

# Proposed Cyberflashing Criminal Offence: draft text and justifications<sup>1</sup>

[Professor Clare McGlynn QC \(Hon\)](#), November 2021

## Context: Prime Ministerial statement on cyberflashing

The Prime Minister recently [stated](#) that he was in favour of criminalising cyberflashing, adding that: 'If you can draft something that will capture it, let's have a look at it.' Culture Secretary Nadine Dorries has also now [said](#) that she is in favour of making cyberflashing unlawful.

While the Law Commission have [proposed text](#) for a new offence, it is limited and will only apply to some cases of cyberflashing. This briefing provides an alternative draft that would enact a comprehensive offence covering all forms of cyberflashing.

## Contents of this Policy Briefing

1. Proposed text for new comprehensive, 'consent-based' criminal offence of cyberflashing
2. Brief explanation of why 'consent-based' cyberflashing offence is recommended instead of Law Commission's 'motive-based offence'
3. Notes on additional definitions and interpretative provisions for cyberflashing offence
4. Detailed justifications for consent-based approach and responses to common concerns and queries
5. Arguments against consent-based offence and responses

## 1. Proposed Text of Consent-based cyberflashing offence

### *Distribution of genital images without consent*

*A person (A) commits an offence if –*

- (a) A intentionally distributes a photograph or film of A's or any other person's genitals to another (B) and*
- (b) B does not consent to the distribution and*
- (c) A does not reasonably believe that B consents to the distribution.*

## 2. Brief Explanation of Consent-Based Offence

- a) There are two main options for a new cyberflashing criminal offence:
  - i. **'consent-based'** offence: adopting a comprehensive offence based on the core wrong of non-consent which covers all forms of cyberflashing; or
  - ii. **'Motive-based'** offence: adopting an offence limited to circumstances where it can be proven the sender had particular motives, such as sexual gratification or causing distress, alarm or humiliation (as currently [proposed](#) by the Law Commission).
- b) An offence based on consent requires proof that:
  - i. the sender intended to distribute an image or video of his or another's genitals to the recipient;
  - ii. the person being sent the image did not consent to it being sent to them; and
  - iii. the sender did not have a reasonable belief that the recipient consented.

- c) A consent-based provision would introduce a new criminal offence specifically targeting cyberflashing – the sending of genital images, usually penis images, to someone without their consent.
- d) The focus is on *non-consent* as the core wrong of this behaviour. Therefore, the offence will be made out whatever the motivations of the sender. Motivations will continue to be important in investigation, prosecution and sentencing, as is the case in all criminal offences: for example, providing evidence regarding intention to distribute images and reasonable belief.
- e) *Reasonable belief* in consent is recommended, as well as proof of actual non-consent to receive the image, to exclude cases where the sender had a reasonably held view that the recipient consented to receiving the image. This ensures an appropriate level of culpability.
- f) The offence is one of *distribution*, without the need for proof that the image was viewed or received. This enables more straightforward prosecutions, obviating the need to prove an image was viewed or accessed.
- g) The offence covers distribution of images of the *perpetrator's or another's penis* to ensure straightforward prosecutions. It also recognises that the harm to victim-survivors is not dependent on sure knowledge that the penis in the image is that of the sender.
- h) The offence is drafted as *gender neutral*, following the approach of most sexual offences, and would therefore equally apply to the non-consensual distribution of vulva images, as well as penis images.
- i) Sentencing: it is recommended that this is a summary offence, attracting a penalty of a fine or maximum 12 months imprisonment.
- j) Additional provisions should include granting complainants automatic anonymity on reporting to the police, and entitlement to special measures and other assistance given to sexual offence complainants.

### 3. Additional Definitions and Interpretative Clauses

#### Consent:

- Definition of consent in [section 74 of the Sexual Offences Act 2003](#) to be used: 'For the purposes of this section, a person consents if they agree by choice, and have the freedom and capacity to make that choice.'

#### Distribution

- Include clause that 'distribution' does not require receipt, viewing or accessing the image.
- For example, the Singapore Penal Code, section 377C(2): 'For the purposes of the definition of "distribute" in subsection (1), a person is treated as having distributed an image or recording whether or not another person views or gains access to the image.'
- See [section 34 Criminal Justice and Courts Act 2015](#) (disclosing private sexual images with intent to cause distress) for definition of disclosure/distribution.<sup>2</sup>

#### Photograph or film

- See [section 34 Criminal Justice and Courts Act 2015](#) (disclosing private sexual images with intent to cause distress) for definition of 'photograph or film'.
- To include section 34(5) to make clear altered images/videos (including altered with AI) included.

#### Genitals

- No further definition of genitals advised. Clause refers to A's genitals, and therefore to a person's, not animals', genitals.
- Dictionary definition of genitals is confined to male and female external reproductive organs, ie penis or vulva. The scrotum is included within a definition of male genitals. An image of the scrotum only could be included within this definition. Unnecessary to be so specific in definition to exclude this. Preferable to have clear reference to 'genitals'.
- Definition of photograph or film ensures cartoon and CGI images not included.

## 4. Why adopt a consent-based cyberflashing offence?

### a) Focus on core wrong of non-consent

Cyberflashing is problematic because it is *non-consensual* conduct of a sexual nature. Distributing penis images is not in and of itself wrongful; but doing so without the consent of the recipient is. The non-consensual act breaches women's rights to sexual autonomy, to be treated with dignity and to be free from sexual violation, *regardless of the motive of the perpetrator*. Women and girls experience cyberflashing as a harmful intrusion into their personal space and daily lives.

### b) Consent should be focus of prevention and education initiatives

A consent-based offence provides a better foundation for education and prevention projects. It can send the message that all sexual activity should be grounded in consent. It better supports education about online activities, with a focus on ethical and consent-based practices, and that any taking or sharing of sexual images without consent is wrong, harmful and criminal.

### c) Overlapping or unclear motivations

Men's motivations for cyberflashing are [varied and overlapping](#) including, misogyny, causing distress, sexual gratification, humour, boosting status amongst peers, sexual intimidation and transactional. There is *no evidence* that the harms experienced by women occur only as a result of specific motives. Further, proving a specific motive is challenging due to a lack of evidence and because motivations are complex and overlapping.

### d) More straightforward prosecutions

Motive requirements invariably mean that only some forms of abuse are covered and create a hierarchy of abuses which do not reflect victims' experiences. For example, a law requiring proof of intention to cause distress (or awareness of risk of causing distress) will exclude some forms of cyberflashing, as well as making prosecutions more difficult.

We know from the law on sending sexual images with intent to cause distress (often problematically known as 'revenge porn') that the requirement to prove a motive to cause distress limits prosecutions. [Police and victims have reported](#) that investigations and prosecutions are not taken forward due to this threshold requirement.

### e) Follows international best practice

A consent-based cyberflashing offence has been [adopted in Texas](#) and is being debated in many other US states.

### f) Comprehensive law covering all cyberflashing

A consent-based offence will cover all forms of cyberflashing, regardless of the motives of the sender. For example, where the sender claims he sent the penis image as a joke, or to boost his status amongst friends, or for a bet or a dare, this conduct will be covered. There will, therefore, be no hierarchy between different victim-survivors dependent on the motives of the sender.

### g) Recognises the harms experienced by victim-survivors, regardless of sender's motives

A comprehensive consent-based offence recognises that some women experience considerable harms from cyberflashing and that these harms are not dependent on the motives of the perpetrator. Women may be sent unsolicited penis images while on public transport, for example, making them fearful and intimidated, regardless of whether the sender intended to cause them alarm or not.

**h) Consent is easily obtained and criminal charges easily avoided**

It is important to remember that avoiding being charged with a criminal offence is straightforward: all the sender needs to do is ask, would you like to see a picture of a penis?

**i) Prioritise women's sexual autonomy rather than men's entitlement to send penis images**

We are faced with a choice between requiring consent for all sexual activity, thereby respecting women's sexual autonomy and dignity, or privileging men's entitlement to send penis images without consent. The law should prioritise women's sexual autonomy due to the potentially harmful impacts of cyberflashing, and the ease with which consent can be obtained.

**j) If there is no harm, there will likely be no police report**

Even if a penis image sent as part of a 'loving relationship' technically comes within the law, this is not a significant problem, as there is unlikely to be a police report, and no incentive or public interest in pursuing a prosecution. The Law Commission respond that this is not sufficient 'curb the reach' of the offence. However, prosecutorial discretion is an inherent part of the criminal justice process and filters out many reports where there is no demonstrable harm or public interest in prosecution.

Further, it is better that we have a cyberflashing criminal law that seeks to protect and provide redress for women who are at risk of experiencing serious harms, than focus on crafting a law protecting men's wish to send penis images whenever and to whoever they wish.

## **5. Arguments against consent-based offence and responses**

**(a) Isn't a consent-based cyberflashing too broad?**

The Law Commission reject a consent-based offence as being 'very broad' and they recommend limiting the scope of any new measure to only those circumstances where it can be proven the perpetrator intended to (a) cause distress, alarm or humiliation to the recipient, or (b) was motivated by sexual gratification and the sender was reckless as to whether he caused distress, alarm or humiliation.

**(b) Surely the law should not include a 'shared picture of a friend on a nudist beach'?**

The Law Commission wants to ensure any law does not apply to 'shared picture of a friend on a nudist beach'. They say such a scenario is 'not meaningfully harmful' and would not come within their motive-based law, as there would unlikely be evidence of an intention to cause distress, alarm or humiliation.

This approach neglects to understand that receipt of a penis image without consent is experienced by many as a sexual violation and breach of sexual autonomy in and of itself, regardless of any further harms. These violations are 'meaningful' to many women.<sup>3</sup>

This approach also appears not to understand that the recipient may well experience significant consequential ('meaningful') harms on receipt of this image; it cannot be assumed there is no harm. The recipient may experience psychological harm, for example, perhaps due to the receipt of the image triggering previous experiences of abuse, including perhaps abuse/harassment from the sender or the person in the image.

Being a 'friend' does not insulate us from experiencing a violation, or other harms. In particular, research with young teenage girls has found that they are more bothered by unsolicited penis images sent by peers, than by strangers. Girls, therefore, are experiencing cyberflashing as *worse* when perpetrated by 'friends'.<sup>4</sup>

This approach also does not account for reality that some women and young teenagers experience harassment or abuse *as a result of receiving* a penis image without consent, due to assumptions that they are in some way responsible or implicated. This has also been reported as being experienced by some black and minoritised women experiencing violence and abuse.<sup>5</sup>

Therefore, a 'friend' sending an image of a 'friend' has harmful effects in and of itself, as well as potentially triggering further harmful impacts. Further, for some women, being sent an unsolicited penis image by a friend is *worse* than from strangers; and for some, just the receipt of the image risks abuse and harassment.

The motive-based approach appears to privilege the entitlement of the male friend to send penis images, over the woman's right not to have sexual images intruding on her personal space and autonomy without her consent.

### **(c) Surely the law should not cover a 'loving relationship' where a man sends a penis image to his partner without consent?**

The Law Commission consider that where someone in a 'loving relationship' sends a penis image to their partner without consent, this does not meet a 'threshold for criminality'. This scenario would be unlikely to fall within the Law Commission's motive-based law as ostensibly there would be no evidence of an intention to cause distress, alarm or humiliation.

However, even if the partner experiences no harm, this remains non-consensual sexual conduct which should not be condoned. The law should promote a consent culture, whereby consent is central to all sexual activity.

It should also not be presumed that in a 'loving' relationship being sent a penis image without consent and without warning is always experienced as harmless. It may ignite previous experiences, and/or it may be experienced as threatening or coercive.

Further, in shaping the law around this scenario, and an assumption that there will never be harm in such cases, we risk denying protection, recognition and redress to those who do not experience receipt of penis images in the ways imagined.

### **(d) Surely the law should not criminalise young boys sending penis images as a joke?**

The Law Commission justify a motive-based offence on the basis that it would exclude the 'juvenile' who sends penis images in a 'genuine (even if misguided) attempt at humour'. A consent-based offence may criminalise such conduct if the image is sent without consent and there is no reasonable belief in consent.

*Humour motives in general:* Committing an offence for a joke, an attempt at humour, does not usually preclude criminal prosecution, as the conduct has itself been judged to be wrongful and victims may experience harms. This is also the case with cyberflashing where sending an unsolicited penis image should always be understood as wrong, due in part to the risk of adverse impacts. Other examples include hateful or racist speech which may be deemed funny by perpetrators, but the motive of humour does not insulate them from prosecution.

*Humour motives of young boys:* In terms of young men, they may be sending penis images as a joke. They may be sending to cause distress, though proving such motivations is always difficult due to a lack of evidence. More commonly, they are sending penis images in the hope of gaining nudes in return which they then use to boost their status amongst their peers. Teenage girls commonly experience being sent penis images in this context as coercive; they are regularly being pressured to send nudes. Some also experience abuse and harassment simply as a result of receiving the images.

*Prioritising boy's entitlements to send images, or girls rights to freedom:* If this scenario is used to justify a motive-based offence, the law will be prioritising boy's attempts at humour (even if 'misguided') over girls' experiences of relentless harassment and pressure. If the law requires proof of specific motives,

most if not all of teenage girls' experiences will fall outside of the law. We will be offering no protection to teenage girls; we will not be recognising their experiences.

*Prosecutorial guidelines for under 18s:* In terms of prosecutions of under 18s, there should be no rush to criminalise. Schools, authorities and prosecutors should only act where it is in the public interest to do so (and the Law Commission recommend prosecutorial guidelines for under 18s that take account of matters such as age, intent, harm etc).

*Criminal law provides foundation for consent-based education:* However, the criminal law can provide a valuable foundation for education and prevention work with young boys (and girls), making clear that consent is central to all sexual activity, including the taking, sharing and sending of sexual images. This also supports education around image-based sexual abuse, including taking or sharing intimate images without consent (sometimes problematically called 'revenge porn').

**(e) Isn't non-consent difficult to prove in sexual offence cases?**

A motive-based offence means no need to prove consent. It is true that consent can be difficult to prove in sexual offence cases: sometimes due to a lack of evidence, often due to inadequate investigations. While there are real challenges with proving consent in sexual offence cases, a major impetus for a cyberflashing law is to raise awareness, challenge the normalisation of the practice, support prevention and education initiatives and to let victims know that their experiences are understood and recognised. These aims are met by focussing on the core wrong of non-consent and therefore justify this focus, in preference to a law requiring proof of specific motives.

**(f) Isn't requiring reasonable belief in consent one of the reasons for low prosecutions and convictions in sexual offence cases?**

How police, prosecutors, judges or juries interpret 'reasonable belief' can vary and can sometimes be victim-blaming. For example, it is sometimes argued that a defendant had a reasonable belief in consent because of prior sexual activity by the complainant, or prior consent. These are significant challenges for sexual offence prosecutions, arising largely from problematic cultural attitudes. This is a wider problem than cyberflashing and we need to tackle attitudes and legal interpretations more broadly, rather than refuse to adopt the most appropriate cyberflashing law.

**(g) Don't we already have too many criminal offences?**

It is sometimes said that the criminal law is being used too often for wider social problems: the concern with 'over-criminalisation'. While this debate raises some legitimate concerns, it is largely gender-free, neglecting to consider that while the law may over-criminalise some actions, it *under-criminalises* and *under-polices* many harms experienced by women.

Therefore, criminalising conduct such as cyberflashing can also be seen as the law (finally) 'catching-up' with some women's experiences.

**(h) Isn't it better to deal with cyberflashing through education rather than the criminal law?**

The criminal law is only ever the first step towards change. It can send a profound message to society that this conduct is recognised as wrong and harmful, and is not condoned.

It says to victims that we hear you, we recognise your harms, we want you to have the option of securing justice and redress.

The criminal law provides a valuable foundation from which to develop education and prevention projects. Education can start from the premise that consent is essential for all sexual conduct and activity. Education and culture change is essential to securing lasting change.

**(i) In reality, the specifics of the law don't matter?**

It might be argued that it doesn't matter what the specifics of the law are, the public message will be heard that cyberflashing is wrong.

But, in practice the details do matter. There will be no deterrent if there are no prosecutions. And if we tell women we've introduced a new law to protect them, for them only to find that there are few prosecutions and only some women are, we cannot be surprised if they express even more resentment and lack of trust in a failing criminal justice system.

**(j) Don't all criminal offences require proof of motives?**

No. There is no requirement in the criminal law to specify particular motives for criminal offences. In fact, it is only in exceptional cases that a motive is specified in the criminal law, such as for racially aggravated offences. The criminal law is generally concerned with an individual's intention to carry out the particular act (eg punch/kill) rather than *why* they have done a particular act. The *why* (motive) becomes relevant in terms of evidence and sentencing; but is not relevant regarding the elements of the crime itself.

**(k) Don't most sexual offences require proof of motives?**

No. For example, in the Sexual Offences Act 2003, approximately three-quarters of offences do not require a specific motive. The 'guilty mind' required to be proven is the intention to commit the non-consensual act. This emphasises that the offending actions are 'sexual offences' due to the nature of the acts (i.e. sexual acts) and *not* a particular motive.

**(l) Does removing motive requirements make this a strict liability offence?**

No. A strict liability offence is where an offence is committed, regardless of the intentions (or motives) of the defendant and even where the acts are accidental. Many health and safety laws are strict liability offences.

In the consent-based cyberflashing offence, the prosecution have to prove the 'guilty mind' (*mens rea*) that the perpetrator intended to send a penis image and that they had no reasonable belief in consent.

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<sup>1</sup> See further: Clare McGlynn, '[A proposed new law on cyberflashing is welcome, but it has one major flaw](#)' *The Independent*, 22 July 2021; Clare McGlynn and Kelly Johnson (2021) *Cyberflashing: recognising harms, reforming laws* (Bristol University Press); Clare McGlynn and Kelly Johnson, '[Law Commission Harmful Online Communications consultation](#)' December 2020; Clare McGlynn, '[Written evidence submitted to Draft Online Safety Bill Joint Committee](#)' OSB0014, September 2021, available at: <https://committees.parliament.uk/writtenevidence/39012/pdf/>

<sup>2</sup> Section 34 Meaning of "disclose" and "photograph or film"

1) The following apply for the purposes of section 33, this section and section 35.

(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.

(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.

(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.

<sup>3</sup> For example, victims have described how they felt 'totally' and 'utterly' violated by having unsolicited penis images 'forced' upon them, with one summarizing the practice as 'at its core, it's very invasive'. A study by Marcotte et al found almost a third of women reported feeling 'violated' after being sent unsolicited penis images. Discussed in McGlynn and Johnson, *Cyberflashing: recognizing harms, reforming laws* (2021), pp 41-45.

<sup>4</sup> See: Jessica Ringrose, Kaitlyn Regehr and Sophie Whitebread (2021) '["Wanna trade?" Cisheteronormative homosocial masculinity and the normalization of abuse in youth digital sexual image exchange](#)' *Journal of Gender Studies*.

<sup>5</sup> See Ringrose et al above, and evidence submission by Angelou Centre, quoted in Law Commission [report](#), para 6.44.