

The Rt Hon David Gauke MP  
Secretary of State for Justice  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

10<sup>th</sup> January 2017

Dear Mr Gauke

## **REFORMING LAW RELATING TO UPSKIRTING AND OTHER FORMS OF IMAGE-BASED SEXUAL ABUSE**

Congratulations on your appointment as Secretary of State for Justice. We are writing to you regarding recent calls for a new criminal offence to cover the pernicious practice of ‘upskirting’. You may be aware that your predecessor undertook to review this area of law.

Drawing on our research and expertise in this field, we are writing to make a number of recommendations regarding any possible reforms. We hope that these will be useful in undertaking the review and recommending change. We would, of course, be happy to provide any further comments if that would be helpful.

### **1. Summary of recommendations**

- 1.** The review should not be limited only to ‘upskirting’, but should extend to examine all forms of non-consensual sharing or taking of private sexual images - known as image-based sexual abuse - to remove inconsistencies and close loopholes in the protections offered to victims;
- 2.** Automatic anonymity should be extended to all complainants of image-based sexual abuse, including in cases of ‘upskirting’ and ‘revenge porn’, as they are all sexual offences;
- 3.** Any revised law should focus on the harms to victims, not motives of perpetrators, by extending the range of motives to be proven beyond ‘sexual gratification’ (voyeurism) and intention to cause distress (‘revenge porn’). For example, the law should also cover seeking financial gain or notoriety, sharing/taking for a ‘laugh’ and other purposes.
- 4.** The revised law must recognise that sexual offences are sexual because of the mode of perpetration and the harm caused, not due to a motive of sexual gratification; and
- 5.** The specific law on non-consensual sharing of private sexual images with intent to cause distress (‘revenge porn’) should be strengthened to cover a range of motives and threats to distribute.
- 6.** These recommendations could be incorporated into a revised section 33 of the Criminal Justice and Courts Act 2015 which then applies to all forms of image-based sexual abuse and grants anonymity equally to all complainants of these offences.

## **2. Our expertise**

We are experts on the law relating to the non-consensual taking or sharing of private images, namely image-based sexual abuse. Our work was cited in Parliament during the passage of the ‘revenge porn’ law in 2015, and we have worked closely with parliamentarians, policy-makers and NGOs across the UK and Ireland to review this area of law and make recommendations on reform. Most recently, [Clare McGlynn gave evidence](#) to the Women & Equalities Select Committee recommending a change to the law on upskirting, as part of their inquiry into sexual harassment.

## **3. The current legal position: inconsistent, unjustified and piecemeal**

Unless the law is changed, unjustified inconsistencies will remain such as:

- private sexual image *taken* of victim without consent in private: automatic anonymity for complainant and potential voyeurism offence but only if sexual gratification proven;
- private sexual image *shared* without consent (ie a classic ‘revenge porn’ scenario): no anonymity for complainant and only offence if intention to cause distress proven;
- private sexual image *taken* in public without consent; no anonymity and only offence if outrages public decency.
- Private sexual image *taken* in place deemed neither public nor private, such as some school settings: no anonymity, no offence of either voyeurism or outraging public decency.

## **4. Extend and amend voyeurism offence to cover upskirting**

To ensure upskirting is clearly covered by the criminal law, one option is to amend the voyeurism offence in section 67 of the Sexual Offences Act 2003. This approach was taken in Scotland in 2010 and can now be found in the amended section 9 of the Sexual Offences (Scotland) Act 2009.

### *Amending and extending motive requirement*

However, if this approach is taken, it is vital that the motive requirement is amended and extended so that it is not limited only to those seeking ‘sexual gratification’. The Scottish legislation has done so and not only covers a sexual motive, but also the intention to ‘humiliate, distress or alarm’ the victim.

Nonetheless, even such an extension would not cover the perpetrator who takes upskirt images (or indeed more conventional forms of voyeuristic images) for a ‘laugh’ or for financial gain. It is vital that the law focuses on the harms to victims that persist irrespective of the motive of the perpetrator.

## **5. Extend automatic anonymity for complainants of image-based sexual abuse**

The law should be amended to grant automatic anonymity to all complainants of image-based sexual abuse, including upskirting, ‘revenge porn’, voyeurism, to encourage victims to report offences and to support prosecutions.

These are all forms of sexual offence: the harm is to the victim’s sexual integrity and sexual privacy, the mode of perpetration is sexual and the abuse that often accompanies this conduct is sexualised. Victims report experiencing these acts as sexual offences.

Sexual offences do not require a sexual motive (it is the mode of conduct that is sexual). Nor do sexual offences require contact (many existing sexual offences do not have a conduct requirement).

An ICM poll we commissioned last year found that [75% of the public agreed](#) that victims of ‘revenge pornography’ should be granted automatic anonymity to bring the offence into line with other sexual offences.

The Government has recently recognised the need for anonymity in cases of female genital mutilation and forced marriage and we urge the Government to extend these protections to complainants of image-based sexual abuse.

## **6. Strengthen ‘revenge porn’ law: s33 Criminal Justice & Courts Act 2015)**

The 2015 Act was a welcome development recognising the harms and impact of what is often referred to as ‘revenge pornography’. However, the practice of the law has revealed its limits. The review of upskirting law provides a valuable opportunity to amend the 2015 to bring it into line with best practice internationally, and to ensure consistency with any new law covering upskirting.

Indeed, strengthening the 2015 Act to cover all forms of image-based abuse, including upskirting, would ensure a more coherent approach to this area.

## **7. Strengthen law by extending motive requirements**

The current law is limited due to it requiring proof that the perpetrator directly intended to cause distress to the victim. Reckless intention is specifically excluded. The law, therefore, fails to provide protection to victims whose images are shared for many other purposes such as sexual gratification, financial gain, notoriety, or for a ‘laugh’. We recommend that the offence is one of intentional distribution of a private sexual image without consent. If the law is to be more restricted, thus excluding some victims, reckless intention should at least be covered.

## **8. Threats to distribute images should be covered**

The 2015 law covering the disclosure of private sexual images with intent to cause distress (‘revenge porn’) does not cover threats to distribute such images. This is a major lacuna that particularly affects women in abusive relationships where such threats are increasingly common. English law is out of step with international best practice in not covering threats.

## **9. Categorise all forms of image-based sexual abuse including ‘revenge porn’ and upskirting as sexual offences**

Sexual offending is not confined to sexual motive. In undertaking a review of this area, we recommend that it be recognised that image-based sexual abuse are forms of sexual offending. The mode of perpetration is sexual (sexual images), the harm can be experienced as sexual (breach of rights to sexual autonomy and sexual expression) and the abuse that accompanies this conduct is often sexualised. Importantly, victims of this conduct experience the harm as a sexual assault.

The motive of the perpetrator is not what dictates whether an act is a sexual offence. In terms of the law, for example, there is rightly no requirement that a rape is perpetrated for a sexual motive. Indeed, we know that rape is conducted for reasons of control, power, violence, harm and many other motives. Other offences require that the act itself is sexual, but are not limited to the motive being sexual.

Granting victims the protection of the law only where the perpetrator has a particular motive fails to recognise the significance and harm of image-based sexual abuse and fails to put victims at the heart of our criminal justice system.

We would welcome the opportunity to discuss any of these changes further. We enclose/attach copies of our research and policy briefings on these issues for further detail.

Yours sincerely

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**Documents attached/enclosed:**

**Academic research:**

McGlynn, Clare, Rackley, Erika & Houghton, Ruth (2017). [Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse](#). *Feminist Legal Studies* 25(1): 25-46.

McGlynn, Clare & Rackley, Erika (2017). [Image-Based Sexual Abuse](#). *Oxford Journal of Legal Studies* 37(3): 534-561.

**Blog:**

'Why upskirting needs to be made a sex crime' *The Conversation*, 15 August 2017  
<https://theconversation.com/why-upskirting-needs-to-be-made-a-sex-crime-82357>

**ICM Poll reported:**

'Revenge porn' victims should get anonymity, say 75% of people, *Guardian*, 19 July 2016  
<https://www.theguardian.com/law/2016/jul/19/revenge-porn-victims-should-get-anonymity-say-75-percent-of-people>