

Cyberflashing and the Online Safety Bill

Briefing/Rebuttals to Government Justifications for Motive-Based Cyberflashing Offence

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Law reform options

There are two main options when drafting a new cyberflashing criminal offence:

- a comprehensive, straightforward '[consent-based](#)' offence requiring proof of non-consent with a reasonable excuse defence (see [amendment 270](#) in OSB before House of Lords); or
- a limited 'motive-based' approach which only makes it an offence on proof of specific motives: (a) causing distress, alarm or humiliation; or (b) sexual gratification *and* being reckless as to causing distress (as [proposed](#) by the Law Commission and included in [section 167](#) of the Online Safety Bill).

Why is a comprehensive consent-based cyberflashing offence necessary?

- Consent-based offence is comprehensive covering *all* forms of cyberflashing.
- Consent-based law is more straightforward and easier to understand.
- Women and girls experience harms regardless of the motives of the perpetrators.
- No evidence that only certain motives cause the harms of cyberflashing.
- Women report feeling violated, threatened, intimidated and harassed. They experience a loss of control, privacy and sexual autonomy. They feel personally targeted.
- It is alarmingly common: almost half of young women (18-24) have been sent unwanted penis images; 76% of teenage girls have been sent unwanted explicit images by their peers and strangers. Some women are bombarded with images across social media and dating apps, meaning they change their behaviour.
- Consent provides better foundation for prevention and education initiatives.
- Consent-based law follows international best practice, eg [Texas](#)
- Consent is easily obtained, and criminal charges easily avoided.
- Motives not required for most criminal offences including most sexual offences.
- The Government is removing the motive requirements from intimate image offences because they exclude harmful cases and make prosecutions less likely. Should be same for cyberflashing.
- Consent prioritises protecting girls' from harassment over boys 'misguided' humour

Inconsistency in Gov't proposals for cyberflashing and intimate image abuse

- Cyberflashing: the Government is proposing a limited, motive-based offence, following Law Commission.
- Intimate image abuse: Yet, in relation to sharing intimate images, Government proposes to strengthen the law by removing motive requirements, making it a consent-based offence, also following Law Commission.
- The Law Commission is inconsistent in its approach, with the Government endorsing such confusion.
- There is now a real risk that the OSB will reproduce these inconsistencies, making the law more inconsistent, complex and confusing. This risks further undermining women's trust in the criminal justice system.

Government says it has widely consulted on cyberflashing proposals

- There has been consultation, but this has shown **widespread rejection** of the motive-based approach.
- No organisation working on violence against women and girls supports the motive-based approach.
- Support for consent-based law comes from voluntary sector, public sector (eg UN Women, Revenge Porn Helpline) and private sector (eg Bumble, BT).
- [The Times](#) (18 April 2023) on support for consent approach from UN Women, Bumble, Grazia.

'Cyberflashing is materially different and not as personal as sharing images without consent'

Rebuttal:

- *Cyberflashing is in fact experienced by many as personal and targeted*: one victim described being on a train and being sent an image and said 'it was so intimidating, I was being targeted and it felt very personal'.
- Another victim said: 'I was terrified as to who was watching me, and knowing there was a sexual predator within a few metres'.
- *Cyberflashing is always wrongful conduct* – it is sending a sexual image to someone without their consent. It breaches their privacy and autonomy, and it is experienced as non-consensual sexual conduct.
- The harms do vary with some women less harmed (often trying to minimise it themselves). But the harms of sharing sexual images without consent are also similarly varied, but we act harms potentially devastating.

'Sexual gratification will catch majority of cases and is straightforward to prove'

Rebuttal:

- Plausible defences created by this motive requirement: 'it was for a laugh' or 'I thought she'd like it and therefore meant no harm'.
- Sexual gratification is not always the motive (gaining nudes as 'digital trophies' common) and therefore still loopholes in the law;
- Even where sexual gratification is the motive, this still requires evidence which is challenging to identify and collect (and requires extra resources and digital skills to acquire the evidence);
- Recklessness must also be proven alongside sexual gratification and the Law Commission admits this excludes those who thought women would like to receive penis images.

Detail:

Government claims the majority of cyberflashing cases will be caught by the sexual gratification motive as penis images are sent in the hope of either gaining nudes in return or sexual activity at some future stage. But the motive requirement will seriously hinder police investigations and prosecutions because:

The prosecution must prove (a) sexual gratification and (b) recklessness as to causing distress.

- (a) *Sexual gratification*: Not always the motivation - while many men do send penis images in hope of gaining nudes in return, [research](#) with young men found that this is to have nudes as 'digital trophies' to show off to friends, not for sexual gratification;
- Even where it is for delayed sexual gratification, evidence is required, and it is widely acknowledged that proving this type of deferred sexual gratification is even more difficult than immediate gratification. What evidence will be sufficient? Will the police be resourcing investigations to secure eg evidence of porn use?
- It is not sufficient that the CPS claims this will be straightforward for juries: evidence must still be produced, and the motive threshold means that cases are unlikely to get to CPS/juries, as we know from intimate image offence ('revenge porn') that the motive hurdle inhibits police investigations.
- (b) *Recklessness to causing distress*: this requires proof that the defendant turned their mind to there being a risk of causing distress but went on to take the risk anyway. The Law Commission acknowledge that the recklessness requirement will exclude 'someone who sent a message uncertain of whether there was consent but where they genuinely believed no harm would result'.
- Any defendant can claim that they thought the recipient would like the image and therefore there would be no harm. We know from surveys that many men do operate on the delusion that women want unwanted penis images and so this defence is plausible and likely to be very common.

'Consent is too broad, with the risk of over-criminalisation'

Rebuttal:

- Some examples such as doctor sharing penis image are covered by reasonable excuse defence.
- Might be possible to find esoteric examples covered by consent-based offence, but focus should be on everyday, relentless harms, and violating and intimidation, experienced by women and girls; rather than worry about a naturists taking and sharing photos (and in any event easy for them to gain consent).

- CPS discretion will constrain prosecutions and Law Comm accept this for intimate image abuse.

Detail:

Former Minister for Tech, Damian Collins, [argued](#) that the following examples would come within a consent-based offence but should not be criminalised. His examples *do not* in fact fall within a consent-based offence.

- *Doctor showing photograph of a patient to a colleague.*
Not covered. The defence of reasonable excuse and of reasonable belief in consent would cover any doctor legitimately sharing an image of genitals with another doctor.
- *Naked figure in the background such as artwork at a museum (and 'accidental images of genitalia')*
Not covered. The offence requires an intention to distribute the image without consent. That such scenarios are not covered is [confirmed](#) by the Law Commission in relation to a consent-based intimate image offence: *'This means, for example, that if someone shares an intimate image by accident, or takes a photo without realising there is someone nude in the background, it is not an offence.'*

'Consent-based cyberflashing law wrongly covers "misjudged attempts at humour" which could impact young people especially'

- **Inconsistency with intimate image proposals:** This concern also applies to the proposed consent-based intimate image abuse offence. Intimate images are sometimes shared in humour, such as an image taken in a men's changing room and shared with the team.
- But, the Law Commission/Gov't recognise that just because this might be possible, this is not a good enough reason to refuse to amend the intimate image laws to better protect the vast majority of victims from very real harms. Prosecutorial discretion limits prosecutions, and any prosecution also requires someone identifying as a victim and reporting to police.
- **Sufficient CPS discretion and Guidance on Young People:** The Law Commission itself justifies its consent-based approach to intimate image abuse on basis of CPS discretion as follows:
 - *'We have carefully considered the arguments and conclude that it is appropriate for the intimate image offences to continue to apply to perpetrators and victims of all ages. The criminal justice system, in particular the youth justice system, is designed to respond to the risks associated with children being criminalised. o Cases involving children are only prosecuted where there is a public interest in doing so (suitably robust prosecutorial guidance would help ensure this).'*
- **Cyberflashing and prosecutorial discretion:** This reasoning applies equally to cyberflashing. There should be no rush to criminalise under 18s, with schools and prosecutors only acting where it is in the public interest to do so (and following specific prosecutorial guidelines for under 18s). Concerns about young people should not lead us to limit the offence for everyone else.
- **Enabling young men or protecting young girls?** There is a choice here. It might be that some young men think they are being funny or misjudge their actions. But we also know that women and young girls are facing relentless harassment and abuse, and can experience considerable harm, regardless of the motives of the senders. Teenage girls commonly experience being sent penis images as coercive; some also experience harassment simply as a result of receiving the images.
- **Why are we prioritising boys and men's rights to try to be funny, over girls and women's rights to live free from harassment and abuse?** Especially when it is easy to avoid criminal liability, by simply asking if someone wants to see the image.

'Cyberflashing is common on instant messaging and dating apps'

Rebuttal:

- Community standards on dating apps used by gay men require consent before sending penis images.

Detail:

Former Minister Chris Philp [raised concerns](#) about criminalisation of those who 'habitually' exchange penis images on certain dating websites where 'the exchange of those kind of images was generally considered fine'. He is referring to dating apps commonly used by gay men. However:

- In fact, community standards of such dating sites require consent before sharing penis images: [Grindr community standards](#).
- Secondly, not all men do accept the normalisation of being sent unsolicited penis images. As one man in a [blog](#) in Attitude (best-selling LGBT magazine) said when suggesting dating apps must do more: *'Unfortunately, it's become second nature to just expect to see some random person's penis in at least half of the messages I open. Do I consent to this? No. Do I want this? No. Does it make me uncomfortable? incredibly.'*

Government/Law Commission accept motive requirements limit intimate image abuse prosecutions, yet include motives in cyberflashing offence

The Government/Law Commission are revising the law on sharing intimate images without consent in recognition that requiring proof of specific motives makes prosecutions more difficult.

- The Law Commission clearly explains why a motive-based offence is 'unsatisfactory' in relation to intimate image abuse:

'First ... Intimate image abuse is perpetuated for many reasons, and sometimes for no clear reason at all. Intimate images may be taken for a joke, shared in exchange for different images in return, for financial gain, to gain social status, or simply because someone felt like it. The conduct causes harm to the victim, regardless of the motivation, or lack of it.'

Secondly, it means that prosecutions may fail, or not even be started, if it is difficult to provide evidence of a specific intent. Even if a perpetrator admits to the act of non-consensual taking or sharing, if it cannot be proved that they did so to cause distress or obtain sexual gratification, they will not be prosecuted. This is unsatisfactory.'
- Yet, the motive requirements remain in place for the cyberflashing offence.
- The motive-based cyberflashing offence is problematic due to:
 - there being many cases where the penis images are sent for motives other than causing distress or sexual gratification; and
 - even in those cases where this is the dominant motive, there is often not evidence to prove this and
 - even where there might be evidence, practice from similar offences suggest this additional hurdle limits investigations and prosecutions.

Law Commission inconsistent on protection of CPS Discretion

In justifying a consent based intimate image abuse offence, the Law Commission emphasises the importance of CPS discretion in limiting the scope of prosecutions:

- *'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.'* ([para 6.42](#))
- Yet, on cyberflashing, in evidence to the Women & Equalities Committee, the Law Commission stated: it is 'no answer to the problem of over-criminalisation to argue that the CPS would not prosecute'.
- There are **clear inconsistencies** between Law Commission statements on CPS discretion regarding intimate image abuse and cyberflashing.

Further information:

Clare McGlynn's website www.ClareMcGlynn.com/cyberflashing

Clare McGlynn, Kelly Johnson (2021) [Cyberflashing: recognising harms, reforming laws](#) (Bristol University Press)

Clare McGlynn, '[A proposed new law on cyberflashing is welcome, but has one major flaw](#)' *The Independent*, 22 July 2021

Clare McGlynn, '[Cyberflashing: Consent, Reform and the Criminal Law](#)' (2022) 86 *Journal of Criminal Law* 336–352.