

Why a Consent-Based Cyberflashing Offence will be More Straightforward, Comprehensive and Effective than the Current Proposal in the Online Safety Bill

[Professor Clare McGlynn QC \(Hon\)](#), Durham University

Law reform options

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

- a comprehensive '[consent-based](#)' offence requiring proof of non-consent; or
- a limited 'motive-based' offence, as proposed in [section 156](#) of the Online Safety Bill, where there is only a criminal offence on proof of specific motives of the offender, such as causing distress, alarm or humiliation, or sexual gratification and being reckless as to causing distress (as currently included in [section 156](#) of the Online Safety Bill).

Why adopt a consent-based cyberflashing offence?

1 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 an intimidating, harmful intrusion into their personal space and daily lives.

2 No evidence that only certain motives cause the harms of cyberflashing

Men's motivations for cyberflashing are [varied and overlapping](#) and include misogyny, causing distress, sexual gratification, humour, boosting status amongst peers and transactional. There is *no evidence* that harms experienced by women are worse when offenders are motivated by the specific purposes identified in 'motive-based' proposals: eg a woman on public transport may feel threatened when sent unsolicited penis images, regardless of whether the sender intended to cause alarm or as 'banter' amongst friends.

3 Consent-based offence is comprehensive covering all forms of cyberflashing

A consent-based offence covers *all* forms of cyberflashing, regardless of the motives of the sender. Motive requirements create an unjustified hierarchy of abuses and victims which do not reflect victims' experiences.

4 Motive requirements will limit police investigations and prosecutions

Requiring proof of specific motives will make investigations and prosecutions more difficult. Evidence to support the motive needs to be secured, requiring additional time, effort and resources. We know from [police and victims](#) that investigations and prosecutions for sharing sexual images without consent (often problematically referred to as 'revenge porn') are not taken forward due to similar motive requirements.

5 Consent should be the focus of prevention and education initiatives

A consent-based offence provides a better foundation for education and prevention. It sends the message that all sexual activity should be grounded in consent including all online activities, and that *any* taking or sharing of sexual images without consent is wrong, harmful and criminal.

6 Consent-based law follows international best practice

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

7 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?

8 Motives not required for most criminal offences including sexual offences

Most criminal offences do not require proof of specific motives. The criminal law is generally concerned with an individual's intention to carry out the particular act (eg assault someone) rather than *why* they have done it. The *why* (motive) becomes relevant in gathering evidence and sentencing, but not as an element of the crime itself. In the Sexual Offences Act 2003, three-quarters of offences do not require a motive. Proof of a 'guilty mind' (*mens rea*) is still required in a consent-based offence: proof of intention to distribute a penis image without consent and no reasonable belief in consent. It is *not* a strict liability offence.

9 Consent prioritises protecting girls' from harassment over boys 'misguided' humour

-The proposed cyberflashing offence is based on Law Commission proposals which justify a motive-based offence as it excludes the 'juvenile' who sends penis images in a 'genuine (even if misguided) attempt at humour'. However, hateful or racist speech may be deemed funny by perpetrators, but the humour motive does not insulate them from prosecution.

-Young boys may send penis images as a joke or to gain nudes in return which they then use to boost their status amongst their peers. Teenage girls commonly experience being sent penis images as coercive; some also experience harassment simply as a result of being sent the images.

-If this scenario is used to justify a motive-based offence, the law will be prioritising boy's attempts at 'misguided' humour, over girls' experiences of relentless harassment. It would mean that most, if not all, 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. We must not unduly criminalise under 18s, with schools and prosecutors only acting in the public interest (and following specific prosecutorial guidelines for under 18s).

10 Consent prioritises women's autonomy over men's entitlement to send penis images

-The Law Commission wants to exclude a 'shared picture of a friend on a nudist beach' which they say is 'not meaningfully harmful'. This neglects to understand that many women experience receipt of an unsolicited penis image as a sexual violation in and of itself - violations that are 'meaningful' to many women. The recipient may also experience significant consequential ('meaningful') harms.

-Being a 'friend' does not insulate us from experiencing a violation, or other harms. For some women, being sent an unsolicited penis image by a friend is *worse* than from strangers due to the breach of trust; and for some, just the receipt of the image risks abuse and harassment.

-The motive-based approach risks privileging the entitlement of the male friend to send unsolicited penis images, over women's right not to have sexual images intruding on her personal space and autonomy without her consent. All he needs to do is ask if she wants to see the penis image.

Proposed draft text revising [section 156](#) of the Online Safety Bill:

Sending etc photograph or film of genitals

In the Sexual Offences Act 2003, after section 66 insert—

"66A Sending etc photograph or film of genitals

(1) A person (A) who intentionally sends or gives a photograph or film of any person's genitals to another person (B) commits an offence if –

(a) B does not consent to the sending or giving of the photograph or film, and

(b) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

~~*(a) A intends that B will see the genitals and be caused alarm, distress or humiliation, or*~~

~~*(b) A sends or gives such a photograph or film for the purpose of obtaining sexual gratification and is reckless as to whether B will be caused alarm, distress or humiliation.*~~

For further info, see Clare McGlynn, '[Cyberflashing: consent, reform and the criminal law](#)' (2022) *Journal of Criminal Law*; Clare McGlynn and 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.