

NSW Government Discussion Paper: sharing intimate images without consent

Evidence submitted by [Professor Clare McGlynn](#), [Centre for Gender Equal Media](#), Durham University, UK Lessons from the United Kingdom

Expertise of Professor Clare McGlynn

[Professor McGlynn](#) worked closely with Members of Parliament, policy-makers and voluntary organisations to introduce new laws criminalising the non-consensual sharing of private, sexual images ('revenge porn') in England & Wales. She has given evidence before the Scottish Parliament on this topic, and worked with parliamentarians to shape the new Scots law, as well as giving presentations across Ireland, Iceland and Australia on lessons learnt from the UK experience. She is a regular media and public commentator regarding 'revenge porn' and online abuse.

Structure of evidence submission

This evidence submission addresses specific questions in the discussion paper, as well as making four preliminary points:

1. Terminology matters and recommendation re term 'image-based sexual abuse';
2. Positive impact of new criminal legislation in England & Wales;
3. Criminal regulation justified as being human rights enhancing;
4. Sharing intimate images without consent as a form of 'cultural harm'; and
5. Sharing of intimate images without consent as a form of sexual offence.

Terminology Matters: image-based sexual abuse

6. The decision of the discussion paper not to use the term 'revenge porn' is welcomed. This term is unduly limiting and inappropriate. The term 'revenge porn' only covers one particular form of online harassment and abuse involving private, sexual images. While using this term has worked to secure the attention of the media and policy-makers, it's time to widen the focus of law and policy to address all forms of what can be called [image-based sexual abuse](#).¹
7. The term *image-based sexual abuse* as suggested by [Clare McGlynn & Erika Rackley](#) better describes the nature and harms of these activities. This term goes beyond *distribution* of images and videos, and also covers the non-consensual *creation* of sexual imagery: for example photos and videos created by means of 'upskirting', forms of voyeurism and sexual extortion, or recordings of sexual assaults. It also covers perpetrators threatening to share images, commonly part of a pattern of coercive behaviour in abusive relationships.

Positive Impact of New & Specific Criminal Offence to Address Image-Based Sexual Abuse

8. Following the introduction in 2015 of the new English criminal law offence – disclosing private sexual photographs and films with intent to cause distress – there has been an important rise in the number of reports made to the police concerning this sort of harm.² Therefore, the law has resulted

¹ For further info, see research briefing available here: <https://claremcglynn.com/revenge-pornography/revenge-pornography-quick-reads/>

² <http://www.bbc.co.uk/news/uk-england-36054273>

in more victims reporting to the police, and more prosecutions being undertaken (though the number of cases resulting in a conviction remains low).

9. In addition, a Government-funded helpline has taken thousands of calls from victims that suggests a growing awareness that these are harmful activities that law and policy is beginning to address.³ The Government also funded an awareness-raising campaign.⁴

Criminal Regulation is Human Rights Enhancing

10. Legal regulation of image-based sexual abuse should be seen as enhancing human rights protections. This point was well made by the UK's [Joint Parliamentary Committee on Human Rights](#) in the context of laws introduced in 2009 to criminalise the possession of extreme pornography:
"We welcome, as a human rights enhancing measure, the provision in the Bill to extend the current offence of possession of extreme pornography to include possession of pornographic images depicting rape and other non-consensual sexual penetration. We consider that the cultural harm of extreme pornography, as set out in the evidence provided to us by the Government and others, provides a strong justification for legislative action, and for the proportionate restriction of individual rights to private life (Article 8 ECHR) and freely to receive and impart information (Article 10 ECHR)".⁵
11. By analogy, regulation of the non-consensual distribution of private, sexual images can enhance the protection of human rights by enabling an online culture in which all can participate freely and without fear of harassment and abuse.

Sharing Intimate Images without Consent is a form of Cultural Harm

12. Criminal regulation can also be justified on the basis of the cultural harm of this form of online harassment and abuse. [Cultural harm](#) means the role of online harassment and abuse in creating a climate in which violence against women is (or at least appears to be) condoned, and in which equality and dignity are not protected.⁶
13. We are currently at risk of entrenching a culture that accepts the non-consensual creation or distribution of intimate images as a 'harmless prank'; where the vast majority of perpetrators are rarely reprimanded while victims continue labelled hypersensitive or humourless. In this context, online abuse such as 'revenge pornography' normalizes non-consensual sexual activity. While this results in serious harms to many individuals, it also adversely impacts on all members of society (though its effects are felt by women and girls in particular).
14. This means that online harassment and abuse, including 'revenge porn', helps to sustain a culture – a set of attitudes that are not universal but which extend beyond those immediately involved – in which sexual consent is regularly ignored. And by extension, this means that acts of sexual violence which are also predicated on an absence of consent are less likely to be recognized as such.

Sharing of Intimate Images without Consent is a Sexual Offence

15. Sharing intimate images without consent is best conceptualised as a sexual offence, and described in law and policy as such. How we frame our law has important ramifications in terms of understanding the nature of the offending (its serious harms), and informing educative and preventative responses (focus on issues of sexual consent, sexual double standards).

³ <http://www.revengepornhelpline.org.uk/>

⁴ <https://www.gov.uk/government/publications/revenge-porn-be-aware-b4-you-share>

⁵ <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/189/18904.htm>

⁶ <http://freespeechdebate.com/en/discuss/the-cultural-harm-of-rape-pornography/>

16. *Victims experience image-based sexual abuse as a form of sexual assault:* Women who have their private sexual images distributed without their consent have spoken about how they experience this abuse as a form of sexual offence. For example: Jennifer Lawrence (start of *Hunger Games*) referred to the extensive distribution of her naked images following a hack of the iCloud as a “sex crime” and Chrissy Chambers (a YouTube star) who had images of a sexual assault distributed without her consent, has argued for the person who distributed the images to be held “accountable for sexual assault”.⁷
17. *The images are sexual* and the harm comes from the fact that it is *sexual* images that are shared without consent; the images go viral because they are *sexual*. Non-sexual images would simply not have the same potency to cause harm and abuse; nor would thousands of others distribute the images unless they were sexualised. Further, the images often end up on pornography websites, some specifically focussing on ‘revenge porn’.
18. *Sexualised nature of abuse:* The harassment and abuse which women suffer when their private, sexual images are shared without consent comes from the sexualised nature of the abuse and the sexual double standard when women are castigated for exercising sexual agency. Women suffer harassment and abuse because they have ‘allowed’ images to be taken, or they have taken images themselves. The online abuse which accompanies distribution of private sexual images includes sexual threats (rape threats), as well as abusive comments about the victim’s appearance, body, sexuality and sexual agency.
19. *Harms are to sexual freedom and autonomy:* Sharing private sexual images without consent is a form of exploitation of an individual’s sexual identity and infringes their sexual autonomy. All of us should be free to create or share private sexual images without fear of them being distributed without our consent. The distress caused by the distribution of their private sexual images and the way women are told to self-censor to avoid becoming victims of ‘revenge porn’, restricts the individual’s willingness or ability to exercise their rights to sexual autonomy and expression.

Definition of ‘Intimate Image’

What images should be captured by the new offence/s?

20. Definitions vary considerably between jurisdictions and therefore the following recommendations reflect experience across the UK and underpinning concepts for this field of law:
 - a. *‘pornographic photoshopping’:* where a pornographic image is superimposed on the head/part body of a person and created/distributed without consent. Scots law does cover pornographic photoshopping, and the Irish Law Commission has recommended a new law covers this practice. However, English law does not cover photoshopping which has been the subject of media criticism due to recent cases involving this harmful practice.
 - b. *Sufficiently broad to reflect changing mores and technology:* in the area of online abuse, including image-based sexual abuse, people are regularly finding new ways of perpetrating harm. The law must be sufficiently flexible to be able to respond to changing technological practices and social mores.
 - c. *Include body parts covered by underwear:* it is important that images of ‘upskirting’ are covered by any new law and such images usually involve the victims wearing underwear.

⁷ <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover>; <http://nymag.com/thecut/2016/06/hillary-asked-how-shell-help-stop-revenge-porn.html>

- d. *Protect privacy in public*: One problem with the definition from South Australia, in focussing on 'private acts', is that it would not cover 'upskirting'. The focus on 'private acts' is common to laws relating to more traditional forms of voyeurism (spying on toilets, changing rooms, bedrooms). However, in seeking to protect traditional ideas of privacy (in the privacy of your own home), it neglects to protect privacy in public which is violated by practices such as 'upskirting'.

Should the definition include images which are 'intimate' but not sexual, including by reference to cultural context?

21. No. On balance, it is recommended that any new law focus on the non-consensual creation/distribution of private, *sexual* images, rather than 'intimate' images more generally. This is because of the expressive role of the criminal law; sending a message that this conduct is harmful and unacceptable. This symbolic message, with the power to change attitudes and behaviour, is weakened if the focus or remit of the law is not clear.
22. The harm comes from the widespread dissemination of private, *sexual images* as it is the images that go viral on social media, and on the internet more generally, and that end up on dedicated porn websites.
23. It is the disclosure of these sexual images that can that lead women to self-censor and to retreat offline. While there is undoubtedly harm in the distribution of 'intimate' but not sexual images without consent, this is a different form of harm and should be regulated in other ways, including via the civil law.
24. In Scotland, prior to enacting the new law covering image-based sexual abuse, there was a debate about extending the law to cover other forms of breaches of privacy, including non-consensual distribution of written text (eg in cases of domestic abuse), supported by Scottish Women's Aid. The Scottish Government rejected this argument and while the Scots law uses the language of 'intimate', it only covers private, sexual images.

Taking or Recording an intimate image without consent

Should the new offence/s include not only the sharing but also the taking/recording of an intimate image without consent?

25. Yes. The harms of image-based sexual abuse stem from both non-consensual creation and distribution of private sexual images. When images go viral across the internet, and result in harassment and abuse, the harms felt by victims and the adverse impact on their lives is similar whether or not the images were created with consent or not.
26. The Irish Law Commission have recommended that a new Irish law cover the non-consensual creation of private sexual images. In English law, no specific offence covers creation, such as 'upskirting', leading to considerable public debate in view of the growing evidence of prevalence and harm.

Should existing NSW offences be amended to apply when images are taken for purposes other than sexual gratification or sexual arousal?

27. Yes. Traditional laws on voyeurism presumed the practice was undertaken for the purposes of sexual gratification. Laws in many jurisdictions, including the English Sexual Offences Act 2003, therefore only cover acts with sexual intent (and do not cover distribution). This is a good example of how laws adopted with only very specific activities in mind have easily become out of date.

28. It is vital to focus on the harms to victims, not the motives of perpetrators. The harms to the victims arise from whatever the motives of perpetrators, be they sexual, for social notoriety, for financial gain or to cause distress.

Fault Element

How should the fault element be defined in a new offence of sharing intimate images without consent?

29. *Intentionally or recklessly create/distribute private sexual images without consent*: This is the most appropriate form of fault element. It will cover the wide range of practices of image-based sexual abuse and focuses on the harms of the victims. It is the approach in Illinois, USA.
30. *No requirement to have intention to cause distress, or show actual distress*: A number of jurisdictions, including England and Scotland, limit the scope of the law by requiring an intention to cause distress or harm to the victim. This unduly limits the law as it potentially precludes harmful acts where the motivations were financial, for social notoriety and where there was no intention of the victim ever finding out about the harmful acts. While a recklessness provision does mean some of these acts can be covered, the message the law sends remains problematic. These harms and serious adverse impacts result whatever the motivations of the perpetrator.

Should the offence include an element of recklessness as to whether consent was given?

31. Yes. Scots Law includes recklessness, and the recommendations of the Irish Law Commission follow this best practice. English law does not extend to reckless conduct, meaning that many forms of image-based sexual abuse are not covered: this includes distribution by hackers, by those able to establish distribution for social bonding or 'a laugh', by those who have no intention of the victim finding out images were either taken or distributed. There is currently on-going public debate over the need to reform English law in view of its limited approach.

Should the new offence include threats to share intimate images?

32. Yes. This is particularly important in terms of challenging forms of coercive control and abuse in domestic abuse relationships. Scots law includes threats to distribute images without consent, a progressive stance compared with the failure of English law to appreciate the prevalence and significance of such threats (as clear from evidence from Women's Aid organisations across the world).

How should the fault element of an offence of threatening to share an intimate image be defined?

Should the offence include an element of recklessness?

33. Scots law includes recklessness for threats to disclose which has the benefit of ensuring the harm to the victim is appropriately recognised. No statutory definition of threat is provided.

Should threats be defined to include both explicit and implicit threats made by conduct?

34. Yes. Implicit as well as explicit threats should be covered to reflect the reality of patterns of coercive behaviour.

Appropriate penalties

What penalty should the new offence carry?

35. In Scotland, the penalty is: 'on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both)'.

36. There is a lower punishment in England & Wales: 'on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both), and on summary conviction, to imprisonment for a term not exceeding 12 months or a fine (or both)'.
37. In practice, and in light of low number of prosecutions (despite increasing reports to the police), what is vital is that cases are processed through the criminal justice system resulting in convictions. This requires police training and understanding of these new fields of investigation and prosecution. This is far more important than a nominal high imprisonment tariff.

Should the Court be able to order an individual convicted of an offence take down/remove the image in question? Should a breach of an order amount to a further offence?

38. Yes, yes. Civil remedies to accompany the criminal penalties are vital. A number of civil remedies have been successfully used in cases of revenge porn in England & Wales and Australia, but bringing such actions can be difficult, expensive and time-consuming.
39. A statutory civil remedy would provide victims with an additional avenue for redress, while recognizing the varied ways in which they experience the harm and how they might want redress. This can be introduced together with the new criminal offence, along the lines of the English Protection from Harassment Act 1997.