

**Dame Vera Baird QC**

**Victims' Commissioner for England and Wales**

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Dear Sirs

## **REFORM OF THE COMMUNICATIONS OFFENCES**

I am pleased that The Law Commission is re-visiting existing communications offences and considering further offences to deal with the horrible phenomena of cyber-flashing and pile on harassment.

As Victims' Commissioner I am deeply concerned about the use of electronic media and social media to commit harassment, make threats to kill or rape and other 'offences'.

As you note in your consultation document, often (although not exclusively) these types of offences are committed against women and I know that the Government has expressed an interest in new and emerging forms of violence against women and girls (VAWG) in its' call for evidence about VAWG to inform a new VAWG strategy.

The 'VAWG' sector would say that these are not as much new and emerging as the same types of offences just being facilitated by new mediums. I am inclined to agree. It is therefore vital that the Law Commission consult widely with the specialist VAWG sector and VAWG academics on the creation of any new offences to ensure that they adequately 'cover' the behaviour concerned and do not have inadvertent unintended consequences.

### **Creating a new offence of so called 'cyber-flashing'**

I agree there should be a new offence of cyber-flashing, but it is vital we get the law right first time. Laws on up-skirting and image-based sexual abuse ('revenge porn'),

for example, are partial and do not cover all abuses. We need a law on cyber-flashing that covers all non-consensual sending of penis images.

As proposed, the offence is problematic for a number of reasons.

The offence as proposed is limited to where the offender sends pictures of his own penis. This is an issue both evidentially and because it misunderstands the harm this offence causes.

Evidentially, I can foresee significant issues in proving the image received was in fact an image of the perpetrator's own genitals. It seems likely the majority of offenders will claim the image is not of their penis and how exactly will the prosecution be able to prove otherwise? To do so would involve measures that are deemed intrusive and therefore, it is unlikely to be attempted, resulting in very few if any prosecutions.

Harm is not dependant on knowledge that the genitals 'belong' to the person sending the message. For example, receiving a penis image could be perceived as a threat of imminent sexual violence. This threat will cause harm regardless of whose penis is in the image, akin to how someone receiving an image of a knife may fear physical violence regardless of whether they know that the sender actually owns the knife in the image. In other words, the harm doesn't come from knowing that the sender has sent an image of his own genitals. It is from receiving any unsolicited image of a penis.

Linked to this is a misunderstanding of the motives of offenders whom, it would seem, the Law Commission have addressed as being motivated in a similar way to physical flashers. This however does not capture the full range of motivations<sup>1</sup> for this type of offending, which can include humiliation and shame, and which again could be achieved regardless of whose penis appears in the image.

It also would create a hierarchy of offences whereby those who receive an unsolicited penis image where the picture is of the offender's genitals will be able to seek justice, and those who receive one that isn't wont, despite there being no evidence the harms are more severe in the former '.

I would recommend, in line with the submission from Prof. Clare McGlynn, that any new offence contains the following elements:

1. A new sexual offence which covers any genital image not just those of the perpetrator's genitals.
2. If motivation is to form an element of the offence, then this should include 'awareness of the possibility of alarm and distress' and be extended to at least include humiliation. However, I agree that an offence based on non-consent rather than the perpetrator's motives would be more appropriate as it is the basis of most other sexual offences and would also seek to challenge the normalisation of such behaviour. Motive based offences risk (and do) create hierarchies of offences.

### **Creating a new offence of pile-on harassment**

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<sup>1</sup> Oswald, F et al (2020) 'I'll Show You Mine so You'll Show Me Yours: Motivations and Personality Variables in Photographic Exhibitionism', *The Journal of Sex Research*, 57(5): 597-609. & Henry, N, McGlynn, C, Flynn, A, Johnson, K, et al (2020) [\*Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery\*](#) (Routledge).

In principle, I agree with the idea in the proposals of creating new offences to capture this insidious behaviour, although I share concerns about the practical workability of a participation offence. Instead, incitement or encouraging offences seem more 'practical'.

What I can say as Victim's Commissioner is that the harm of this type of offending is clear. In particular, it is a feature of almost daily life for women in the public eye and as such, it must be addressed. If this sort of behaviour was occurring in an analogue way, for example if hundreds of people walked past a woman's house shouting rape threats at her every day, action would be taken. With our lives increasingly 'lived' online, this type of abuse can have a silencing effect.

Although outside the scope of this consultation, this is linked to the Government's online harms white paper and proposed Bill. What is needed are greater measures to prevent this happening, increased responsibility and penalties for platforms who fail to mitigate this type of behaviour and address it where it occurs.

It strikes me that criminalising this behaviour would also play an important role in sending a message of the unacceptability of this type of behaviour.

### **New offence to replace s.1 of the MCA 1988 and s.127 (1) of the CA 2003**

I am in favour of creating a new offence here and agree that likely to cause harm rather than actually causing harm is the right test, not least because related to the above, many women in the public eye receive such regular threats on social media that they cease to have the desired impact on that woman. However, there is a very real societal harm here and women 'witnessing' this can also experience harm, as it forms part of the very gendered 'micro' aggressions women endure every day, which can lead to a sense of feeling unsafe whilst moving through the world .

Finally, I note you are also considering reform around Image -based abuse more broadly and I hope that this will lead to a consolidation of all the 'digital' sexual offences that are currently poorly dealt with in law, such as so called up-skirting, so called revenge porn, cyber-flashing, deepfakes, sharing recordings of sexual assaults and threats to share images etc. These are all undoubtedly linked and require a joined-up approach.

I am very happy to offer any assistance in this matter in my capacity as Victims' Commissioner and keen to see these high harm behaviours addressed.

In line with my usual practice, a copy of this letter will be placed on my website

Yours sincerely



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