image offence (where the relevant criteria are met). It is important to note that orders such as these complement the notification regime but are not substitutions: notification orders serve a distinct purpose, and CBOs help fill in the gaps in protection.[86]

13.100 Finally, restricting notification requirements to circumstances where the offender's purpose was to obtain sexual gratification is consistent with the current law.[87] Parliament recently considered this issue when implementing the upskirting offence in 2019, and concluded that notification requirements should only be triggered where this condition is met. Consequently, to extend our proposal to all recommended offences would be to depart from Parliament's decision. Similarly, to adopt the view of some consultees that they should be triggered at the court's discretion would also be a departure from current practice: as we noted above, it is well established that "[t]here is no discretion, exercised by either the courts or the police, in imposing the

---

85 Crown Prosecution Service, *Criminal Behaviour Orders* (13 May 2020), https://www.cps.gov.uk/legal-guidance/criminal-behaviour-orders,

86 North Yorkshire Police, Fire and Crime Commissioner and North Yorkshire Police jointly argued that our proposal is unnecessary because restraining orders and other measures are already in place to protect individuals. However, measures such as restraining orders or SHPOs serve a different function and target different circumstances. Therefore, they are not appropriate replacements for notification orders.

87 Notification requirements are automatically triggered upon conviction of the existing voyeurism, upskirting and breastfeeding voyeurism offences where a sentence threshold is met and, for the latter, where the purpose was to obtain sexual gratification.

notification requirements on relevant offenders".[88] There is no justification for departing from this standard for intimate image offences alone. The issue of whether a discretionary approach to notification requirements should be adopted is a wider question that goes beyond the scope of this project's terms of reference.

Conclusions following consultation

13.101 Consultees supported this proposal, generally agreeing that a sufficiently high threshold must be met before notification requirements are triggered. In Chapter 7 on a tiered structure and sentencing, we recommend that our specific intent offences should have a maximum sentence of two or three years' imprisonment. Notification is triggered for voyeurism, upskirting and breastfeeding voyeurism,[89] for which the maximum sentence is two years' imprisonment.[90] As analogous to those offences, we consider it appropriate that the same threshold be applied to our recommended offences of taking or sharing for the purpose of obtaining sexual gratification. This threshold is met if:

(1) where the offender was under 18, he is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months;

(2) in any other case—

(a) the victim was under 18, or

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

(i) sentenced to a term of imprisonment,

(ii) detained in a hospital, or

(iii) made the subject of a community sentence of at least 12 months.[91]

13.102 Some consultees argued that notification requirements should not be limited to circumstances where the offender's purpose was to obtain sexual gratification. We conclude that they must be so limited to ensure they only apply in cases where the sexually harmful nature of the offending justifies the serious imposition, and is appropriately addressed by the specific purpose of notification requirements. Other measures exist to deal with offenders who do not meet this threshold.

13.103 Within the current regime as it applies to all offences in Schedule 3 to the SOA 2003, notification requirements will automatically apply where a conviction is secured for a relevant offence and the sentence given meets the relevant threshold. We do not think it is appropriate to recommend a different regime for applying notification requirements

---

88 Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (September 2018), 5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755142/11.18guidanceonpart2ofthesexualoffencesact2003.pdf.

89 Where the offence was committed for the purpose of obtaining sexual gratification: SOA 2003, Sch 3, para 34A(1)(a).

90 SOA 2003, ss 67(5) and 67A(4).

91 Above, Sch 3, paras 34 and 34A.

only for intimate image offences. Therefore, notification requirements should be automatically triggered, rather than being at the court's discretion, for an offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification when the relevant sentence threshold is met.

Recommendation 50.

13.104 We recommend 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.

13.105 This threshold should be met if:

(1) where the offender was under 18, he is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months;

(2) in any other case—

(a) the victim was under 18, or

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

(i) sentenced to a term of imprisonment,

(ii) detained in a hospital, or

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

SEXUAL HARM PREVENTION ORDERS

13.106 Sexual Harm Prevention Orders ("SHPOs") impose prohibitions on an offender in order to prevent sexual harm. These may include restrictions on foreign travel or internet access.[92] SHPOs apply to any offence contained in Schedules 3 and 5 to the SOA 2003, and will trigger notification requirements for offences in Schedule 5 where a SHPO is imposed for such an offence.[93]

13.107 SHPOs can only be made where the court considers it necessary to protect the public, or particular members of the public, within the UK (or children and vulnerable adults outside the UK) from sexual harm.[94] For the purpose of imposing SHPOs, "sexual harm" is defined as

---

92 *R v Jackson* [2012] EWCA Crim 2602.

93 SOA 2003, s 103G(2). See also Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (September 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755142/11.18guidanceonpart2ofthesexualoffencesact2003.pdf.

94 Sentencing Code, ss 343(2) and 346.

physical or psychological harm caused—

(a) by the person committing one or more offences listed in Schedule 3 to the Sexual Offences Act 2003, or

(b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in that Schedule if done in any part of the United Kingdom.[95]

13.108 In the consultation paper we recognised that SHPOs have been imposed in cases of voyeurism and upskirting,[96] and consequently considered that they should apply to all of our offences where deemed necessary to protect the public from sexual harm. The voyeurism and upskirting offences are included in Schedule 3, but the disclosure offence is neither in Schedule 3 nor 5. Our proposal would thus extend the application of SHPOs to offences of sharing intimate images without consent and threats to share.

13.109 Consultation Question 47 and Summary Consultation Question 16(iii) asked:

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

Consultation responses and analysis

13.110 We received overwhelming support for this proposal. Most consultees who responded agreed (227 out of 251), and only four disagreed.

13.111 Some consultees justified their support on the basis that SHPOs play a valuable role in protecting the public and reducing reoffending.[97] Additionally, in line with responses to previous consultation questions in this chapter, consultees argued that intimate image offences should be treated similarly to other sexual offences: Backed Technologies Ltd stated that "[i]ntimate online image abuse is sexual abuse, online."[98]

13.112 A number of consultees raised concerns about the difficulties children face in managing SHPOs and the long-term effects of such measures on young people.[99] These issues will be discussed in more depth in Chapter 14.

---

95 Sentencing Code, s 344(1).

96 See the recent case of John Wood, against whom the court made a 10-year SHPO (and imposed a notification requirement) following his conviction of voyeurism: 'Secret filming victim feels let down by courts' (7 May 2022) *BBC*, https://www.bbc.co.uk/news/uk-england-59399309.

97 Including: Magistrates Association; Backed Technologies Ltd; North Yorkshire Police, Fire and Crime Commissioner and North Yorkshire Police; and personal responses from Lauren White; Peter Greenwood; Tina Meldon; Anon 37; Anon 54; Lee Elms; Teuta Smith; Paul Hostler; Anon 78; Clive Neil; Joanne Clark; Anon 118; Linzi Garton; Sara Wade-Vuletic.

98 Consultation Response.

99 Including: Youth Practitioners Association; Corker Binning; Lucy Faithfull Foundation.

13.113 The key concerns raised by consultees in response to these questions related to the appropriateness of the threshold at which SHPOs are imposed, and any available alternatives.

Seriousness threshold

13.114 Consultees highlighted the need to ensure an appropriate threshold is met before SHPOs are imposed.[100] Some suggested that this is necessary as SHPOs can impose disproportionate and onerous restrictions on the offender: "SHPOs have a significant and life-changing impact on offenders, who are essentially unable to rehabilitate themselves properly into society once one is imposed."[101] Queen Mary Legal Advice Centre similarly adopted this view, and considered the practical limitations to applying SHPOs to all of our recommended offences:

> [SHPOs] should be workable, proportionate and practical in terms of the ability to police them. We have serious reservations of the type of conditions that would be proportionate, practical and 'policeable' for this type of offending. For example it would not be sensible to have a term prohibiting an individual from taking intimate images of another without consent as there could not be a term which equates to a criminal offence. Equally it is unlikely to be proportionate to require an individual to not have a mobile phone with the capability of storing data which is not registered with the police, for an offence of this type. Consideration must also be given to the distribution of public interest in and resources for policing SHPOs.

13.115 The Law Society considered the proportionality of imposing SHPOs:

> While it is correct that [SHPOs] have been imposed for voyeurism previously, these have been in cases that involved sufficiently serious and/or repetitive conduct. It is necessary to be careful therefore not to create a system where the imposition of such orders occurs routinely, to avoid restricting the liberty of individuals when the circumstances and seriousness of the offence do not justify such an order.

13.116 Some consultees consequently argued that SHPOs should not apply to all of our recommended offences. The Law Society did not consider it appropriate for those convicted of the base offence to be subject to SHPOs,[102] and both Corker Binning and the Queen Mary Legal Advice Centre argued that – if taken forward – this proposal should be limited to the sexual gratification offence only. Professor Gillespie noted that it may be difficult to establish that an offender poses a sexual risk in some cases where the relevant image was "private" (rather than sexual). Consequently, he warned that "care should be taken not to dilute the purposes of both the notification requirements and SHPO regime by including conduct that is not sexual." Professors McGlynn and Rackley, and Kingsley Napley LLP, supported sentence thresholds so

---

100 Including: Professors McGlynn and Rackley; Kingsley Napley LLP.

101 Corker Binning, Consultation Response.

102 Consultation Response to Consultation Question 48.

that SHPOs would only apply where the offender receives a sentence of a particular length and/or severity.[103]

13.117 We recognise the importance of ensuring SHPOs are imposed only where necessary and proportionate. However, SHPOs are not automatically imposed. The court must determine that such an order is necessary to protect the public from the risk of sexual harm posed by the offender,[104] and that its conditions are proportionate to avoid imposing onerous obligations.[105] Therefore, while we proposed that SHPOs should apply to all offences including the base offence, an order would only be made in these circumstances where this threshold is satisfied.[106] The same can be said in regards to the application of SHPOs to offences where the intimate image is not considered sexual (but the court's assessment of the sexual risk posed by the offender may be informed by the nature of the image). Further, the difference in applying notification requirements only to the sexual gratification offence but applying SHPOs to all offences is justified because the former are triggered automatically, while the latter are not. The automatic nature of notification requirements means that a higher threshold is necessary when attaching them to an offence, whereas there is no need to restrict the application of SHPOs as it is for the judge to use their discretion to decide whether to make such an order. In these ways, the defendant is safeguarded against the disproportionate and unnecessary imposition of SHPOs.[107] HM Council of District Judges (Magistrates' Court) considered that the necessity test for granting SHPOs effectively ensures that their imposition is compatible with rights under the ECHR and Human Rights Act 1998.

13.118 Moreover, there is value in applying SHPOs to all of our recommended offences, including the base offence. Professor Gillespie noted that this would solve the challenge he identified in respect of notification requirements – that a sufficiently culpable offender may not be subject to notification requirements if they are charged with the base offence, rather than the sexual gratification offence, because their

---

103 Professors McGlynn and Rackley suggested that the threshold should be met where the offender receives a sentence of a significant length or a prison sentence. Kingsley Napley LLP argued that the threshold should be defined according to length of sentence.

104 In *McDonald* [2015] EWCA Crim 2119, [2016] 1 Cr App R (S) 48 (307), the Court stressed that SHPOs must not be made without proper consideration of the statutory requirements: a test of necessity for the imposition of the SHPO, and a test of necessity for the inclusion of any prohibition within it. See also *NC* [2016] EWCA Crim 1448, [2017] 1 Cr App R (S) 13 (87); and *Smith (Steven)* [2011] EWCA Crim 1772, [2012] 1 Cr App R (S) 82 (468).

105 Where there was no evidence that the defendant posed a risk to boys, as opposed to girls, a restriction in the SHPO in respect of "any child" could not be justified: *Franklin* [2018] EWCA Crim 1080. Where the defendant had admitted offences of possession of indecent images of children, a restriction in the SHPO on "working paid or unpaid anywhere where there could be a child under 18 on the premises" was too vague, too prohibitive and too wide: *Begg* [2019] EWCA Crim 1578, [2020] 1 Cr App R (S) 30 (227). In *Mortimer* [2010] EWCA Crim 1303, the Court of Appeal deleted or amended several prohibitions in an order restricting the defendant's access to the internet, on the basis that they were disproportionate and/or very difficult to enforce.

106 Note that the Court of Appeal has recognised that in certain areas developments in technology and changes in everyday living call for an adapted and targeted approach to setting the terms of prohibitions under a SHPO, particularly in relation to the use of risk management monitoring software and restrictions on cloud storage and encryption software: *Parsons* [2017] EWCA Crim 2163, [2018] 1 Cr App R (S) 43 (307).

107 See D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), para E21.25.

purpose is too difficult for the CPS to prove.[108] If SHPOs are available for all recommended offences, such an offender may be deemed a sexual risk and thus subject to a SHPO. This would also have the effect of triggering notification requirements for the length of the SHPO (where the offence was in Schedule 5 but not Schedule 3 of the SOA and therefore notification requirements were not otherwise available).[109]

Alternatives to SHPOs

13.119 Consultees who raised concerns about the threshold for imposing SHPOs suggested alternative measures that they argued were more appropriate. Professor Gillespie suggested that SHPOs could be used where the relevant image or motivation is sexual, whereas it may be sensible to rely on restraining orders[110] "where the intention of the offender is to cause harm, distress or fear etc". Furthermore, he considered that the court may impose a CBO, given that the behaviours covered by our offences could amount to conduct likely to cause harassment, alarm or distress.[111]

13.120 Parliament has decided that SHPOs should be imposed only where the 'sexual harm' threshold is met. In the case of intimate image abuse, this threshold is more likely to be met where the nature of the image or motivation was sexual. This is how the existing SHPO regime operates; we provisionally proposed that our offences be brought within its scope. Where this threshold is not satisfied, it may be the case that other court orders are available in the circumstances.

13.121 The Queen Mary Legal Advice Centre highlighted that Serious Crime Prevention Orders may be available as ancillary orders to blackmail and computer misuse offences. However, these orders are not a substitute for SHPOs as they apply only where the offender has been convicted of or involved in a serious offence;[112] and intimate image offences are not categorised as such.[113]

13.122 Refuge emphasised the value in using civil remedies alongside criminal measures to protect victims. They stated their support for Professors McGlynn and Rackley's recommendation to include a statutory civil claim in any new intimate image abuse legislation that prohibits a person from taking, making, or sharing intimate images without consent.[114] Refuge also advocated for the provision of emergency orders for victims of our offences. Additionally, the Angelou Centre and Imkaan argued that civil protection orders should be available to support victims who do not want to engage with the criminal justice system or failed to secure a prosecution due to evidential barriers:

---

108 See para 13.91.

109 Sentencing Code, s 352(2).

110 Above, s 359; Protection from Harassment Act 1997, ss 5 and 5A.

111 Sentencing Code, s 330.

112 Serious Crime Act 2007, s 1.

113 Above, s 2(2), and Sch 1, Part 1.

114 Clare McGlynn and Erika Rackley, "Policy Briefing on Law Commission Consultation on Intimate Image Abuse" (5 May 2021), available at: https://claremcglynn.files.wordpress.com/2021/05/mcglynnrackley-stakeholder-briefing-5-may-2021-final.pdf.

It is essential that the [C]ommission provides additional avenues and options for safety and protection, with an understanding that the criminal justice system is not an equitable system, particularly for Black and minoritised women and children victim-survivors.

Conclusions following consultation

13.123 Consultees generally agreed with our proposal that SHPOs should be available for all intimate image offences. This will protect the public from offenders who pose a sexual risk and will bring our offences in line with the measures available in respect of the existing voyeurism, upskirting and breastfeeding voyeurism offences.

13.124 The main point of contention related to the threshold at which SHPOs are imposed: a few consultees considered SHPOs to be too onerous and disproportionate to the behaviour in question, and some argued that they should only apply to the sexual gratification offence (if applying to any offences). However, we conclude that the 'sexual harm' threshold is a sufficient safeguard against the unnecessary and inappropriate imposition of SHPOs.

13.125 A number of consultees also suggested alternative measures to SHPOs that can be used in the intimate image abuse context. Restraining orders, CBOs and other civil remedies address a different type of behaviour and are useful where, for example, the sexual harm threshold for SHPOs may not be met. These measures are thus better understood as complementary to the use of SHPOs, rather than replacements for them.

Recommendation 51.

13.126 We recommend that Sexual Harm Prevention Orders should be available for all of our recommended intimate image offences.

DEPRIVATION AND FORFEITURE ORDERS

13.127 While the civil law may provide adequate remedies in some cases,[115] we concluded in the consultation paper that it is not an appropriate alternative to an effective criminal law regime and requires victims to have financial resources that are not available to everyone.[116] In any case, this project necessarily focuses on the criminal law; civil remedies are outside its scope. Though we did not consult the public on the use of deprivation or forfeiture orders in respect of intimate images, consultees' responses repeatedly discussed the need to make such court orders available to complainants. They argued that these are important tools that allow complainants to protect

[115] For example, courts may award damages to a claimant to fund the use of a professional service that monitors the internet for certain images and removes them as they are identified.

[116] Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, appendix 1, para 1.14.

themselves and assert their rights. We briefly considered these ancillary orders in the consultation paper and noted that they are not adequately utilised by the courts.[117]

Availability of deprivation and forfeiture orders

13.128 Courts have the power to make a deprivation order that deprives an offender of their rights in the property to which the order applies.[118] Under section 153(2) of the Sentencing Code, such an order is available relating to property that—

> (a) has been lawfully seized from the offender, or
>
> (b) was in the offender's possession or under the offender's control when—
>
> (i) the offender was apprehended for the offence, or
>
> (ii) a summons in respect of it was issued,
>
> if subsection (3) or (5) applies.

13.129 Subsection (3) applies if the court is satisfied that the property has been used for the purpose of committing, or facilitating the commission of, an offence; or where the offender intended to use the property for that purpose. Subsection (5) applies where the offence of which the offender has been convicted, or an offence which is taken into consideration by the court in determining their sentence, consists of unlawful possession of the property. These provisions mean that, for example, in cases involving indecent images of children ("IIOC"), deprivation orders can be made either in respect of: the images themselves as possession is an offence;[119] or the device used to take or store the images as it was used for the purpose of committing an IIOC offence (possession or making).[120]

13.130 Further, the courts have powers to order the forfeiture of property under specific statutory provisions. For example, the Protection of Children Act 1978 provides for the forfeiture of indecent images of children where lawfully seized by police.[121] Additionally, where a person is convicted of, for example, an offence under the Misuse of Drugs Act 1971, the court can order forfeiture and destruction of the drugs.[122]

Application to intimate image offences

13.131 Under our recommendations, it would not be possible to make a deprivation order in relation to an offender who possesses another's intimate images without consent, whether or not they also took the images. First, this is because we do not recommend an offence of possession and thus there is no unlawful possession of the images. This means that subsection (5) would not apply. Secondly, subsection (3) would not be satisfied, even where the offender *took* the images: the possession of such images

---

117 Above, Appendix 1, para 1.5; the under-utilisation of orders was reported by Kingsley Napley LLP.

118 Sentencing Code, s 152.

119 Above, s 153(2) and (5).

120 Above, s 153(2) and (3).

121 Protection of Children Act 1978, s 5 and sch 1, para 1.

122 Misuse of Drugs Act 1971, s 27(1).

occurs *after* the offence of taking has been committed, meaning they were not used for the purposes of committing (or facilitating the commission of) that offence. Deprivation orders could, however, be made in relation to the device used to take the image, given that it would have been used for purpose of committing an offence of taking intimate images without consent.[123] While this provides some recourse for complainants, the images may be stored elsewhere in addition to the forfeited item, and therefore the offender may still have access to them.

13.132 However, for the recommended offences of sharing and threatening to share, deprivation orders may be capable of targeting the images themselves. The offender must be in possession of the intimate image in order to share it. Therefore, the image has been used for the purpose of committing, or facilitating the commission of, these offences.[124] In some (but not all) cases, they will possess an image they threaten to share. A deprivation order can apply even where the offender has not yet committed either offence but has the image with the intention to use it for this purpose.[125]

13.133 In light of the inapplicability of deprivation and forfeiture orders to taking offences, it may be appropriate to consider the introduction of a deprivation order that specifically applies to images possessed by an offender following the commission of a taking offence.[126] The need for this measure in the absence of a possession offence was highlighted by Baroness Morgan in her consultation response: she urged us to consider recommending a separate order imposed by the courts "for the destruction of any images" in the event that we do not recommend introducing a possession offence.[127] Similarly, the former Director of Public Prosecutions, Alison Saunders, invited the Voyeurism (Offences) Bill Committee in 2018 to consider making available a power of forfeiture in respect of those who possess or are convicted of taking upskirting images if possession were not criminalised.[128] We recommend that Government consider this same approach in respect of any new taking offences in light of the responses from consultees and analysis of the harms caused by continued possession after non-consensual taking.[129]

---

123 Sentencing Code, s 153(3).

124 Above, s 153(3)(a).

125 Above, s 153(3)(b).

126 The Victorian Law Reform Commission recommended that image-based sexual abuse offences should be amended to give courts power to order the destruction of the intimate image in question: Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (September 2021), recommendation 52(d), https://www.lawreform.vic.gov.au/wp-content/uploads/2021/11/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf.

127 A magistrates' court used its power to order destruction of images after convicting Alexander Woolf of a communications offence in 2021. Woolf uploaded non-intimate images of women taken from their social media to Reddit and encouraged users to edit the victims' faces onto the bodies of porn actresses, before he posted the edited images on pornographic sites. See Katie Weston, 'BBC's Young Composer of the Year 2012 winner, 26, avoids jail after stealing images of women from social media and uploading doctored versions to pornographic sites' (17 August 2021) *Mail Online*, https://www.dailymail.co.uk/news/article-9902561/BBC-award-winner-avoids-jail-stealing-images-women-uploading-porn-sites.html.

128 Alison Saunders, Submission to the Voyeurism (Offences) Bill Committee (10 July 2018), para 2.5, https://publications.parliament.uk/pa/cm201719/cmpublic/Voyeurism/memo/VOB04.pdf.

129 See Chapter 4.

Recommendation 52.

13.134 We recommend that Government consider making available to the courts a power of forfeiture or destruction in respect of intimate images possessed without consent by an offender following the commission of a taking offence.

PLATFORM LIABILITY

13.135 Some organisations have taken steps to tackle the spread of intimate images without consent online. In December 2021 the Revenge Porn Helpline launched StopNCII.org[130] with support from Meta and Facebook Ireland. This is an initiative that serves "to safely and securely help people who are concerned their intimate images … may be shared without their consent."[131] It does this by using a tool that detects when someone has shared, or is trying to share, a person's intimate images on platforms run by participating companies. Antigone Davis, Global Head of Safety at Meta, describes the site as featuring "even greater safety, privacy and security to help victims take back control."[132]

13.136 The government is also seeking to improve online safety by imposing greater obligations on platforms to remove certain content via the Online Safety Bill, which is at Committee stage at the time of writing.[133] The Bill places a duty of care on platforms and search engines to limit the distribution of illegal content on these services and requires them to implement systems and processes to remove illegal content.[134] It also requires that they take additional steps in respect of " 'priority' illegal content."[135] The list of priority offences in the Bill contains, among others, offences relating to

---

130 NCII refers to the non-consensual sharing of intimate images. Note that this platform is only available to people over the age of 18.

131 Antigone Davis, "Strengthening Our Efforts Against the Spread of Non-Consensual Intimate Images" (2 December 2021) *Meta*, https://about.fb.com/news/2021/12/strengthening-efforts-against-spread-of-non-consensual-intimate-images/.

132 Antigone Davis, "Strengthening Our Efforts Against the Spread of Non-Consensual Intimate Images" (2 December 2021) *Meta*, https://about.fb.com/news/2021/12/strengthening-efforts-against-spread-of-non-consensual-intimate-images/.

133 Department for Digital, Culture, Media and Sport and Home Office, "Online safety law to be strengthened to stamp out illegal content" (4 February 2022), https://www.gov.uk/government/news/online-safety-law-to-be-strengthened-to-stamp-out-illegal-content.

134 Online Safety Bill, cl 9(3). Article 24b of the EU's Digital Services Act will impose similar obligations across the EU on platforms used to distribute user-generated pornographic material. These platforms will be required to take measures to ensure that those disseminating such content have identified themselves by email and phone number; that the platform has professional, appropriately trained human moderators; and that there is an additional notification mechanism whereby victims may notify platforms of the dissemination of content, and content is to be removed without undue delay. See European Commission, "The Digital Services Act: ensuring a safe and accountable online environment" (c.15 December 2020)https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en#documents

135 Online Safety Bill, cl 9(3).

sexual images. This includes images subject to the disclosure offence under section 33 of the CJCA 2015.[136]

13.137 This is a welcome move. It means that technology firms will have to be more proactive in removing private sexual images that have been shared without consent on their platforms with the intention to cause distress to the person depicted. They will also face greater sanctions if they do not comply with their obligations to prevent exposure to such illegal content on their sites. This move does not, however, extend the scope of images that would be considered "illegal content".[137] Therefore, this "priority illegal content" protection will only apply to images that are currently covered by the existing disclosure offence. This means it will not apply to images including deepfake pornography, intimate images taken in public places such as changing rooms, or intimate images that are shared for the purpose of obtaining sexual gratification or for a joke.

13.138 Our recommended offences would replace the disclosure offence and could also, therefore, replace it in the list of priority offences within the Online Safety Bill. This would extend the types of images and conduct protected to include the examples in the paragraph above that are currently excluded.

CONCLUSION

13.139 In this chapter we have considered which special measures and ancillary orders should be available in respect of intimate image offences. Consultees expressed strong support for our proposals, commonly arguing that the similarities between intimate image offences and sexual offences warrant equal protections for complainants of both.

13.140 We conclude that complainants of intimate image offences should be entitled to automatic lifetime anonymity and automatic eligibility for special measures at trial, and that restrictions on the cross-examination of witnesses should be available in proceedings. Furthermore, we conclude that notification requirements should be automatically triggered for the offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification when an appropriate seriousness threshold is met. Additionally, Sexual Harm Prevention Orders should be available for all of our intimate image offences.

13.141 Our recommendations in this chapter aim to achieve parity of treatment of complainants across all intimate image offences and with sexual offences. This is important to reflect the typically sexual nature of intimate image abuse, and to support complainants in reporting this behaviour and engaging with proceedings.

13.142 We have also considered two types of civil responses to intimate image abuse. This issue is ancillary to the substance of the criminal offences, but worthy of addressing. First, we assessed the applicability of deprivation or forfeiture orders to intimate image

---

136 Online Safety Bill, Sch 7, para 26.

137 "Illegal content" means content that amounts to (a) an offence specified in Schedule 5 (terrorism offences), (b) an offence specified in Schedule 6 (offences related to child sexual exploitation and abuse), (c) an offence specified in Schedule 7 (other priority offences), or (d) an offence, not within paragraph (a), (b) or (c), of which the victim or intended victim is an individual (or individuals).

offences. We have identified that these orders may not be available in respect of the taking offence where the offender still possesses the complainant's intimate images. It may be appropriate to introduce a bespoke order that applies in such circumstances. Secondly, we explained the potential relevance of the platform liability provisions in the Online Safety Bill (at the time of writing) for intimate image offences.

Chapter 14: Children and young people

INTRODUCTION

14.1 The criminal justice system recognises that children and young people sometimes need different treatment to adults, as victims, witnesses and perpetrators. There are a raft of measures throughout the criminal law to reflect this. For example: some offences apply specifically to child victims,[1] some offences are limited so they only apply where the perpetrator is over 18,[2] witnesses under 18 are automatically eligible for some special measures,[3] there is specific Crown Prosecution Service ("CPS") guidance on charging decisions involving child defendants,[4] there are special rules for sentencing children,[5] and there is a special youth court for child defendants.[6] These measures generally recognise that because of their age, capacity, and brain development, children do not always act, reason, or respond as adults do. The impact of offending, and prosecution, can also be markedly different.

14.2 The current intimate image offences apply to victims and perpetrators of all ages. In the consultation paper we concluded that the same approach was appropriate for any new intimate image offences. This issue sparked a lot of debate in consultation responses. In this chapter we will set out how we addressed the issues specific to children and young people in the consultation paper, the issues raised by consultees, and our conclusion informed by the totality of responses and evidence provided. We ultimately conclude that children and young people should not be excluded from intimate image offences; the offences should apply equally to victims and perpetrators of all ages. We consider that the existing safeguards in place within the criminal justice system are well placed to protect children from any disproportionate impact of criminalisation.

14.3 One of the strongest, most consistent, messages we received was that the criminal law cannot operate in isolation and that it is vital that any changes in the law are accompanied by a well-resourced, effective education programme for children and those who work with and care for them. We strongly agree.

---

1 For example, the child sexual offences Sexual Offences Act 2003, s 9 to s 15A.

2 For example, sexual offences where the victim is aged under 18 including abuse of position of trust offences, s 16 to s 19 of the Sexual Offences Act 2003.

3 Youth Justice and Criminal Evidence Act 1999, s 16(1)(a).

4 For example, Crown Prosecution Service, *Indecent and Prohibited Images of Children*, (30 June 2020) https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children.

5 For example, when sentencing, the court must have regard to the welfare of the child (this is not a requirement when sentencing adults). See, Sentencing Council "Sentencing Children and Young People" (1 June 2017) https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/.

6 See "Criminal Courts: Youth Courts", *HM Government*, https://www.gov.uk/courts/youth-courts.

14.4 The indecent images of children ("IIOC") regime is outside the scope of this project.[7] IIOC offences criminalise the taking, making, possession and distribution of images of children that are "indecent".[8] One of the key differences between IIOC and intimate image offences is that there is (generally) no consent element to IIOC offences; the conduct is an offence whether or not the child depicted consented to it.[9] This is because the offences are based on the premise that indecent images of children are so inherently wrongful and harmful that they should be criminalised in (almost) all circumstances. Intimate images, as we explain in Chapter 1 are not inherently wrongful; it is the lack of consent that makes them so. There are many other differences between the regimes (including, for example, the type of images covered, sentencing, and the definition of "taking") that we have explored throughout this report. The fundamental difference in the wrongfulness of the images and consent central to the regimes renders the IIOC regime difficult to compare with the intimate image offences. We can identify the differences and how they manifest, but we do not draw any conclusions on the operation of the IIOC regime. We do note consultees' views on IIOC offences below where these are relevant to the intimate images regime.

14.5 We acknowledge that with an intimate image of a child, it may be that both the intimate image and IIOC regime could apply. As with the current intimate image offences, it will be for the prosecution to decide in individual cases which is the more appropriate regime to charge.[10]

14.6 For the purposes of this project, we use the term "children" to refer to those under 18, and "young people" to refer to those between the age of 18 and 24.[11] In a consultation meeting with the Angelou Centre they advised us that the concept of "childhood" can differ for different ethnicities, religions and cultural groups. We also note that levels of maturity, responsibility and development will differ for individuals of all ethnicities and religions. Also relevant is the perception of age and maturity including concerns about the "adultification"[12] of Black children, who can be viewed as "older and less innocent"

---

7 See Terms of Reference in Chapter 1.

8 The main offences are Protection of Children Act 1978, s 1 and Criminal Justice Act 1988, s 160.

9 There is a narrow exception to this. Where the child depicted is aged 16 or 17 and the perpetrator was married, in a civil partnership, or living together in an enduring relationship, with them, consent can be relevant.

10 Paras 6.1 to 6.5 of the Code for Crown Prosecutors provides guidance on selecting the appropriate charge. Para 6.1 states that charges should be selected which: "reflect the seriousness and extent of the offending; give the court adequate powers to sentence and impose appropriate post-conviction orders; allow a confiscation order to be made in appropriate cases, where a defendant has benefitted from criminal conduct; and enable the case to be presented in a clear and simple way".

11 Article 1 of the United Nations Convention on the Rights of the Child provides the definition of child for the purposes of the convention as everyone under the age of 18 (unless under the law the child is subject to provides for legal adulthood at an earlier age). The upper limit of 24 years is consistent with the United Nations definition of a young person and also reflects the age bracket given to us by stakeholders when referring to "young people". UN Resolution 36/28 of 1981.

12 "Adultification" refers to biases that lead people to perceive certain marginalised ethnic groups, in particular, Black children, as older and more mature than their white peers. This often leads to more serious consequences for childhood transgressions because of the perception that they are more culpable and more capable of serious conduct.

than their peers.[13] However, for consistency, and in recognition of the age at which "child" specific provisions usually apply in England and Wales, we use "child" to refer to those under 18.

THE APPROACH IN THE CONSULTATION PAPER

14.7 In the consultation paper we explained that children and young people are both perpetrators and victims of intimate image abuse, and therefore it is not appropriate to exclude them from intimate image offences. We noted that the Government chose not to exclude children and young people from the existing intimate image offences. However, we also noted that the developing minds of children require special consideration and suggested that the requirement for prosecutors to consider the public interest test, and specialist guidance for charges involving child perpetrators, allow for such consideration.[14]

14.8 We described the harm and prevalence of intimate image abuse involving children and young people. We explained that we had heard conflicting views from stakeholders about both the prevalence and harm, something that has also been a feature of the consultation responses:

> Older children and young people feel pressured to take and send images of themselves, and those images are routinely non-consensually shared with the wider friendship group or year group.[15] This group is said to be living in a "group chat culture". It is not uncommon for there to be Facebook messenger or WhatsApp group chats where most of the year group is included. This can result in images being shared with hundreds of people, and then shared on.[16] A good example is a recent case in Denmark, where over 1000 children were prosecuted because they shared in a large group chat videos of young girls having sex.[17] In addition, a series of Freedom of Information ("FOI") requests, submitted by the media literacy charity The Student View, revealed that 36 police forces in England and Wales collectively received reports relating to 541 child victims of the disclosure of private sexual images without consent. A further 360 children and young people were revealed to be suspects, suggesting that children are often being victimised by other children.[18]

---

13 Commission on Young Lives, "All Together Now. Inclusion not exclusion: supporting all young people to succeed in school" Thematic Report 3 (April 2022), p 21.

14 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 1.75.

15 Alexandra Whiston-Dew and Tim Thompson (Mishcon de Reya).

16 Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).

17 Hilary McGann and Antonia Mortensen, "Danish police charge 1,000 young people with 'distribution of child porn'" (16 January 2018) CNN, https://edition.cnn.com/2018/01/16/europe/denmark-facebook-child-porn-intl/index.html.

18 Caitlin Webb and Sally Weale, "More than 500 child victims of 'revenge porn' in England and Wales last year" (9 October 2020) The Guardian, https://www.theguardian.com/society/2020/oct/09/more-than-500-child-victims-of-revenge-porn-in-england-and-wales-last-year; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.75.

14.9 We also cited research[19] that suggested children and young people are more likely to be victims of intimate image abuse than other age groups:

> In the year after the disclosure offence was introduced in England and Wales, 36% of victims were 19 or younger and 39% were between 20 and 29.[20] Additionally, in the Cyber Civil Rights Initiative's survey, 27% of individuals whose private sexual images were shared without consent were between 18 and 22 years old.[21]

14.10 However, some stakeholders disagreed that it was as prevalent as most believed:

> The Professionals Online Safety Helpline ("POSH") suggested that sexting is not normalised amongst this group, and a high proportion would be distressed and offended if an image of them was taken or shared without their consent. They also suggested that, contrary to popular opinion, low numbers of children and young people are sending nude pictures.[22]

14.11 Later in the consultation paper we explored the unique harms that children and young people may experience:

> They often worry that they will be blamed for their abuse, feel they have to laugh along or suffer in silence, are very reluctant to report to the police, find that their whole school experience is tainted and struggle to develop romantic relationships as adults.[23] Children and young people are also turning to self-harm and cyber self-harm (a form of self-harm where victims send abusive messages to themselves online) to deal with their feelings of self-blame, shame and humiliation.[24]

14.12 This is contrasted with views from stakeholders that suggest the behaviour is "normalised" among children and young people, that children do not think people who share images intend to cause harm, and that girls in particular are socialised to accept it.[25]

14.13 A prominent issue with intimate image abuse among children is the impact of potential criminalisation under the IIOC regime. Unlike a number of contact sexual offences with child victims, IIOC offences can be committed by children. Children can commit

---

19 Elena Sharratt, "Intimate image abuse in adults and under 18s" (2019) at p 9 https://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf.

20 Peter Sherlock, "Revenge pornography victims as young as 11, investigation finds" (27 April 2016) BBC News, https://www.bbc.co.uk/news/uk-england-3605427.

21 Cyber Civil Rights Initiative, "End Revenge Porn: A Campaign of the Cyber Civil Rights Initiative", https://www.cybercivilrights.org/wp-content/uploads/2014/12/RPStatistics.pdf; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 5.103.

22 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.76.

23 Clare McGlynn, Erika Rackley, Kelly Johnson and others "Shattering Lives and Myths: A Report on Image-Based Sexual Abuse" (July 2019) Durham University and University of Kent, p 15, https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf.

24 Dr Carrie-Anne Myers and Holly Powell-Jones; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 5.104.

25 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 5.105.

an IIOC offence by taking and sharing a nude photo of themselves ("self-generated indecent images"). As it is outside the scope of this project we do not form a view on the appropriateness of criminalising this conduct, but we do note it has attracted a significant amount of criticism.[26] There are also formal measures to reduce the number of children prosecuted for self-generated indecent images. We discuss this later in this chapter. In the consultation paper we noted that children do not always report intimate image abuse (such as the non-consensual sharing of their own intimate image) for fear of being criminalised for the creation of the image in the first place.

14.14 When considering different types of intimate image abuse we noted that children (as well as women) are more likely to be victims of sextortion when the extortion is for more images, and they are mostly targeted by social media manipulation, or "catfishing".[27] We also cited a newspaper report of upskirting conviction figures which reported that children were among the 150 victims.[28]

14.15 We also noted a particular context in which children perpetrate intimate image abuse against one particular group of adults: specifically teachers. Teachers have been victims of upskirting and sexualised photoshopping by their students.[29] This behaviour can be very damaging to teachers personally and professionally.

14.16 The final significant consideration in the consultation paper concerned the relevance, and operation, of children's consent to taking and sharing of intimate images. This formed part of our proposals, and now recommendations, in relation to consent. We explain the issue further in the next section of this chapter, but also address it within the wider question of consent, in Chapter 8.

CRIMINAL JUSTICE AND CHILDREN

14.17 We did not ask a specific question in the consultation paper relating to children and young people. Still, a number of consultees raised the issue throughout their responses. We identified children and young people as a potential issue for further discussion during the consultation process and specifically addressed it in individual stakeholder meetings,[30] roundtables,[31] and hosted a multi-disciplinary children and

---

26 See, for example, Abhilash Nair "Why the law on underage sexting needs to change" (November 2020) *Aston University*, https://www.aston.ac.uk/latest-news/why-law-underage-sexting-needs-change.

27 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 2.130. "Catfishing" is the act of luring someone into a relationship by adopting a fictional online persona.

28 "Upskirting law: Children among 150 victims, figures show" (10 January 2020) BBC News, https://www.bbc.co.uk/news/uk-england-5106174.

29 See for example, Katherine Sellgren, "More female teachers report upskirting, says union" (21 April 2019) BBC News, https://www.bbc.co.uk/news/education-47996888 and Eleanor Busby, "Children as young as 11 are upskirting teachers as reports in schools grow, union leader says" (21 April 2019) The Independent, https://www.independent.co.uk/news/education/education-news/upskirting-sexual-harassment-teachers-pupils-schools-nasuwt-union-a8879866.html.

30 Including with Professor Alisdair Gillespie; Frances Ridout; The Angelou Centre; and RASA Merseyside.

31 Including the academic and legal roundtables.

young person consultation event.[32] We include issues raised during those meetings here.

Consultation responses and analysis

14.18 A number of consultees called for careful consideration of the issues pertaining to children and young people. Not all advocated for a particular approach. For example, the Youth Justice Board recommended a "nuanced" approach to children, although they did not specify what that should involve. They stated it is important to "recognise" that children are "still developing and have yet to reach maturity" and that therefore "they will not think through their actions in the same way that an adult does or have an appreciation of the consequences of their behaviour". Jo Jones, personal response, asked for thought to be given to "images taken by children under 16 which may be the area of greatest prevalence".

Prevalence, motivation, and harm

14.19 The consultation process has added to our understanding of prevalence and type of behaviours amongst this age group. Academic Agnes E Venema submitted "the sharing of intimate images is often a way of courtship for young people, who may not be capable of fully overseeing the consequences of doing so and sharing received materials with a wider audience" and concluded "age-appropriate legislation and/or sentencing is therefore in order". In the children and young person consultation event, attendees debated the prevalence of the behaviour. Some submitted that there is a "youth culture" of sharing intimate images. Conversely, others argued that it is not right to say all children are doing this.[33] Gareth Edwards, the National Police Chiefs' Council Lead on child abuse investigations, noted that research had consistently shown that the majority of children do not take intimate images, but also there is less clarity on how many share images. There was general agreement amongst attendees that the risk of criminalisation from self-generated imagery negatively impacts the way young people interact with police and their confidence in reporting intimate image abuse.

14.20 Attendees also gave examples of intimate image abuse perpetrated by children. Professor Phippen gave an example of a "young man" who sold images of his girlfriend for £10. The South West Grid for Learning also noted that they see financial motivation "a lot" amongst younger people. Many consultees[34] agreed that much more work was needed to understand better the motivations and prevalence of intimate image abuse involving children and young people, as it is a very complex area. This is especially so when children are sexually maturing.

14.21 The Lucy Faithfull Foundation told us that motivations may differ for children and suggested that sexual gratification or exploration is more likely to feature for children than power and control. In the consultation event, Carmel Glassbrook (South West Grid for Learning) explained that making intimate images of teachers (such as

---

32 The event had 25 external attendees including government departments, academics, victim support groups, CPS, police, children's charities, lawyers, judiciary, and school representation.

33 Including Professor Andy Phippen.

34 Including Dr Emma Short and the South West Grid for Learning

creating sexual deepfakes) is usually done for a joke or to impact the teacher's professional life.

14.22 A significant issue in understanding the prevalence and harms of intimate image abuse amongst children is disentangling it from the research and evidence from the IIOC regime. Anything arising from the IIOC regime includes both consensual and non-consensual image-taking and sharing. Consent is not usually a relevant factor therefore data does not usually separate out consensual behaviour. For example, we were told one way this manifests is in the double counting of perpetrators.[35] Consider, a 16 year old girl who takes a nude photo of herself and sends it to her boyfriend, aged 17. He then shares it with his school friends. If the girl reports this then in the IIOC regime not only will her boyfriend be counted as a perpetrator, but she may also be counted because she has taken and shared an indecent image of a child (that child being herself). For intimate image offences, only the boyfriend would be counted as a perpetrator. We have also considered quantitative research that draws less from offending data, although we recognise that any research conducted in this jurisdiction will still be in the context of the IIOC regime. The research we have seen largely looks at prevalence and attitudes among children and young people towards "sexting". This usually includes consensual behaviour only or both consensual and non-consensual behaviour. There is less research focused on non-consensual "sexting" and the prevalence findings differ between studies.[36] There is even less research available on motivations for non-consensual taking and sharing. We have also found that some studies looking at the prevalence of this behaviour amongst children have included conduct outside the scope of our project such as online abuse, other sexual behaviour, the receiving of unsolicited sexual images, sexually explicit text messages as part of "sexting", and coercion or peer pressure to take and share "self-produced" indecent images.[37] This lack of clear data informs the way we interpret consultees' responses and understanding of prevalence.

14.23 One relatively consistent finding from recent research demonstrates that girls suffer more negative outcomes resulting from intimate image abuse (however defined for the purposes of the individual studies) than boys, and that boys often gain social status[38] with one report finding that this disproportionate negative impact was even more acute in girls from disadvantaged backgrounds.[39]

Criminal justice

14.24 Consultees and stakeholders have shared their views on the risks of criminalising children for this type of conduct, and of criminalisation generally. Where those have led to calls for a particular approach we consider them under the relevant heading below. One submission that captures the majority of views was from the Lucy Faithfull

---

35 CSA Centre.

36 See for example the review of available data conducted by the Australian Institute for Criminology; Nicola Henry, Asher Flynn and Anastasia Powell "Image-based sexual abuse: Victims and perpetrators" *Trends and issues in crime and criminal justice*, No 572, (March 2019).

37 For example, Ofsted, "Review of sexual abuse in schools and colleges" (10 June 2021).

38 Jessica Ringrose, Kaitlyn Regehr and Betsy Milne, *Understanding and Combatting Youth Experiences of Image-Based Sexual Harassment and Abuse* (December 2021).

39 Revealing Reality, *Not Just Flirting*, (June 2022).

Foundation. They supported "careful consideration" as to how the recommendations would apply to children. They argued that the criminal justice system is not the appropriate place for children and young people exploring sexuality and boundaries while still maturing. They submitted that "there is now a large body of scientific evidence to support the view that children and young people who have displayed harmful sexual behaviour are not 'mini adult sex offenders'". They expressed their strong support for a better community and support services response to sexual misconduct by children, including better education. They summarised the harm caused to children charged with a sexual offence, submitting that it:

> …can be a stigmatising and distressing experience for both the young person and their family, with potentially significant social implications for outcomes such as employment and housing, as well as mental and physical health, and their capacity to build positive relationships in adulthood.

They recognised the harm caused to victims of intimate image abuse committed by children but suggested that "interventions through alternatives to criminal justice routes should be favoured, alongside services that empower the victim to access the support they need to aid their recovery".

CHILDREN AS VICTIMS

14.25 Many consultees raised issues that are specific to the operation of intimate image offences involving child victims. These were specific to issues relating to children (under 18) as opposed to young people (over 18). First, there were concerns about the overlap between the IIOC regime and intimate image offences. Secondly, consultees queried how the consent requirement would work with child victims, noting that there are different consent provisions in sexual offences.

Crossover with indecent images of children offences

14.26 Our starting point in the consultation paper was that there was no rationale for excluding children as victims from the intimate image offences. There is no age qualification in the current intimate image offences. We had heard evidence that children are victims of non-consensual taking and sharing of intimate images, in fact research suggested they are disproportionately victimised. We are aware that some images may fall under both the IIOC regime and intimate image offences, but there will be some images where only one regime applies; for example, where an image is "intimate" but not "indecent".

Consultation responses

14.27 Professor Gillespie argued that the IIOC offences contained in the Protection of Children Act (PCA) 1978 are more appropriate to apply to intimate images of children as "there are appropriate ancillary orders, and it is marked by an appropriate sentencing regime". He also suggested that the IIOC regime would cover almost all images that we consider intimate. He cited *R v Henderson*,[40] where the Court of Appeal confirmed that a picture that showed the upper thighs of a girl of school age could constitute an indecent photograph of a child.

---

40 [2006] EWCA Crim 3264

14.28 The NSPCC welcomed new offences that would increase and improve protection for child victims of intimate image abuse. They suggested that the images covered by intimate image offences are broader than those covered by the IIOC regime. They mentioned in particular, that "pseudo-photographs"[41] are more narrowly defined than our proposed altered images as they require that the "predominant impression conveyed is that the image is of a child".[42] They also supported the inclusion of partially-nude images in the intimate image offences, suggesting they can fall outside the IIOC regime.[43] They described such images as a "real concern" for children that can cause "significant harm". They provided evidence from Childline counselling sessions where children (aged between 14 and 16) described their experiences of intimate image abuse involving "semi-nude" images. The NSPCC explained that clearer inclusion of such images in a criminal offence will help reduce the barriers currently faced when trying to remove them from the internet.

14.29 Dr Kelly Johnson submitted that the abuse experienced by child victims "must not be minimised". She described how:

> Several victim-survivors we spoke to had experienced image-based sexual abuse when they were children/young people and reported experiencing significant, long-lasting and ongoing harms as a result, even decades after the abuse occurred.

14.30 She also referred to forums such as Everyone's Invited[44] "which demonstrate the prevalence, seriousness and significant impacts of sexual violence and abuse experienced by young women". She argued this emphasises the importance of child victims having "an option for redress via the criminal justice system". She suggested that this prevalence:

> …speaks to the further value of the expressive function of the law – that image-based sexual abuse is wrong no matter how old you are or what the motivation – to challenge the increasingly commonplace normalisation and trivialisation of non-consensual digital sexual practices.

Analysis

14.31 We are satisfied that child victims should not be excluded from the scope of intimate image offences. Children can be victims of both child and adult perpetrators. Where either an intimate image offence, or an IIOC offence could apply, it is appropriate for

---

41 A pseudo-photograph is defined as an image, "whether made by computer-graphics or otherwise howsoever, which appears to be a photograph": Protection of Children Act 1978, s 7(7). If a pseudo-photograph conveys the impression that the person depicted is a child, it is treated as an image of a child for the purposes of the Protection of Children Act 1978: Protection of Children Act 1978, s 7(8).

42 In Chapter 4 we discuss the definition of "pseudo-photograph", including criticisms of the term, when considering the extent to which an altered image should be realistic in order to be included in a sharing offence.

43 The lowest "Category C" threshold may not be met if a child is covered by underwear or the image is not sexually suggestive.

44 Everyone's Invited is an online forum where victims of sexual violence can anonymously submit their experience. They state that their mission is "to expose and eradicate rape culture with empathy, compassion, and understanding". A large number of submissions are about the experiences of children and young people. The forum gained particular attention during 2021 for the number of stories of sexual assaults in schools.

prosecutors to make that decision in individual cases. This decision can include consideration of appropriate labelling and ancillary orders. We also note our recommendations in Chapter 13 that ancillary orders including Sexual Harm Prevention Orders and notification requirements should apply to intimate image offences where there is sexual offending of sufficient seriousness.

14.32 There are, however, three ways in which the scope of the intimate image offences is limited so that not all taking or sharing will be criminal. First, we exclude images of the chest area of prepubertal children from the definition of "partially nude" (see Chapter 3 for the rationale). It should be noted, though, that if an image of a prepubertal child's chest were nude (in that it also showed genitals or buttocks) or was otherwise sexual then it would be included in the offences. Secondly, we recommend a specific exclusion from the base offence for the taking and sharing of intimate images of young children that are of a kind ordinarily taken by or shared between family and friends. We heard submissions that such behaviour is harmless and should be excluded from the scope of offences. As one anonymous consultee submitted:

> Parents/guardians should be able to share naked everyday images of their children (eg playing in a water fountain or in the bath) to a photographic company for printing, say as part of an album.[45]

Thirdly, we recommend a specific exclusion from the base offence for the taking or sharing for their medical care or treatment, intimate images of children who lack capacity to consent where there is valid parental consent. This is to mirror the protective provisions for the taking and sharing for their care and treatment, of intimate images of adults who lack capacity, in section 5 of the Mental Capacity Act 2005. For further discussion of these exclusions, see Chapter 11.

14.33 Now we have concluded that child victims should not be excluded, we turn to whether there needs to be special consideration of the way children can consent.

Consent

14.34 In Chapter 8 we explain how the existing consent regime in the Sexual Offences Act ("SOA") 2003 would apply to children. In the consultation paper we explained that under the current intimate image offences, the prosecution do have to prove that the victim did not consent, regardless of the victim's age. We conclude again in this report that if a child gave valid consent to taking or sharing an intimate image, then an intimate image offence would not have been committed (though the IIOC regime may still apply).

14.35 The consent provisions in sections 74 to 76 of the SOA 2003 apply to victims of all ages. The provisions of the Mental Capacity Act (MCA) 2005 apply to 16 and 17 year olds, and mean that 16 and 17 year olds will be presumed to have capacity to consent, like adults, although this presumption can be rebutted. Courts usually apply the *Gillick*[46] principles when deciding whether someone under 16 has capacity to consent in common law. We have noted that the MCA 2005 approach is used increasingly in civil courts to assess capacity of children under 16. As we explained in

---

45 Anon 84, personal response.

46 *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 AC 112, [1985] 3 All ER 402.

the consultation paper, there will be a starting presumption that children under 16 do not have capacity under the MCA 2005, that presumption can be rebutted.[47] In Chapter 8 we conclude that the SOA 2003 and MCA 2005 are suitable bases on which to assess capacity to consent.

Consultation responses

14.36 Some consultees suggested alternative approaches to children's consent, or argued that consent should always be invalid for victims under a certain age. In their joint response, the Office of the Police, Fire and Crime Commissioner for North Yorkshire and North Yorkshire Police suggested that consent should never be valid for children: "any new law needs to make clear that children under 16 or 18 (needs deciding given the age of consent for sex is 16) can never consent".

14.37 The NSPCC agreed that the consent provisions under section 74 to 76 of the SOA 2003 should apply to the offences, but suggested that, in line with "all other sexual offences", children under 13 should be considered unable to give consent. In fact, for children under 13 who have capacity to consent, their consent is legally effective in relation to some current sexual offences, including voyeurism and upskirting.

14.38 The NSPCC also explained how complex the existing framework is for sexual offences involving images of children and the variations of age of consent.[48] They submitted that particular confusion is caused for 16-17 year olds; currently it is an offence to possess an image of someone of that age regardless of consent. They submitted that under our proposals, if there is consent, it is not illegal which can lead in the "short term" to confusion and in the "long term" to "effective decriminalisation of sexual images of 16 and 17 year olds" which would be "extremely problematic".

14.39 At our children and young person consultation event, District Judge Redhouse suggested that the consent provisions for intimate image offences should be consistent with the sexual offences where under 13s cannot consent. She submitted that we should not be bound by the approach taken in the current intimate image offences where such issues may not have been so thoroughly thought out.

14.40 HM Council of District Judges (Magistrates' Court) Legal Committee suggested that the capacity provisions under the MCA 2005 should apply to children aged 13 to 15, noting that this is an area in particular need of review. In their view, the definition of capacity under the MCA 2005 is adequate: "these provisions do not frequently cause difficulty in the adult or youth magistrates courts", and they are accompanied by clear guidance. They submitted that "there should be provision that those under 13 cannot consent, in line with other sexual offences".

Analysis

14.41 With regards to the NSPCC's concern regarding 16-17 year olds; we note that the presence of consent does not affect the possession, making or sending of an indecent image, which is currently illegal under the IIOC regime. Consent would remove the act

---

47 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 8.24.

48 This includes s 15a SOA (sexual communication with a child under 16), s 160 criminal Justice Act 1988 (possession of indecent photograph of child under 18), s 1 POCA 1978 (possession or sharing of sexualised image of child under 18), s 62 of Coroners and Justice Act (possession of prohibited image of child).

of taking or sharing an intimate image of a child from the scope of an intimate image offence, but the same conduct could still be within the scope of the IIOC regime.[49] As we have described above, and throughout this report, lack of consent is the key feature that makes the taking and sharing of intimate images criminal. The IIOC and intimate image regimes target different (but sometimes overlapping) behaviours and harms. We think therefore it is right that consent remains a key part of the offences.

14.42 We appreciate the NSPCC's detailed summary of the way consent operates for different ages for different offences. This is an already complex structure. We do not think it is necessary for intimate image offences to add to this complexity. We have carefully examined in both the consultation paper and this report how children's consent, and capacity to consent, is already considered by courts. We concluded that the current application of the SOA 2003 and MCA 2005 is appropriate and effective. We remain of this view.

CHILDREN AS PERPETRATORS

14.43 The majority of consultation responses on this issue considered whether and how the intimate image offences should apply to child perpetrators. Some consultees advocated limiting the offences so they only apply to perpetrators over the age of 18. Others suggested ways of minimising negative impacts on child perpetrators if they are included in the offences.

14.44 Again, the majority of responses discussed children (under 18) rather than young people (over 18), therefore we will use "children" rather than "children and young people" in this section. Where young people were specifically mentioned we will set that out.

Overcriminalisation

14.45 The primary concern submitted by consultees was that the proposed intimate image offences risk serious overcriminalisation of children.

14.46 The Law Society, for example, were "concerned that these new offences could potentially operate to unduly criminalise young people who may not realise that taking or sharing such images are criminal offences". They also submitted that:

> International human rights law recognises that the criminalisation of children can have a far reaching and irreversible impact on their life chances and that they should, so far as possible, be diverted out of the criminal justice system for this reason.

14.47 Corker Binning suggested: "the scope of the proposed offences, as drafted, will result in significant over-criminalisation, particularly of young people".

---

[49] The NSPCC referred to possession of an intimate image in this regard; we do not recommend a possession offence. We instead consider this point as it might relate to the taking or sharing of an intimate image of a 16 or 17 year old.

14.48 The NSPCC suggested that the base offence could lead to overcriminalisation. They concluded that "the broader societal, political and legal context must be considered to ensure these proposals work effectively in practice".

14.49 Some consultees concerned about overcriminalisation, and the negative impact of criminalisation on children, argued that the risks justify excluding child perpetrators from the offences. Other consultees considered ways that the risks could be mitigated without excluding child perpetrators. We explore those below but first draw attention to an alternative approach.

14.50 Some consultees raised concerns with specific elements of our proposals which they felt would disproportionately impact children. For example, Corker Binning argued that including "toileting" images in the offences could overcriminalise children who are more likely to take and share such images. Some consultees thought that children find toilet humour funny and therefore are less likely to understand it as harmful. As another example, consultees argued that children often show images to friends on their phone and therefore including "showing" as form of sharing would risk overcriminalising children. These concerns suggest different possible approaches to addressing the risk of overcriminalisation. One approach could be to modify the way that elements of the offence would apply to children. Another could be to take the offence as a whole and consider its application to children. We have taken the latter approach because, while there may be particular elements that apply more to cases involving children, overcriminalisation is not best addressed by looking at the operation of individual definitions or elements. Instead, having considered the need for each element and definition as they would apply to all perpetrators, and reached final recommendations for the necessary scope and operation of the offences, it is better then to consider the risk as a whole and whether and how those offences in their entirety should apply to children. As we will discuss further below, where offences are clear in scope and well-defined, that will help address some concerns relating to specific elements.

Exclusion

Consultation responses

14.51 The Youth Practitioners Association and the Howard League for Penal Reform advocated the exclusion of children from the intimate image offences.

14.52 The Youth Practitioners Association described, in similar terms to other organisations, how children engage in "sexting" "through curiosity and exploration and need education and safeguarding rather than criminalisation". They cited the 2016 UK Council for Child Internet Safety (UKCCIS) non-statutory guidance on managing incidents of sexting by under-18s (updated).[50] They also cited the 2016 National Institute for Health and Care Excellence (NICE) guideline on children and young people who display harmful sexual behaviour[51] which concluded "many children and

[50] *Sharing nudes and semi-nudes: advice for education settings working with children and young people*, 23 December 2020 (UK Council for Internet Safety) https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people.

[51] Harmful sexual behaviour among children and young people, NICE Guideline, 20 September 2016, p 25 https://www.nice.org.uk/guidance/ng55/resources/harmful-sexual-behaviour-among-children-and-young-people-pdf-1837514975173.

young people's display of harmful sexual behaviour will naturally come to an end as they mature". As we have mentioned above, unpicking non-consensual conduct from data on "sexting" is difficult. We apply caution when considering the relevance of this data to non-consensual intimate image conduct.

14.53 The Youth Practitioners Association mentioned that "a number of reports published in the past 5 years" "recommend moving away from prosecuting children for producing sexual imagery". They cited a 2016 report of an inquiry chaired by Nusrat Ghani MP into harmful sexual behaviour by children that said, "children should be treated as children first and should not be unnecessarily criminalised".[52] They submitted this suggests society is starting to move away from criminalising children for lower level sexual offending and that our new proposals could "be a regressive step". They acknowledged that harm can be caused to victims of child-perpetrated intimate image abuse, but suggested a restorative approach[53] is preferable to a criminal justice response:

> The possibility of restorative processes rather than prosecution where both parties to "sexting" are children were canvassed back in 2016 when the issue of proportionality was considered to be a key factor. The Overarching Principles – Sentencing Children and Young People subsequently confirmed that 'Restorative justice disposals may be of particular value for children and young people as they can encourage them to take responsibility for their actions and understand the impact their offence may have had on others'.

We note this is limited to sexting between two children.

14.54 The Howard League for Penal Reform argued that:

> As research on contextual safeguarding has shown, the social environments which children spend their time in normalise victim-blaming, sexual exploitation, and peer abuse. Education should be the focus of attention rather than criminalising individual young people.

In support of this, they cited research they published in 2016 exploring young people's understanding of the laws around sexting. The research found that "none of the children who participated in the study knew that forwarding an intimate image of a 17-year-old was a criminal offence".[54]

---

52 *Now I know it was wrong: Report of the parliamentary inquiry into support and sanctions for children who display harmful sexual behaviour*, 2016 (Chair: Nusrat Ghani MP; Supported by Barnardo's) https://www.basw.co.uk/system/files/resources/now_i_know_it_was_wrong_0.pdf.

53 Restorative justice is an umbrella term that refers to an approach to criminalisation where the victims, witnesses and perpetrators are facilitated to resolve issues arising from an offence collectively. See Crown Prosecution Service, *Restorative Justice*, (24 September 2019), https://www.cps.gov.uk/legal-guidance/restorative-justice.

54 M Bevan, *Investigating young people's awareness and understanding of the criminal justice system: An exploratory study*, 2016 (Howard League for Penal Reform) https://howardleague.org/wp-content/uploads/2016/06/Investigating-young-people%E2%80%99s-awareness-and-understanding-of-the-criminal-justice-system.pdf.

14.55 The Howard League commented that children do not always understand what is criminal or wrong, or the consequences of their actions. They also provided an example that illustrates the harm caused by relying on a justice criminal response rather than child-centred welfare response:

> If a young person is being prosecuted for their behaviour, they may be asked not to talk about any incidents of harmful sexual behaviour until after the criminal trial. This means that they may not be able to receive therapeutic treatment until after the trial has finished.

14.56 The Youth Practitioners Association also argued that children may be less able to determine what is "intimate" than adults. They submitted, for example, that:

> Relying on the definition that a reasonable person would consider the image to be sexual does not allow for the reasonable person to be a child imbued with that child's relevant characteristics.

They also argued that the specific intent elements would require children to behave, think and rationalise like adults which they do not.

14.57 The Youth Practitioners Association also suggested that including children in the offences raises a child protection issue as it necessitates someone explaining to a child who may have no prior concept, about sexual behaviour and sexual content. They argued that sex education should not happen in a criminal justice process as it risks traumatising them.

14.58 Some consultees considered whether children could be excluded only from the base offence. This is because the base offence is broader, and includes less culpable behaviour that children may be more likely to engage in, such as sharing for a joke. The Lucy Faithfull Foundation submitted that the base offence should not apply to children. They described how the adolescent years are crucial for sexual and relationship development, and how social media and phones are an important part of that now.[55] They noted from their work that children "engage in this behaviour impulsively, sometimes to 'fit in' or because they think it is funny". Corker Binning argued that the:

> Prevalence of social media applications… means that schoolchildren are encouraged to share pictures habitually. Thus, the likelihood that a youth will commit this offence, given the breadth of what is considered an intimate image is inevitable.

They give an example of a teenager who takes a photo of a friend whose trousers have fallen down, suggesting it is inappropriate to criminalise a child for that behaviour.

14.59 The NSPCC submitted that the base offence may result in unnecessary criminalisation and can add to the confusion of the current legal landscape and could undermine efforts to reduce disproportionate criminalisation under the IIOC regime.

---

[55] They also acknowledged that this can expose children to content they are not ready for and can lead to exploitative behaviours.

14.60 Lawyers from Kingsley Napley LLP noted that without a base offence, there would be a risk that children would instead be prosecuted for more serious offences. The Youth Practitioners Association also acknowledged this risk, which they argued justifies excluding children from all intimate image offences.

14.61 The Howard League also argued that the offences should apply differently to young people (aged under 25). In this regard they stated that "maturity of young adult perpetrators should be considered and factored into any criminal justice response".

Prosecution for sex offences

14.62 Some consultees were particularly concerned about the negative impact on children of being prosecuted for a sex offence. The Lucy Faithfull Foundation described the potential harm caused to children who are labelled as sex offenders (including the inappropriateness of SHPOs and notification requirements which were designed for adult offenders) and concluded that "timely, evidence-led and community-based services" are the best way to help children who commit sexual misconduct.

Analysis

14.63 We understand the concern that children should not be unduly criminalised for behaviour that they do not sufficiently understand. We also acknowledge that the impact of criminalisation on children can be severe and that, where appropriate, children should be diverted away from the criminal justice system. Social support and education are key elements of an effective response to children's harmful behaviour. However, we are not convinced that excluding children entirely from intimate image offences is an appropriate response to these concerns. The consultation process has shown that children are capable of harmful offending behaviour involving intimate images that should be met with a criminal justice response. Consider for example a 17 year old who shares an intimate image of their 18 year old partner on a revenge porn website, or a 15 year old who creates a deepfake pornography photo of their teacher and sends it round the school. This behaviour is sufficiently wrongful and harmful that it should be criminalised. It would not be within the scope of the IIOC regime. Some such behaviour can only be appropriately prosecuted under the base offence.

14.64 While we acknowledge there may be significant overlap, the IIOC regime is not always available, or appropriate to use, when both the perpetrator and the victim are children. The IIOC regime was not designed for intimate image abuse behaviour; the type of images and conduct covered differ. There may be cases, even where they do overlap, where it might be appropriate to keep child perpetrators out of the IIOC regime (which has different labelling and sentencing implications).

14.65 We note that many issues raised by consultees in respect of the risks are not exclusive to intimate image offences. For example, the risks of labelling and inappropriate criminal justice response to child sexual exploration all arise with the IIOC regime and contact sexual offences. This is not to diminish the concerns. We do not make our recommendation on the basis that such risks already exist therefore it is acceptable to replicate them. Instead, we note that the criminal justice system already has to manage these risks and has created ways of doing so. Some of these we set out in the introduction above, and we explore others below.

14.66 We accept that, for some children, understanding what is intimate can be challenging. We think that clear definitions, with an objective standard, will help. We repeat the calls for an effective education programme to work alongside implementation so that children can better understand the type of images that they should not take or share without consent. Examples in guidance and educational material can also assist. We think that many children will be able to understand what is meant by the terms sexual, nude, partially nude and toileting. We also note that understanding of what is sexual is not limited to intimate image offences but is a part of sexual offences such as sexual assault.[56]

14.67 The Youth Practitioners Association were concerned that the specific intent offences imply that children can act and think with the same intention as adults. We do not think this is necessarily true. A child may form the requisite intent for these offences; whether they have done would be a question of fact. The individual child's level of understanding, age and maturity would be relevant factors when deciding if there is evidence of a specific intent. It should be noted that, where there is sufficient evidence to bring a charge, prosecutors must also consider whether charging is in the public interest. This guards against inappropriate or disproportionate use of specific intent offences against children because, although more serious offences would usually require a charge, prosecutors must consider the age and maturity of the defendant. With regards to age and maturity, the Code for Crown Prosecutors states: "the criminal justice system treats children and young people differently from adults and significant weight must be attached to the age of the suspect if they are a child or young person under 18".[57] Among the factors to be taken into account:

> The best interests and welfare of the child or young person must be considered, including whether a prosecution is likely to have an adverse impact on their future prospects that is disproportionate to the seriousness of the offending.[58]

14.68 We are particularly concerned with any disproportionate impact on children being labelled as a sex offender where, for example, they have been prosecuted for a base offence where there was no sexual element to the offending. We have not made any recommendations as to whether these offences should be labelled as sex offences, although we note that the behaviour sits on a continuum of sexual offending. We have made recommendations for the availability of SHPOs and notification requirements only where there is sufficient sexual offending and is of a seriousness that warrants such imposition.

14.69 We do not think that exclusion from intimate image offences is a proportionate way to address the risks identified by consultees. We have also concluded that it would not be appropriate to exclude children from just the base offence. First, this will not protect children from a risk of criminalisation. We share the concerns that without a base offence, children who display harmful culpable conduct may be prosecuted for a more serious specific intent offence instead. Further, where both the victim and perpetrator

---

56 Sexual Offences Act 2003, s 3.

57 Crown Prosecution Service, *The Code for Crown Prosecutors* (26 October 2018), at para 4.14(d) https://www.cps.gov.uk/publication/code-crown-prosecutors.

58 Crown Prosecution Service, *The Code for Crown Prosecutors* (26 October 2018), at para 4.14(d) https://www.cps.gov.uk/publication/code-crown-prosecutors.

are children, it is likely that an IIOC offence could apply. In short, without a base offence there is a risk that children will either be prosecuted for a child sex offence or a more serious intimate image offence. This negates any benefit of excluding children from part of the intimate image regime. Secondly, there will be harmful and culpable conduct, such as the examples identified above at paragraph 14.63, that may not be able to be prosecuted as a specific intent offence. We recommend the base offence because it provides a suitable option for prosecution when conduct warrants criminalisation but a specific intent offence is inappropriate, not applicable, or cannot be proven. The rationale for including perpetrators of all ages extends to the base offence as it serves as a necessary prosecutorial option for criminally culpable behaviour. Thirdly, excluding children only from the base offence could send the damaging message that only the specific intent offences are really harmful or taken seriously, undermining any educational message and positive cultural change. We remain concerned about the risk of overcriminalisation of children, especially for less culpable conduct, but in consideration of the above we do not think it is proportionate to exclude children from the base offence to address this risk.

14.70 Ultimately we have concluded that there are sufficient instances of culpable behaviour from children to justify all of the offences applying to perpetrators of all ages, provided there is suitable mitigation to address the risk of overcriminalisation of children. We now consider responses that did not advocate exclusion but instead looked at ways of mitigating the risks and harms of inclusion.

Mitigation

Consultation responses

Legislative options

14.71 Professor Gillespie suggested that prosecutions of a child for intimate image offences could require the consent of the Director of Public Prosecutions (DPP). He suggested that "guidance can be issued by the DPP on when to give permission, potentially including whether it appears the accused understood the behaviour". DPP consent is required in a number of other offences, although not many sexual offences.[59] The Law Reform Commission for the Australian state of Victoria has recently recommended that the DPP should have to approve any prosecution for intimate image offences of perpetrators under the age of 16, to reduce the risk of overcriminalising children.[60]

14.72 Professor Gillespie alternatively suggested that the intimate image offences could be included in the offences listed in section 13 of the SOA 2003.[61] Section 13 provides a separate offence for certain child sexual offences when they are also committed by a child. Section 13 allows a lower sentence maximum to apply than in the "adult" offences. He argued that this:

> …would mean that a child accused of one of these offences would be charged with 'child sex offences committed by children or young persons'. That perhaps arguably

---

59 Offences under the Sexual Offences Act 1956, ss 10-12 and s 37 do require DPP consent.

60 Victorian Law Reform Commission, "Improving the Justice System Response to Sexual Offences" (September 2021), recommendation 54.

61 This was also supported by an attendee at one of the consultation events for defence practitioners.

better labels what has happened (assuming it is a sexual image and for sexualised purposes), but also limits the potential punishment and ancillary treatment.

14.73 Just for Kids Law considered the impact of prosecutions and ancillary orders on children. They suggested that some intimate image offences could be excluded from schedule 15 of the Criminal Justice Act 2003. Offences listed in schedule 15 are subject to the multi-agency public protection arrangements ("MAPPA") under section 325 of the Criminal Justice Act 2003. MAPPAs involve active management of offenders deemed to pose a risk to the public. They apply in more cases than notification requirements (which are limited to "exclusively sexual offences"[62] where a seriousness threshold is met). By excluding intimate image offences from schedule 15, fewer children would be subjected to MAPPAs. Currently only voyeurism is in schedule 15 (not upskirting or the disclosure offence).

14.74 Just for Kids Law also suggested that there could be "minor" versions of the offences which would not be disclosable, but SHPOs could still apply where relevant. Schedule 34A of the Criminal Justice Act 2003 provides a list of sexual offences where there is a child victim. The effect of schedule 34A is that any prosecution for one of the listed offences can be disclosed to the public.[63] Currently the voyeurism and upskirting offences are listed in this schedule. Their proposal could mean that cases of intimate image abuse where a child offends against another child could be excluded from the public disclosure provisions.

14.75 Some consultees raised concerns with the application of ancillary orders to children such as SHPOs and notification requirements. The Law Society submitted "young defendants should not face disproportionate restrictions which are likely to have a considerable impact on their future lives". The Lucy Faithfull Foundation argued that such restrictions "could act as an obstacle to young people engaging with normal activities, preventing them from living a positive, good life" and may "have a long-term impact… which may not be proportionate" on their lives. The Youth Practitioners Association highlighted the significant impact that SHPOs can have on children and young people. They noted that child defendants must be treated differently to adults as SHPOs are "too onerous for children to manage" and may prevent rehabilitation. Corker Binning similarly expressed concerns "about over criminalisation and the disproportionate impact of these proposals on young people" and suggested that SHPOs should be limited to the sexual gratification offence.

Prosecutorial discretion

14.76 In the consultation paper we suggested that prosecutorial discretion was an effective tool to help minimise disproportionate or unnecessary prosecutions of children for intimate image offences. Many consultees submitted that this was not satisfactory.[64] Consultees noted that by the time prosecutorial discretion applies, the child is already involved with the justice system.

---

62 HHJ Rook and P Ward, *Rook and Ward on Sexual Offences* (5th ed. 2019) p 1858.

63 Under Criminal Justice Act 2003, s 327A.

64 Including attendees of the children and young person consultation offence such as District Judge Redhouse, District Judge Hammond; Frances Ridout; Garden Court Chambers; Professor Andy Phippen.

14.77 The Youth Practitioners Association suggested that the CPS guidance that "suggests sexual imagery produced by children should not be routinely prosecuted is often not adhered to". They also argued that prosecutorial discretion as to charging is not an appropriate replacement for "correctly worded legislation".

14.78 Garden Court Chambers Criminal Law Team, stated:

> The law should not simply pass all the responsibility for policing the boundaries of acceptable behaviour to individual prosecutors. Too wide a discretion gives rise to the risk of arbitrary decision making and discrimination.

14.79 They also suggested that relying on prosecutorial discretion has a disproportionate impact on marginalised groups as they are less likely to be able to afford representation or be able to advocate for better treatment within the youth justice system.

14.80 Dr Holly Powell-Jones in a consultation meeting suggested that the public interest threshold for prosecution is a sufficient safeguard.

The current approach

14.81 Some consultees noted the way child perpetrators are dealt with under the IIOC regime. The NSPCC referred to Outcome 21 as one of the ways in which children who may have committed a low level offence (usually involving peer to peer sexting) can be dealt with more appropriately. They suggested we consider how our proposals may impact on the way Outcome 21 is applied.

14.82 Outcome 21 is a category of crime outcome recording introduced by the Home Office in January 2016. It is largely used and understood to be for the purpose of better addressing youth produced sexual imagery offences (so called "sexting"), although it is not limited to use in such offences. The outcome reads:

> Not in the public interest – suspect identified. Further investigation, resulting from the crime report, which could provide evidence sufficient to support formal action being taken against the suspect is not in the public interest – police decision.

14.83 Police advice suggests that Outcome 21 means a crime has occurred but it is not in the public interest to pursue a criminal justice response. In their guidance on sexting, Avon and Somerset Police state "this outcome code allows us to record a crime as having happened but for no formal criminal justice action to be taken".[65]

14.84 Guidance indicates it should only be used where the "sexting" was non-abusive and there was no evidence of "exploitation, grooming, profit motive, malicious intent eg extensive or inappropriate sharing (eg uploading onto a pornographic website) or it being persistent behaviour".[66] This guidance document advises that where there is a single incident, and Outcome 21 is used, it should not appear on any Disclosure and

---

65 Avon and Somerset Police, "Sexting", https://www.avonandsomerset.police.uk/crime-prevention-advice/sexting/.

66 See Government Guidance for Disclosure Units https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578979/GD8_-_Sexting_Guidance.pdf

Barring Service (DBS) checks. There is still room for discretion; attendees at the children and young people consultation event advised that they do still appear on DBS checks. The impact of such disclosures can be significant and long lasting for children. A criminal record can prevent them from working in certain professions, from travelling, and can affect housing and immigration status.[67]

14.85 Professor Phippen summarised some of the concerns regarding Outcome 21:

> The introduction of police guidance in applying 'outcome 21' recording … has, as the research has shown, muddied the waters further, with some forces applying this recording a great deal, and some hardly at all. And while some viewed outcome 21 recording as "the solution" to the problems of the criminalisation of minors thrown up by the application of the legislation to scenarios for which it was never envisioned, it further compounds the impact on the victim in that an outcome 21 'may' be retrieved in a DBS check.

14.86 The NSPCC cited Professor Phippen's research with the University of Suffolk and Marie Collins Foundation, which found the application of Outcome 21 was inconsistent and disproportionate throughout the UK.[68]

14.87 Responses from both the Howard League and the Youth Practitioners Association suggested that the current safeguards in place for mitigating the potential overcriminalisation of children under the IIOC are, to some extent, working. The Youth Practitioners Association submitted that "the new [intimate image] offences should not jeopardise the pragmatic and effective response to children who share intimate images which is currently being taken by police". They suggested that a "pragmatic" approach to "sexting and intimate image sharing" has been taken. We understand this includes professionals not reporting incidents to the police if they do not need a criminal justice response.

14.88 Professor Phippen explained that the IIOC regime, and education provided on it, has meant children are taught to fear being prosecuted if they participate in any intimate image taking or sharing. He concluded that this message is so pervasive that, while IIOC is the regime under which indecent images of children are primarily prosecuted, any mitigation taken against overcriminalising children under the intimate image regime will be futile.

14.89 Police discretion as to whether a caution is appropriate for children who commit intimate image offences has been identified as a potential means of reducing the risk of overcriminalistion. The Victorian Law Reform Commission has recommended that the police should "use its discretion to issue formal cautions for image-based sexual

---

67 For further information on the negative impact of criminal records disclosure on children and young people, and recommendations for a wider review into the criminal records disclosure regime, see Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371.

68 Bond, E and Pippen, A (2019), *Police response to youth offending around the generation and distribution of indecent images of children and its implication,* University of Suffolk and Marie Collins Foundation.

abuse offences, without the requirement for 'exceptional circumstances'"[69] in order to reduce this risk of overcriminalisation of children and young people.

Clear framework of offences

14.90 A number of consultees submitted that a clear, well-defined framework of offences would address some concerns regarding children and young people. Garden Court Chambers Criminal Law Team submitted that "clearly defined law" is required to minimise negative impacts. The Youth Justice Board suggested that "a clear framework would help children's understanding of the law and appropriate behaviour and better protect victims of offending, either the victims of child offending or children as victims".

14.91 The NSPCC suggested that the tiered structure of intimate image offences could assist with determining which offences perpetrated by children warrant a criminal justice response. This indicates that lower level behaviour (that might fall under the base offence) could be appropriate for options available in youth proceedings for diversion out of the formal criminal process. Conversely, they also suggested that it could add to an already complex legal framework involving intimate images of children. They concluded by asking us to be "mindful" of the existing complex legal landscape and that we consider how best not to add to this. District Judge Redhouse suggested that the tiered approach can mitigate some of the negative impact on children as it means not all prosecutions will trigger notification requirements.

Education

14.92 Most consultees who responded on this issue advocated education on intimate image abuse for children and those who work with them or care for them. For example, the Law Society argued that it is "very important" to have a public education campaign, especially in schools and universities, if the recommendations are implemented so that children and young people can understand what behaviour is criminal. The Centre for Expertise on Child Sexual Abuse (the CSA Centre) told us that professionals working with children also need to be trained, and that education cannot be limited only to children.

14.93 The Howard League for Penal Reform (who advocated children's exclusion from intimate image offences) also noted the importance of education:

> The harmful norms which enable intimate image abuse must be challenged to create safe environments for children who are at risk of victimisation. This will require a combination of education and culture change, which must address the culture of silence about sexualised pressure among young people and promote healthy expectations about sex and consent. The inclusion of healthy intimate relationships and sexual pressure in the new Relationships and Sex Education curriculum[70] is a welcome step in this direction.

---

69 Victorian Law Reform Commission, "Improving the Justice System Response to Sexual Offences" (September 2021), Recommendation 54.

70 Department for Education, 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908013/Relationships_Education__Relationships_and_Sex_Education__RSE__and_Health_Education.pdf

14.94 Reminding us of the importance of education, Professor Phippen explained that the focus on criminalisation, of even self-generated images, in the educational messaging about the IIOC regime, impacts adult victims of intimate image abuse. He stated that "the educational messages have impact and last".

Analysis

14.95 The above discussion demonstrates how varied the responses were. One of the consistent messages, however, was the importance of education. The views of many who work with children can be summarised by the Youth Practitioners Association's submission: "their education is more important that their prosecution". It is clear that effective, well-resourced education on intimate image abuse and any new offences is required for children, young people, and those who work with and support them. There are clear calls for better education on these topics from those working in schools. Ofsted conducted a review of sexual abuse in schools and colleges following the reporting of abuse on Everyone's Invited.[71] This report found that "sexual harassment and online sexual abuse" (including some intimate image abuse) are "prevalent". They also recommended that schools and colleges implement "carefully sequenced" relationships, sex and health education that specifically includes online sexual harassment and provides space for children to talk about "nudes" as that is an area children found difficult to discuss. They also recommended training for those working with children in schools on the topic. PSHE Association, the national body for personal, social and health education, have recently published lesson plans for children at key stage 3 (11 to 14 year olds) and 4 (15 to 16 year olds) to explore the issues associated with sharing nude images.[72]

14.96 We will now consider the options proposed by consultees for mitigating any negative impact of intimate image offences on children.

(1) DPP consent. Requiring the consent of the DPP does not make a significant practical difference to the operation of an offence. Requiring the personal consent of the DPP (which means no crown prosecutor can consent on their behalf) has more of an impact but is very resource intensive. A similar effect can be achieved by bespoke CPS guidance. This helps ensure that prosecutions are only brought where it is appropriate, and in the public interest, to do so.

(2) The section 13 approach. We have considered whether intimate images could be included in the offences listed at section 13 of the SOA 2003. As explained at paragraph 14.72 above, a section 13 offence is a specific offence that should be charged where the perpetrator is also a child, when conduct would otherwise fall under "child sex offences" if the perpetrator were an adult.[73] We do not think section 13 would be appropriate to address the concerns raised as it is designed as an alternative offence to child sexual offences committed by adults;

---

71 "Review of sexual abuse in schools and colleges" (10 June 2021) *Ofsted.*

72 See https://pshe-association.org.uk/imagesharing. These lesson plans build on research that PSHE conducted in partnership with Revealing Realities looking at nude image sharing amongst children and young people: Revealing Reality, *Not Just Flirting*, (June 2022).

73 Sexual Offences Act 2003, ss 9 to 12.

if it were used for intimate image offences, those committed by children against adults would effectively be decriminalised.[74] However, we considered whether the same principle could be applied by creating bespoke offences where an intimate image offence is perpetrated by a child against a victim of any age. The benefits of this approach would be that for child perpetrators we could apply a lower sentence range, bespoke threshold to trigger notification requirements, and the offence could be given a different label to address concerns of the negative impact of labelling. A bespoke offence could make it clear (on any subsequent disclosure) that the offence was committed when the person was a child. It could also have a different name to reflect the fact it is considered a different type of conduct because of the age of the defendant. We see the attraction of such an approach. However, an offence that applies to perpetrators of all ages can equally provide for different sentence maximums and notification triggers for children. Therefore, the main benefit of a bespoke offence would be fairer, or more accurate, labelling. This would meet some consultees' concerns about labelling, but not those who were concerned about children being labelled as sex offenders (if both offences were to be found in the SOA 2003). We are not convinced that the added complexity this would bring is outweighed by this quite limited benefit.

(3) Different approach to notification requirements and SHPOs. The current law already allows children to be subject to notification requirements where they commit an offence listed under schedule 3 of the SOA 2003 that does not impose an age restriction, and to SHPOs. It is not inconsistent to have them available for intimate image offences. We have explored in Chapter 13 the need for a high threshold for notification requirements. It will be a small proportion of offenders, of any age, who would meet any threshold for notification. We do not think it is proportionate to exclude the possibility of applying such orders to any cases involving children. There may be rare cases when it is necessary for public safety to be able to do so. Within one offence, there can be separate thresholds for notification requirements dependent on the age of the perpetrator. We have recommended a similar approach for intimate image offences; notification requirements would apply to an offender under the age of 18 only if they are sentenced to a term of imprisonment of at least 12 months. For an adult offender, the threshold would be lower; notification requirements would apply if they are sentenced to any length of imprisonment. This reflects the different thresholds for the existing intimate image offences in the Sexual Offences Act 2003. [75]

(4) Schedule 15 and schedule 34A of the Criminal Justice Act 2003. Schedule 15 lists offences where active management of an offender under a MAPPA can be implemented. Schedule 34A lists offences that can be disclosed to the public if

---

[74] Section 13 would carve out child perpetrators from the intimate image offences, however the section 13 offence only applies to child sexual offences therefore there would be no offence that applies to child perpetrators where the victim was an adult.

[75] For example, in the voyeurism offence and upskirting offences (where the intent was to obtain sexual gratification) notification requirements apply to adult defendants if either if the victim was under 18, or the defendant was sentenced to any term of imprisonment, was detained in hospital, or was given a community sentence of at least 12 months. For child defendants, notification requirements only apply if the defendant was sentenced to at least 12 months' imprisonment (Sexual Offences Act 2003, sch 3, paras 34 and 34A).

someone is convicted of a relevant offence perpetrated against a child. The current voyeurism offence is listed in both schedules. The upskirting offence is listed under schedule 34A. We note that these schedules apply to both adult and child perpetrators. The offences that we recommend would replace the current voyeurism and upskirting (and disclosure) offences. We have not consulted on this issue, which arose late in the consultation process, and we do not make a recommendation. We invite the Government to consider whether any new intimate image offences should be included in either schedule 15 or schedule 34A.

14.97 We conclude from the above that bespoke legislative options are neither necessary nor proportionate responses to the concerns relating to children committing intimate image offences. We proposed in the consultation paper that prosecutorial discretion, with bespoke prosecutorial guidance relating to children and young people, would address the concerns explored in this chapter. Some consultees' responses suggested that prosecutorial discretion may not be sufficient. We understand the concerns about relying on prosecutorial discretion, but still consider it has an important role. We recommend offences with clear scope and definitions; prosecutorial discretion will determine when prosecution is in the public interest, taking account of the age and maturity of the suspect. This is the appropriate role of prosecutorial discretion. Bespoke guidance that addresses the range of issues relevant to child perpetrators, and options for mitigation, will assist in safeguarding against disproportionate or inappropriate charging.

14.98 The NSPCC argued that the public interest test should be applied when considering prosecutions for child perpetrators; they also encouraged active engagement with all current provisions for the avoidance of overcriminalisation of children, in particular Outcome 21. Dr Holly Powell-Jones shared concerns about the risks to children as both victims and perpetrators of intimate image abuse. However, she noted that the public interest threshold acts as a safeguard and that clear messaging about what is criminal is helpful and educational. We agree that this combination of clear offences, education, application of the public interest test, and engagement with current provisions to mitigate harm from involvement with the criminal justice system, is the right approach.

14.99 We consider briefly now the operation of current provisions in the IIOC regime to mitigate harm from involvement with the criminal justice system. There is no real consensus amongst consultees about how well the current approach to the IIOC regime is working. The "current approach" appears to be a mixture of prosecutorial discretion, Outcome 21, diversion, and discretion in reporting cases to police. Some consultees thought the current approach was pragmatic and helpful. Others thought the operation of the IIOC regime inappropriately criminalises children. We make no judgement on how well the IIOC regime is operating as it is outside our Terms of Reference and we have not, therefore, consulted directly on it. The intimate image offences cannot operate to fix any flaws that may exist in the IIOC regime. We note the submissions that intimate image offences should not undermine progress made under the IIOC regime. It is not clear how a separate intimate image regime would undermine positive developments in the way the IIOC regime operates, particularly given that such a separate intimate image regime already exists and applies to both child perpetrators and child victims. In fact, if there are positive lessons to be learnt

from the way police and prosecutors apply the IIOC guidance, train professionals, and educate children, the intimate image regime could benefit from that.

14.100 It is not clear how or if specific provisions, such as Outcome 21, could apply to intimate image offences. Currently they operate to distinguish less culpable behaviour within the IIOC regime, most commonly consensual sexting and self-generated indecent images. Consensual behaviour would not be captured by intimate image offences therefore it may not be necessary for Outcome 21 to operate in the same way. If there is scope for applying similar provisions to provide alternative routes for children who commit lower level intimate image offending, we would welcome this. For example, guidance on the use of Outcome 21 could be updated to reflect the intimate image offences. The response from the NSPCC suggested that the tiered structure could help distinguish cases which are appropriate for such alternative outcomes.

14.101 Prosecutorial discretion remains a valuable tool to mitigate the risk of overcriminalisation. It helps ensure charges are only brought in cases where it is in the public interest. The CPS produce guidance that is specific to charging and case decisions, including applying the public interest test in the context of children and young people for a range of offences, including the upskirting offence.[76] Similar, robust, guidance on what factors specific to children (with regard to their age and understanding) should be considered when deciding whether to prosecute intimate image offences would help mitigate the risks and harms of overcriminalisation of children for intimate image offences. We recommend that the CPS consider producing prosecutorial guidance specific to children and young people for our intimate image offences, if implemented. We have spoken to the CPS regarding this, and they expect that if any new intimate image offences were introduced, they would provide prosecutorial guidance, which may include guidance specific to children and young people, in addition to their policy on youth offenders and the guidance on prosecuting children and young persons in The Code for Crown Prosecutors.[77]

Recommendation 53.

14.102 We recommend that the Crown Prosecution Service consider producing prosecutorial guidance specific to children and young people for new intimate image offences.

CONCLUSION

14.103 Consultation responses explain and describe the complex issues that children and young people face in respect of intimate image abuse. Relevant issues involve sexual development, emotional and cognitive development, sexting, the use of smartphones, the impact of the criminal justice system, and the need for better education and social welfare responses. There is a divergence of views on impact, harm, prevalence,

---

76 Crown Prosecution Service, *Youth Offenders Legal Guidance* (28 April 2020) https://www.cps.gov.uk/legal-guidance/youth-offenders.

77 Crown Prosecution Service, *Code for Crown Prosecutors* (26 October 2018) https://www.cps.gov.uk/publication/code-crown-prosecutors.

appropriateness of the current criminal justice response, and how the intimate image offences should apply to children. Most consultees, however, agreed that the intimate image offences as proposed risked overcriminalising children and young people. Consultees suggested that some of what might be deemed intimate image abuse is how children explore their sexuality and socialisation. Some children may be too young to understand the behaviour is in any way inappropriate or has sexual connotations. There was also support for keeping children out of the criminal justice system where possible because of the long term and disproportionate impact it has on them. Concerns about overcriminalisation were considered acute in the context of sexual offending. The stigma, social isolation, impact on schooling and future careers is significant for children convicted of sex offences. Many of these issues go beyond the intimate image offences and apply to other, if not all, criminal offences that children could perpetrate. They also apply to the existing intimate image offences. We acknowledge that the recommended base offence expands the scope of the criminal law in relation to intimate images. This expansion is necessary and justified as this report sets out.

14.104 We explained in the consultation paper that our proposal was informed by Parliament's decisions not to exclude children from the current intimate image offences. We do not consider ourselves bound by those decisions. We have considered a range of options and views on the issues before reaching this final recommendation.

14.105 The data from and analysis of the operation of the IIOC regime is helpful but not determinative. Generally we have heard how it applies in cases of consensual sexting. For example, the Youth Practitioners Association submitted "there has been a number of reports published in the past 5 years that recommend moving away from prosecuting children for producing sexual imagery". This suggests the evidence base is often limited to one particular type of intimate image abuse, sharing (mainly) self-produced images. Taking self-produced images, and consensual sharing would be excluded from intimate image offences. Therefore, the same considerations will not always apply. We know that intimate image abuse behaviours are much wider than "sexting". We also noted that a significant amount of the research cited by consultees is from 2016 (when Outcome 21 was introduced). In terms of technology, child development and the prevalence of smart phones and social media, 2016 was a long time ago. We have also been advised that research involving children and intimate images is limited by ethical concerns. We note at paragraph 14.22 above some of the limitations with the available research and data as applicable to the behaviour that is within the remit of this project.

14.106 We also considered the extent to which it is possible to engage with children within this project. Similar ethical and safeguarding issues arise. We have engaged with organisations and professionals that work with children. This will not always be fully representative of all children impacted by our recommendations. We acknowledge that this limits our knowledge and evidence base of intimate image abuse involving children.

14.107 Despite this, we have sufficient evidence to recommend that children and young people should not be excluded from the intimate image offences. The criminal justice system, in particular the youth justice system, is designed to respond to the risks

associated with children being criminalised. Where these are not working well or proportionately, it is not appropriate to try and fix the system using the underlying offences. This is too blunt a tool. The most effective way of addressing the risks associated with criminalising children for intimate image abuse is to ensure that:

(1) The offences are clear and well-defined.

(2) Prosecutorial discretion operates effectively to prosecute cases only where there is a public interest in doing so (guidance specific to the intimate image offences can assist with this).

(3) Provisions designed to support child perpetrators and victims, and offer alternatives to a formal criminal justice response, operate effectively.

(4) Children, young people and adults are trained and educated to enable good understanding of intimate image abuse, and intimate image offences.

14.108 We do not recommend that children or young people should be excluded from the intimate image offences as either victims or perpetrators.

Chapter 15: Jurisdiction

INTRODUCTION

15.1 In this short chapter we consider the issue of jurisdiction. We set out the challenges raised by offences that can be committed across multiple jurisdictions, such as sharing an intimate image without consent. We invite the Government to consider whether the approach to jurisdiction in current, similar, offences, would be appropriate for intimate image offences.

THE JURISDICTIONAL CHALLENGE

15.2 Intimate image abuse, like an increasing amount of criminal conduct, can be perpetrated from and across a number of jurisdictions. This is particularly true of crimes that are committed on, or enabled by, the internet. The sharing of intimate images without consent commonly occurs online. An image can be taken, sent, transmitted, stored, and received in a number of different jurisdictions almost instantaneously. The individuals and technology involved can all be located in different countries. This project addresses the criminal law of the jurisdiction of England and Wales; in this section we briefly consider the problems presented by the cross-jurisdictional nature of some offending.

15.3 There are two themes that arise when criminal conduct occurs across multiple jurisdictions:

(1) How to determine whether specific criminal conduct can be prosecuted in the jurisdiction of England and Wales.

(2) The wider challenges presented by international law.

15.4 In this section we will address the first theme as it relates to intimate image offences. First, we examine the common law position as it applies to the current disclosure offence and would apply to our recommended offences. Second, we consider the possibility of an explicit extension of jurisdiction, canvassing some relevant examples. We discuss a consultation response that argued for wider jurisdictional application of the intimate image offences and consider whether this is desirable. We conclude that it may be appropriate to enable some intimate image abuse that is committed outside of England and Wales to be prosecuted here. We do not make a recommendation on this issue; instead, we invite the Government to consider the options for including extra-territorial provision in the intimate image offences.

15.5 This discussion is best placed within the context of the second theme. In the consultation paper we explained the more general challenges where criminal conduct is cross-jurisdictional:

> Such challenges go beyond the wording of individual offences and will be affected by international law and developing practice in the wider criminal law. In our Scoping Report, we concluded that even where domestic law is able to address cross-

jurisdictional issues in the immediate offence, there will always be difficult questions where more than one jurisdiction is involved. For example, a defendant may face criminal charges in more than one country for the same act or there may be differences in the legality of certain acts or elements in the different countries that have a jurisdictional claim.[1]

15.6 These concerns are not unique to intimate image offences, nor indeed any type of offence. Specific provisions for determining jurisdiction in individual offences cannot satisfactorily address all the issues. Any discussion of jurisdiction relating to individual offences therefore needs to be situated within this wider context of cross-jurisdictional criminal law.

DETERMINING WHEN CRIMINAL CONDUCT CAN BE PROSECUTED IN ENGLAND AND WALES

15.7 The starting principle in this jurisdiction is that the criminal law of England and Wales applies only to acts committed in England and Wales. A specific statutory provision would be required for any acts committed outside the jurisdiction to be able to be prosecuted here.[2] In the absence of statutory provision, the case of *R v Smith (Wallace Duncan) (No 4)*[3] sets out the principles for establishing which acts can be prosecuted in this jurisdiction. In that case, the Court of Appeal held that where "substantial activities constituting the crime take place in England" or "a substantial part of the crime was committed here", the courts of England and Wales have jurisdiction to try the case. There must be a "substantial connection" with England and Wales. This case established an "inclusive" approach to determining jurisdiction,[4] and has been endorsed by Court of Appeal decisions since.[5]

15.8 The conduct criminalised by the current disclosure offence can be committed across multiple jurisdictions. The Crown Prosecution Service ("CPS") guidelines for the disclosure offence acknowledge this and advise that the principles of *R v Smith* apply, such that the disclosure offence will have been committed in this jurisdiction if the substance of the offence occurred here.[6] What counts as the "substance" of this offence is not defined, but the guidelines state that if the perpetrator is located in England and Wales this would be sufficient. The guidelines do not advise what will count as "substantial" if the defendant is not located in the jurisdiction.

---

1 See Abusive and Offensive Online Communications: A Scoping Report (2018) Law Com No 381 p 27 to 32; Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 3.70.

2 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), para A8.2.

3 [2004] EWCA Crim 631, [2004] QB 1418.

4 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2022), para A8.5.

5 Including *R v Burns* [2017] EWCA Crim 1466.

6 See Crown Prosecution Service, *Revenge Pornography - Guidelines on prosecuting the offence of disclosing private sexual photographs and films*, (24 January 2017) https://www.cps.gov.uk/legal-guidance/revenge-pornography-guidelines-prosecuting-offence-disclosing-private-sexual.

Consultation

15.9 In the consultation paper we noted that the challenges presented by this approach to jurisdiction are not unique to intimate images, do not arise from the substance of the offence itself, and cannot be fully addressed by reform of individual offences.[7]

15.10 We did not ask consultees any specific questions about jurisdiction. The issue did, however, arise in consultation. When considering what forms of sharing should be included in intimate image offences, lawyer Honza Cervenka argued that sharing should include "causing to receive". The intended consequence of this was to enable the sharing offence to apply to images sent from outside the jurisdiction, if the recipient was in England and Wales. The effect of expanding the definition of sharing in this way would be that where an image was received in England and Wales, it will have been "shared" here, regardless of the location of the person who sent it. This is a very broad definition of sharing. The sharing offence recommended in this report is complete at the point an image is sent. It is the conduct of sharing, and not the result, that warrants criminalisation. This means, for example, that someone in England who uses their phone to upload an intimate image to a website hosted in the US would have committed the sharing offence in this jurisdiction.

15.11 Including "causing to receive" as a form of sharing would significantly widen the scope of the offence. We have only heard one benefit of including it; to extend the jurisdictional reach of the offence. We do not think that the definition of sharing is the best place to address concerns about jurisdiction. Jurisdiction is better considered as an issue separate from the elements of the offence.

Approach to jurisdiction in other offences

15.12 The current intimate image offences do not have any application beyond England and Wales. Generally, it is most appropriate for criminal conduct to be prosecuted in the jurisdiction in which the relevant act occurred. However, there are some offences that have specific provisions to enable criminal conduct committed outside of the jurisdiction to be prosecuted here.

15.13 There are a number of serious offences that can be prosecuted in England and Wales where the criminal act took place abroad, if the perpetrator is a UK national or habitually resident in the UK. Examples include offences relating to terrorism under the Terrorism Act 2000 and Terrorism Act 2006, and offences under the Female Genital Mutilation Act 2003.[8]

15.14 Other serious offences provide for prosecution in England and Wales of acts committed abroad where the perpetrator is a UK national or habitually resident in the UK *and* the act committed was also an offence in the country in which it occurred. Examples of these offences that require a "local law" equivalent include murder, manslaughter, and offences of assault under sections 18 and 20 of the Offences Against the Person Act 1861.[9]

---

7 Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 3.69.

8 Female Genital Mutilation Act 2003, ss 1 to 3A.

9 Pursuant to the Domestic Abuse Act 2021, s 72.

15.15 Section 72 of the Sexual Offences Act ("SOA") 2003 provides for a range of sexual offences committed outside this jurisdiction by a UK national to be prosecuted here. Schedule 2 to the SOA 2003 lists the offences to which section 72 applies, and includes most of the sexual offences that apply to child victims (including indecent images of children offences).[10] Recently, the Domestic Abuse Act 2021 extended section 72 of the SOA 2003[11] so it now applies to offences of rape, sexual assault, and causing a person to engage in sexual activity without consent, where the victim is over 18.

15.16 The Domestic Abuse Act 2021 also extended the extra-territorial application of harassment offences (under sections 4 and 4A of the Protection from Harassment Act 1997) and the offence of controlling or coercive behaviour (under section 76 of the Serious Crime Act 2015). The Government extended extra-territorial jurisdiction to such offences in the Domestic Abuse Act 2021 to meet the requirements of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention").[12] Under the provisions of the Istanbul Convention, the UK must make provisions to be able to prosecute certain offences when committed outside this jurisdiction by a UK national, or someone who is habitually resident in the UK.[13] The offences specified in the Convention that require such extra-territorial provision are offences of violence against women and girls, and domestic abuse.

15.17 The harassment and controlling or coercive behaviour offences require a course of conduct. Where a perpetrator is a UK national, or habitually resident in England and Wales, and commits relevant criminal conduct that consists of, or includes, behaviour outside this jurisdiction, they can be prosecuted for the relevant offence in England and Wales.[14]

15.18 Finally, clause 155 of the Online Safety Bill provides for the harmful, false, and threatening communications offences (in clauses 151 to 153) to be prosecuted in England and Wales where the relevant act was committed outside this jurisdiction by someone who is habitually resident in England and Wales. Clause 155 would give effect to the following recommendation in the Law Commission report on Modernising Communications Offences:

> We recommend that the harm-based communications offence applies to communications that are sent or posted in England and Wales, or that are sent or posted by a person habitually resident in England and Wales.[15]

---

10 Protection of Children Act 1978, s 1; Criminal Justice Act 1988, s 160.

11 Domestic Abuse Act 2021, sch 3, part 1.

12 Home Office, "Extraterritorial jurisdiction factsheet" (31 January 2022) https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/extraterritorial-jurisdiction-factsheet#what-behaviour-does-the-istanbul-convention-require-the-uk-to-criminalise.

13 Article 44, Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS 210.

14 Protection from Harassment Act 1997, s 4B and Serious Crime Act 2015, s 76A.

15 Modernising Communications Offences: A final report (2021) Law Com No 399, para 2.274.

15.19 This recommendation sought to extend the jurisdiction of the harmful communications offence in a limited way. In the Modernising Communications Offences report we considered examples where a person habitually resident in England and Wales sent a harmful communication while on holiday temporarily outside of the jurisdiction and could not be prosecuted. We concluded it would be unsatisfactory for someone normally subject to the criminal laws of this jurisdiction to be able to evade them by being temporarily outside the jurisdiction while committing the same culpable conduct. We also acknowledged that extraterritorial provisions require significant resources from other jurisdictions, including extradition proceedings. The modest recommendation made sought to balance this concern with the need to close the identified narrow gap in liability of those habitually resident in England and Wales. This balance ensures that the relevant offence still applies only to those who would usually be subject to it.

Analysis

15.20 In this report we have considered the crossover between intimate image offences and sexual offences, harassment offences, and communications offences. It is therefore worth considering whether, like those other offences, intimate image offences should provide for prosecution in England and Wales for any conduct committed outside the jurisdiction.

15.21 Intimate image offences do not require a course of conduct like the harassment and controlling or coercive behaviour offences. They do not include physical acts of serious violence as many of the terrorism, assault and female genital mutilation offences do. Intimate image offences are perhaps most conceptually similar to the sexual offences and communications offences. Conduct similar to intimate image abuse within these offences has been considered appropriate for extraterritorial jurisdiction. It may therefore be appropriate for intimate image offences to have extraterritorial application. We note the analysis in the Modernising Communications Offences report exploring how gaps in liability can arise with a communications offence involving sending, and the recommended proportionate extension to the jurisdiction of the new communications offences. There is a clear analogy to be drawn with the recommended intimate image offences.

15.22 Without specific statutory extra-territorial provision, the approach to jurisdiction set out in *R v Smith (Wallace Duncan) (No 4)*[16] will apply, as it does with the current disclosure offence. We have not sought views or evidence on how well this operates in the context of sharing intimate images without consent.

15.23 We did not consult on this issue. However, in light of the discussion above, we invite the Government to consider whether intimate image offences would benefit from specific extra-territorial statutory provision, such as the approach in either the sexual offences, or the recommendation in our Modernising Communications Offences report currently being implemented in the Online Safety Bill.

---

16 [2004] EWCA Crim 631, [2004] QB 1418.

Recommendation 54.

15.24 We recommend that the Government consider whether intimate image offences would benefit from specific extra-territorial statutory provision.

Chapter 16: Conclusion

INTRODUCTION

16.1 In this chapter we set out our recommended new framework of offences that cover taking and sharing intimate images without consent, and threats to share such images.

THE OFFENCES

16.2 In the consultation paper we explained the need for a new framework of offences to better address the full range of intimate image abuse, and to provide better protection for victims and clarity in the law. In this report we make final recommendations for a new framework of offences, having considered the consultation responses received. We recommend that the current intimate image offences – disclosure and threatening to disclose,[1] voyeurism,[2] and upskirting[3] – are repealed and replaced by our recommended framework of offences which uses one consistent definition of an intimate image, covers the full range of perpetrator motivations, and applies protective measures for victims consistently.[4]

16.3 We recommend five offences that sit across two tiers:

(1) A base offence of taking or sharing an intimate image without consent.

(2) More serious offences:

(a) An offence of taking or sharing an intimate image without consent with the intention of causing the victim humiliation, alarm or distress.

(b) An offence of taking or sharing an intimate image without consent with the intention that the image will be looked at for the purpose of obtaining sexual gratification.

(c) An offence of threatening to share an intimate image.

(3) An offence of installing equipment in order to commit a taking offence.

16.4 We now consider the detail of each offence.

---

1 Criminal Justice and Courts Act 2015, s 33.

2 Sexual Offences Act 2003, s 67(3).

3 Sexual Offences Act 2003, s 67A.

4 We are not recommending that the breastfeeding voyeurism offence be repealed; it covers a small range of images and conduct that Parliament has determined should be criminalised but are not within the scope of our recommended intimate image offences.

The base offence

16.5 Under the base offence it would be an offence for a person D intentionally to take or share an intimate image of V if —

(a) V does not consent to the taking or sharing; and

(b) D does not reasonably believe that V consents.

16.6 The base offence would be summary only with a maximum sentence of six months' imprisonment.

Public element tests

16.7 The base offence includes two additional elements which only apply when there is a public element to either the taking or sharing.

16.8 First, where a defendant is charged with taking or sharing an intimate image without consent, and:

(1) the intimate image was taken in a place to which members of the public had access (whether or not by payment of a fee); and

(2) the victim was, or the defendant reasonably believed the victim was, voluntarily engaging in a sexual act or toileting, or was voluntarily nude or partially nude,

the prosecution must prove that, in the circumstances as the defendant reasonably believed them to be, the victim had a reasonable expectation of privacy in relation to the taking of the image. The victim will have a reasonable expectation of privacy in relation to the taking of an intimate image when breastfeeding in public or when nude or partially nude in a public or semi-public changing room.

16.9 Secondly, it would 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, unless

(3) the person depicted subsequently withdrew their consent to the image being publicly available and the defendant knew that they had withdrawn that consent.

16.10 The legal burden of proof for this test is on the prosecution.

Reasonable excuse defence

16.11 A defendant should be not convicted of the base offence where there is a reasonable excuse for their conduct. The following is a (non-exhaustive) list of conduct that should

amount to a reasonable excuse for behaviour that would otherwise be criminal under the base offence:

(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 or regulatory proceedings;

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

(4) taking or sharing the defendant reasonably believed was necessary for a genuine medical, scientific or educational purpose; and

(5) taking or sharing that was in the public interest.

16.12 The defendant should bear the legal burden of proof to establish the defence on the balance of probabilities.

Exclusion for sharing family photos of young children

16.13 The following conduct should be excluded from the base offence. It should not be an offence:

(1) to share an intimate image of a young child if it is of a kind that is ordinarily shared by family and friends;

(2) for family and friends to take an intimate image of a young child if it is of a kind that is ordinarily taken by family and friends.

16.14 The burden should be on the prosecution to prove that this exclusion does not apply.

Exclusion for the taking or sharing of an intimate image of a child in connection with their medical care or treatment[5]

16.15 The following conduct should be excluded from the base offence. It should not be an offence for a person D to take or share an intimate image of a child under 16 (P) in connection with P's medical care or treatment where:

(1) when doing the act, D reasonably believes

(a) that P lacks capacity to consent to the taking or sharing;

(b) the taking or sharing will be in P's best interests; and

(2) if D does not have parental responsibility for P, someone with parental responsibility for P has given valid consent to the taking or sharing in connection with P's care or treatment.

---

5 In relation to those aged over 16 who lack capacity, section 5 of the Mental Capacity Act 2005 provides a similar exclusion. See paras 11.112 to 11.115 for full discussion.

16.16 The burden should be on the prosecution to prove that this exclusion does not apply.

The "humiliation, alarm, or distress" offence

16.17 Under this specific intent offence, it would be an offence for a person D intentionally to take or share an intimate image of V if —

(a) V does not consent; and

(b) D does so with the intention of causing V humiliation, alarm or distress or with the intention that D or another person will look at the image for the purpose of causing V humiliation, alarm or distress.

16.18 There is no requirement for the prosecution to prove that D does not reasonably believe that V consents. Such a belief would be inconsistent with the intention of causing V humiliation, alarm or distress.

16.19 The offence would also include the two "public" elements outlined at paragraphs 16.8 and 16.9 above.

16.20 The humiliation, alarm, or distress offence would be triable either way with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction.

The "sexual gratification" offence

16.21 Under this specific intent offence, it would be an offence for a person D intentionally to take or share an intimate 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.

16.22 The offence would also include the two "public" elements outlined at paragraphs 16.8 and 16.9 above.

16.23 The sexual gratification offence would be triable either way with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction.

The "threatening to share" offence

16.24 Under this offence, it would 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.

16.25 The threatening to share offence would include implicit and conditional threats. It would also include threatening to share an intimate image that does not exist and other circumstances where it is impossible for the defendant to carry out the threat.

16.26 The threatening to share offence would include threats made to the person depicted, or to a third party.

16.27 The threatening to share offence would also include the two "public" elements outlined at paragraphs 16.8 and 16.9 above. As these elements will apply when an image is shared (when either the image was taken in public or previously shared in public), they will apply in the same way when there is a threat to share.

16.28 The threatening to share offence would be triable either way with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction.

The "installing" offence

16.29 Under the installing offence, it would be an offence for a person D to install equipment with the intent of enabling D or another to commit the offence of taking an intimate image without consent.

16.30 The installing offence can apply to taking either under the base offence or under the two specific intent offences. Therefore, it should be summary only (with a maximum sentence of six months' imprisonment) when it applies to the base offence, and an either way offence (with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction) when it applies to the specific intent offences.

Definition of intimate image

16.31 The same definition of "intimate image" would apply to all offences in this framework.

16.32 For the purposes of these offences, "image" means a photograph or video.

16.33 For the purposes of these offences, "intimate image" means images that are sexual, nude, partially nude or of toileting where:

(1) "Sexual" shows something that a reasonable person would consider to be sexual because of its nature; or taken as a whole, is such that a reasonable person would consider it to be sexual. The definition of sexual should be applied only to the person depicted in the image itself, without considering external factors such as where or how the image was shared.

(2) "Nude or partially nude" means images of all or part of a person's genitals, buttocks or breasts, whether exposed, covered with underwear or anything being worn as underwear, or where the victim is similarly or more exposed than if they were wearing underwear. This includes images that have been altered to appear similarly or more exposed. For the purposes of these offences, "breasts" are female breasts and female breast tissue, which would include the chest area of: trans women (whether they have breast tissue or not, and regardless of whether any breast tissue is the result of hormonal or surgical treatment);

women who have undergone a mastectomy; girls who have started puberty and are developing breast tissue; non-binary people and trans men who have female breast tissue.

(3) "Toileting" means images of a person in the act of defecation or urination, and images of personal care associated with genital or anal discharge, defecation or urination.

16.34 Intimate images that only show something ordinarily seen on a public street would be excluded from intimate image offences, with the exception of intimate images of breastfeeding.

16.35 For the sharing and threatening to share offences, "intimate image" would also include images that are intimate as a result of altering, and that are created (whether by digital or non-digital means), if the altered or created image appears to be an intimate image of a person.

Taking and sharing

16.36 For the purposes of these offences, "taking" would be understood using the ordinary meaning of the term. It would include any means by which a relevant image is produced, including taking a photo or video with a camera whether digital or analogue and using a device to capture a photograph or video, whether using the camera or an app. "Taking" an intimate image which is instantaneously modified by software (such as through a filter) would also be included in a "taking" offence.

16.37 The definition of "taking" an image would only include such behaviour where, but for the acts or omissions of the defendant, the image would not otherwise exist.

16.38 For the purposes of these offences, "sharing" would include all behaviours that have directly made the intimate image available to another. This would include physical posting, showing, or displaying, sharing on social media, peer to peer messaging, or making the image available digitally through transferring a file, sending an encrypted file, saving the image at a specific location and enabling someone to access it, sending a link, or other instructions on how to access the file from a place where the sender has stored it.

16.39 The definition of sharing would not include "secondary sharing" in cases where a person D has informed a third person E where to find an image (for example, by sending a link to a website) that another person F has made available there, D has not shared the image itself or otherwise made the image available, and the image was already available to E.

16.40 "Sharing" would include sharing with the person depicted.

Ancillary orders and special measures

16.41 For all intimate image offences, the following special measures would apply:

(1) complainants of the new intimate image offences would have automatic lifetime anonymity.

(2) complainants of the new intimate image offences would automatically be eligible for special measures at trial.

(3) restrictions on the cross-examination of complainants of sexual offences would extend to complainants of the new intimate image offences.

16.42 Sexual Harm Prevention Orders would be available for all the intimate image offences. They would only be made in cases where the court considers such an order necessary to protect the public from sexual harm.

16.43 Notification requirements would be automatically applied for the offence of taking or sharing an intimate image without consent with the intent that the image will be looked at for the purpose of obtaining sexual gratification, when an appropriate seriousness threshold is met. That threshold would be met if either: (where the offender was under 18) the offender is sentenced to imprisonment for a term of at least 12 months; or (in any other case) the victim was under 18, or the offender is sentenced to a term of imprisonment, detained in a hospital, or made the subject of a community sentence of at least 12 months.

Chapter 17: Recommendations

Recommendation 1.

17.1 We recommend 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 in the definition of an intimate image. The definition of sexual should be applied only to the person depicted in the image itself, without considering external factors such as where or how the image was shared..

Paragraph 3.67

Recommendation 2.

17.2 We recommend that the Government consider the behaviours of downblousing and taking “creepshots” in public as part of any review into the need for a specific offence of public sexual harassment.

Paragraph 3.121

Recommendation 3.

17.3 We recommend that the definition of nude and partially nude should include female breasts and female breast tissue, which would include the chest area of:

(1) trans women, whether they have breast tissue or not, and regardless of whether any breast tissue is the result of hormonal or surgical treatment;

(2) women who have undergone a mastectomy;

(3) girls who have started puberty and are developing breast tissue; and

(4) non-binary people and trans men who have female breast tissue.

Paragraph 3.131

Recommendation 4.

17.4 We recommend that any garment which is being worn as underwear should be treated as underwear for the purpose of an intimate image offence.

Paragraph 3.145

Recommendation 5.

17.5 We recommend that the definition of "nude or partially nude" should include images which show the victim similarly or more exposed than they would be if they were wearing underwear. This includes images that have been altered to appear similarly or more exposed.

Paragraph 3.157

Recommendation 6.

17.6 We recommend that the definition of an intimate image should include nude and partially-nude images, defined as images of all or part of a person's genitals, buttocks or breasts, whether exposed, covered with underwear or anything being worn as underwear, or where the victim is similarly or more exposed than if they were wearing only underwear.

Paragraph 3.161

Recommendation 7.

17.7 We recommend that the definition of an intimate image should include toileting images, defined as images of a person in the act of defecation or urination, and images of personal care associated with genital or anal discharge, defecation or urination.

Paragraph 3.180

Recommendation 8.

17.8 We recommend that it should be an offence to take or share, without the consent of the person depicted, an image that falls within the definition of "toileting".

Paragraph 3.187

Recommendation 9.

17.9 We recommend that an intimate image be defined as an image that is sexual, nude, partially nude, or a toileting image.

Paragraph 3.211

Recommendation 10.

17.10 We recommend that the Government consider whether any further offences are necessary to ensure the behaviour of exposing someone to a serious risk of significant harm in the context of an abusive dynamic is appropriately criminalised.

Paragraph 3.264

Recommendation 11.

17.11 We recommend that the Crown Prosecution Service consider including intimate image offences in the list of offences in their guidance on so-called honour-based abuse and forced marriage.

Paragraph 3.265

Recommendation 12.

17.12 We recommend that images that only show something ordinarily seen on a public street should be excluded from intimate image offences, with the exception of intimate images of breastfeeding.

Paragraph 3.300

Recommendation 13.

17.13 We recommend that images where the victim is not readily identifiable should not be excluded from intimate image offences.

Paragraph 3.318

Recommendation 14.

17.14 We recommend that the act of "taking" an image should form a component of our recommended intimate image offences.

17.15 "Taking" should be understood using the ordinary meaning of the term. It should include any means by which a relevant image is produced, including taking a photo or video with a camera whether digital or analogue and using a device to capture a photograph or video, whether using the camera or an app.

17.16 "Taking" an intimate image which is instantaneously modified by software – such as through a filter – should also be included in a "taking" offence.

Paragraph 4.23

Recommendation 15.

17.17 The definition of "taking" an image should only include such behaviour where, but for the acts or omissions of the defendant, the image would not otherwise exist.

Paragraph 4.50

Recommendation 16.

17.18 We recommend that it should be an offence for D to install equipment with the intent of enabling D or another to commit the offence of taking an intimate image without consent.

Paragraph 4.88

Recommendation 17.

17.19 We recommend that the behaviour prohibited by the current voyeurism and "upskirting" offences should be combined in a single taking offence.

Paragraph 4.105

Recommendation 18.

17.20 We recommend that it should be an offence to share an intimate image without consent.

17.21 The definition of sharing should include all behaviours that have directly made the intimate image available to another. This should include physical posting, showing, or displaying, sharing on social media, peer to peer messaging, or making the image available digitally through transferring a file, sending an encrypted file, saving the image at a specific location and enabling someone to access it, sending a link, or other instructions on how to access the file from a place where the sender has stored it.

17.22 The definition of sharing should not include "secondary sharing" in cases where a person D has informed a third person E where to find an image (for example, by sending a link to a website) that another person F has made available there, D has not shared the image itself or otherwise made the image available, and the image was already available to E.

Paragraph 4.141

Recommendation 19.

17.23 We recommend that offences of sharing intimate images without consent should include sharing with the person depicted.

Paragraph 4.171

Recommendation 20.

17.24 We recommend that it should not be a criminal offence simply to "make" an intimate image without the consent of the person depicted.

Paragraph 4.220

Recommendation 21.

17.25 We recommend that sharing offences, including threats to share, should include images that are intimate as a result of altering, and that are created (whether by digital or non-digital means) if the altered or created image appears to be an intimate image of a person.

Paragraph 4.245

Recommendation 22.

17.26 We recommend that it should not be an offence to possess an intimate image without the consent of the person depicted.

17.27 If an offence based on possession of an intimate image without consent were to be introduced, we recommend that this offence should be limited to circumstances of possession where the victim never consented to the possession of the image by the defendant.

Paragraph 4.280

Recommendation 23.

17.28 We recommend that it should be an offence for a person D intentionally to take or share a sexual, nude, partially-nude or toileting image of V if —

(a) V does not consent to the taking or sharing; and

(b) D does not reasonably believe that V consents.

Paragraph 6.45

Recommendation 24.

17.29 We recommend that it should be an offence for a person D intentionally to take or share a sexual, nude, partially-nude or toileting image of V if —

(a) V does not consent; and

(b) D does so with the intention of causing V humiliation, alarm or distress or with the intention that D or another person will look at the image for the purpose of causing V humiliation, alarm or distress.

Paragraph 6.67

Recommendation 25.

17.30 We recommend that it should be an offence for a person D intentionally to take or share a sexual, nude, partially-nude or toileting 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.

Paragraph 6.100

Recommendation 26.

17.31 We recommend that the Government consider reviewing the statutory guidance for the offence of controlling or coercive behaviour in light of the recommendations in this report, and the evidence of intimate image abuse perpetrated in the context of abusive relationships in this report and the consultation paper.

Paragraph 6.166

Recommendation 27.

17.32 We recommend that the Sentencing Council consider reviewing the sentencing guidelines for domestic abuse offences in light of the recommendations in this report, and the evidence of intimate image abuse perpetrated in the context of abusive relationships in this report and the consultation paper.

Paragraph 6.167

Recommendation 28.

17.33 We recommend that for all additional intent intimate image abuse offences, the magistrates' court and the Crown Court should be empowered to find the defendant guilty of the base offence in the alternative.

Paragraph 7.26

Recommendation 29.

17.34 We recommend that the base offence should be summary only with a maximum sentence of six months' imprisonment.

17.35 We recommend that the additional intent and threat offences should be triable either way with a maximum sentence of two or three years' imprisonment on indictment, or a term not exceeding the general limit in a magistrates' court on summary conviction.

Paragraph 7.68

Recommendation 30.

17.36 We recommend that the consent provisions in sections 74 to 76 of the Sexual Offences Act 2003 should apply to intimate image offences.

Paragraph 8.38

Recommendation 31.

17.37 We recommend that proof of actual harm should not be an element of intimate image offences.

Paragraph 9.29

Recommendation 32.

17.38 We recommend that where a defendant is charged with taking or sharing an intimate image without consent, and:

(1) the intimate image was taken in a place to which members of the public had access (whether or not by payment of a fee); and

(2) the victim was, or the defendant reasonably believed the victim was, voluntarily engaging in a sexual act or toileting, or was voluntarily nude or partially nude,

the prosecution must prove that, in the circumstances as the defendant reasonably believed them to be, the victim had a reasonable expectation of privacy in relation to the taking of the image.

Paragraph 10.66

Recommendation 33.

17.39 We recommend that a victim who is breastfeeding in public or is nude or partially nude in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of an intimate image.

Paragraph 10.81

Recommendation 34.

17.40 We recommend 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 the person depicted in the image consented to that previous sharing, unless

(3) the person depicted subsequently withdrew their consent to the image being publicly available and the defendant knew that they had withdrawn that consent.

Paragraph 10.178

Recommendation 35.

17.41 We recommend that there should be a defence of reasonable excuse available to our recommended 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 or regulatory proceedings;

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

(4) taking or sharing the defendant reasonably believed was necessary for a genuine medical, scientific or educational purpose; and

(5) taking or sharing that was in the public interest.

17.42 We recommend that the defendant should bear the legal burden of proof to establish the defence on the balance of probabilities.

Paragraph 11.203

Recommendation 36.

17.43 We recommend that it should not be an offence:

(1) to share an intimate image of a young child if it is of a kind that is ordinarily shared by family and friends;

(2) for family and friends to take an intimate image of a young child if it is of a kind that is ordinarily taken by family and friends.

The burden should be on the prosecution to prove that this exclusion does not apply in cases where it is relevant.

Paragraph 11.219

Recommendation 37.

17.44 We recommend that it should not be an offence for a person D to take or share an intimate image of a child under 16 (P) in connection with P's medical care or treatment where:

(1) when doing the act, D reasonably believes

(a) that P lacks capacity to consent to the taking or sharing;

(b) the taking or sharing will be in P's best interests; and

(2) if D does not have parental responsibility for P, someone with parental responsibility for P has given valid consent to the taking or sharing in connection with P's care or treatment.

The prosecution must prove that this exclusion does not apply in relevant cases.

Paragraph 11.225

Recommendation 38.

17.45 We recommend that the same definition of "intimate image" is used for both the offences of sharing and threatening to share an intimate image.

Paragraph 12.125

Recommendation 39.

17.46 We recommend that the offence of threatening to share an intimate image should include implicit and conditional threats.

Paragraph 12.136

Recommendation 40.

17.47 We recommend that the offence of threatening to share an intimate image should include threatening to share an intimate image that does not exist and other circumstances where it is impossible for the defendant to carry out the threat.

Paragraph 12.144

Recommendation 41.

17.48 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.

Paragraph 12.154

Recommendation 42.

17.49 We recommend that the Sentencing Council consider whether an intent to control or coerce should be an aggravating factor at sentencing for the offence of threatening to share an intimate image.

Paragraph 12.165

Recommendation 43.

17.50 We recommend that the prosecution should not have to prove that the person depicted did not consent to the act of sharing that is the subject of the threat.

Paragraph 12.179

Recommendation 44.

17.51 We recommend that it should be an offence to threaten to share an intimate image of V, whether the threat is made to V, or to a third party.

Paragraph 12.193

Recommendation 45.

17.52 We recommend that, where a threat is made to a third party, the prosecution should not have to prove that the recipient of the threat did not consent to the act of sharing that is the subject of the threat.

Paragraph 12.194

Recommendation 46.

17.53 We recommend that section 75 of the Sexual Offences Act 2003 be amended so that a threat to share an intimate image made by the defendant or another triggers an evidential presumption that there was no consent to sexual activity and that the defendant had no reasonable belief in consent to sexual activity, provided that if the defendant did not make the threat, they knew that it had been made.

Paragraph 12.211

Recommendation 47.

17.54 We recommend that complainants of the new intimate image offences should have automatic lifetime anonymity.

Paragraph 13.37

Recommendation 48.

17.55 We recommend that complainants of the new intimate image offences should automatically be eligible for special measures at trial.

Paragraph 13.60

Recommendation 49.

17.56 We recommend that restrictions on the cross-examination of complainants of sexual offences should extend to complainants of the new intimate image offences.

Paragraph 13.81

Recommendation 50.

17.57 We recommend 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.

17.58 This threshold should be met if:

(1) where the offender was under 18, he is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months;

(2) in any other case—

(a) the victim was under 18, or

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

(i) sentenced to a term of imprisonment,

(ii) detained in a hospital, or

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

Paragraph 13.104

Recommendation 51.

17.59 We recommend that Sexual Harm Prevention Orders should be available for all of our recommended intimate image offences.

Paragraph 13.126

Recommendation 52.

17.60 We recommend that Government consider making available to the courts a power of forfeiture or destruction in respect of intimate images possessed without consent by an offender following the commission of a taking offence.

Paragraph 13.134

Recommendation 53.

17.61 We recommend that the Crown Prosecution Service consider producing prosecutorial guidance specific to children and young people for new intimate image offences.

Paragraph 14.102

Recommendation 54.

17.62 We recommend that the Government consider whether intimate image offences would benefit from specific extra-territorial statutory provision.

Paragraph 15.24

Glossary

This is not an exhaustive comprehensive glossary of terms relating to intimate image abuse, nor is it a glossary of legal terms. It includes only the terms related to intimate image abuse that have been used throughout this project and defines them as they are commonly understood.

4chan

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

Actus reus

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

AirDrop

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

App

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

Artificial Intelligence (AI)

The development of machines that simulate human intelligence processes to enable the performance of tasks such as problem-solving and decision-making.

BAME

This is an acronym for black and minority ethnic.

Blog

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

messages such as sentences, video links or other forms of content. Twitter is an example of a microblog.

Binder

Tight, elastic-type underwear that is used to cover and compress body parts. Binders are most commonly used by trans men and non-binary people to compress breast tissue.

Bumble

A dating, professional networking, and friend-finding app. Profiles are shown to users, who swipe left to reject a person or swipe right to indicate interest. In heterosexual matches, only women can initiate conversations with men.

By-and-for sector

Organisations that design and deliver services with the people or groups who use the services.

Catfishing

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

Chatroom

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

Charge

The crime that the defendant is formally accused of committing.

Chemsex

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

Cisgender or Cis

Someone whose gender identity is the same as the sex they were assigned at birth.[1]

Cloud

A network of remote servers accessed via the internet on which software and services run. Cloud computing refers to the storage of data on these remote servers, which are physically hosted in what are termed data centres, server rooms, or server farms.

---

[1] See further, Stonewall, Glossary of terms, “Cisgender”, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

Collector culture

The “trading” of intimate images of women without consent between groups of men as a way of gaining social status.

Comment

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

Count

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

Crowdfunding

The practice of funding a project or venture, or raising money for a charity, by collecting money from a large number of people who each contribute a sum, typically via the internet. Websites have been created specifically for crowdfunding, such as www.justgiving.com or www.kickstarter.com.

Cyberbullying

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

Cyberflashing

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

Cyberstalking

A form of stalking that takes place over the internet.

Deepweb and Darkweb

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

Deepfake

The term is a blend of the words “deep learning”, which is an artificial intelligence method, and “fake”. It describes realistic synthetically-generated images, video, and audio.

Deepfake pornography

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

Defendant

A person formally accused of committing an offence.

Dick pic

A photograph that a person has taken of their penis. The term commonly relates to these photographs being sent to another or posted publicly.

Disclosure

We use this term to describe the act of sharing or making available an intimate image to another. It is not used in this project to refer to criminal disclosure evidence rules.

Downblousing

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

Doxing

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

Either-way offence

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

Emoji

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

Extortion

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

Facebook

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

Facebook messenger

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

Fake news

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

Fault element

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

Filter

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

Friend

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

Follow

"Following" another user of certain social media platforms (for example, Twitter or Instagram) means that one will receive updates from that user, which will appear in one's newsfeed.

GIF

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

Group chat

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

Handle

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

Hacking

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

Hashtag

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

Hate Crime

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

Image hashing

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

Indictable offence

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

Indictment

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

Instagram

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

Instant messaging (IM)

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

Internet Access Provider

A company that provides subscribers with access to the internet.

Internet Service Provider

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

IP address

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

Jurisdiction

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

LGB

An abbreviation for lesbian, gay and bisexual.

LGBT

An abbreviation for lesbian, gay, bisexual and transgender.

LGBTQ/+

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

Liking

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

Live streaming

The act of delivering video content over the internet in real-time.

Meme

A thought, idea, joke or concept that has been widely shared online, often humorous in nature – typically an image with text above and below it, but sometimes in video and link form.

Naturism

The practice of going without clothes.

Non-binary

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

Notification

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

Nudification

The process of using software to modify existing, non-intimate images, and "strip" the person depicted of their clothes, resulting in an image that makes them appear naked.

Offline communication

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

Online abuse

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

Online communication

Communication via the internet between individuals and/or devices with other individuals and/or devices.

Online hate

By "online hate" we mean a hostile online communication that targets someone on the basis of an aspect of their identity (including but not limited to protected characteristics). Such communications will not necessarily amount to a hate crime. We note that the College of Policing's Authorised Professional Practice guidance on hate crime (2020) stipulates that police should record "hate incidents" using a perception-based approach. Again, such incidents may not amount to a hate crime.

OnlyFans

A subscription-based content sharing website launched in 2016.

Outing

Disclosing a person's sexual orientation, gender identity or HIV status without their consent. The term can also be used to describe revealing other intimate information including participation in sex work, without consent.

Periscope

A social video app that allows users to broadcast live video from wherever they are and to engage with others' videos, browse live or recent broadcasts, and follow users to receive notifications.

Photoshop

A software application for editing or retouching photographs and images.

PornHub

A pornography website launched in 2007.

Post or posting (on social media)

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

Private message

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

Profile page

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

Protected characteristics

In the context of hate crime this refers to characteristics that are specified in hate crime laws in England and Wales, namely: race, religion, sexual orientation, disability and transgender status. The term is also sometimes used in the context of the Equality Act 2010, which specifies nine protected characteristics. There is some overlap between the two, but we use the term to describe the hate crime characteristics unless we specify otherwise.

Replying

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

Retweeting

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

Revenge porn

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

Screenshot

Capturing in a photo form the contents of a screen, usually a mobile phone, tablet or laptop. Most devices have a unique button or combination of buttons that enable the user to capture a photo of the current screen of that device and store it to the device's memory.

Sex worker

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

Sextortion

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

Sexting

The practice of using digital technology to create, send, and receive intimate texts, images or videos, usually taking place in the context of a sexual conversation between two people in a relationship.

Sexualised photoshopping

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

Sexual Harm Prevention Order or SHPO

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

Sharing (on social media platforms)

This refers to sharing as a specific tool enabled on social media platforms, defined as the broadcasting by social media users of web content on a social network to their own social media page or to the page of a third party.

Skype

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

Snapchat

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

Social media

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

Social media platform

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

Social Networking

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

Summary or summary-only offence

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

Tag or Tagged

A social media function used commonly on Facebook, Instagram and Twitter, which places a link in a posted photograph or message to the profile of the person shown in the picture or targeted by the update. The person that is “tagged” will receive an update that this has occurred.

TikTok

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

Tinder

A location-based online dating app that allows users to like (swipe right) or dislike (swipe left) other users, and allows users to chat if both parties swiped to the right ("a match").

Transgender or Trans

An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth.[2]

Transgender man

Someone who was assigned female at birth but identifies and lives as a man.[3]

Transgender woman

Someone who was assigned male at birth but identifies and lives as a woman.[4]

Trolling

Where a person or group creates controversy in an online setting (typically on a social networking website, forum, comment section, or chatroom), disrupting conversation about a piece of content by providing commentary that aims to provoke an adverse reaction.

Tweet

A post on the social networking service Twitter. Tweets can contain plain text messages (not more than 280 characters in the English version of the service), or images, videos, or polls. Users can Tweet to another person (@mention tweets) to ensure they will be notified of the Tweet, or can also message them directly. Other users can retweet the Tweets of others amongst their connections on the platform.

Twitter

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

Upload

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

---

2 See further, Stonewall, Glossary of terms, "Trans", available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

3 See further, Stonewall, Glossary of terms, "Transgender man", available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

4 See further, Stonewall, Glossary of terms, "Transgender woman", available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

Upskirting

The act of taking a photograph or video underneath a person's clothing such as a skirt or kilt without consent, typically in a public place.

VAWG

An acronym for violence against women and girls.

Victim

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

Viral

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

Vlogging

Utilising video recordings to tell a story or to report on information; common on video sharing networks such as YouTube (a shortening of "video web log").

Voyeurism

The behaviour of observing or recording private acts of another without their consent usually for the sexual gratification of the perpetrator.

Webcam

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

Webchat

Communicating either one-to-one or in a group over the internet, usually through a text-based application such as WhatsApp or Facebook private messenger.

WhatsApp

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

YouTube

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

Zoom

An app that uses a cloud-based software programme to enable users to webchat, voice call or video call each other.