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Chair, Women & Equalities Committee
House of Commons
London SW1A 0AA

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Dear Chair

Cyberflashing offence and Online Safety Bill

I am writing to follow-up on my [evidence](#) to your Committee as part of its inquiry into Pornography and its Impact on Violence against Women and Girls, particularly regarding the proposed cyberflashing offence in the Online Safety Bill.

In particular, I am responding to the [evidence](#) from Chris Philp MP, Parliamentary Under-Secretary of State (Minister for Tech and Digital Economy) given to the Committee on 22 June 2022 and the [letter](#) to the Committee from the Law Commission of 28 June 2022.

In summary:

- The choice to be made is between (a) the Law Commission that only want to criminalise 'culpable cyberflashing' as they consider sending penis images without consent is not always wrongful conduct, and (b) a consent-based approach which holds that sending penis images without consent is wrongful per se and consent should be the foundation for all sexual activity.
- Examples given of supposedly benign sending of penis images, such as streakers or nudist sunbathers, are not in fact caught by a consent-based offence. Further, even if there are harmless, rarefied scenarios that might be included, the focus should be on the high prevalence of cyberflashing and the real-world, everyday experiences of women and young girls.
- While there is undue focus on complainants' behaviours in sexual offence cases when examining whether they consented, current problematic criminal justice practices should not dictate the substantive content of new laws.
- Motive thresholds are difficult to evidence and limit prosecutions, as now accepted by Law Commission in its report on intimate image abuse. Further, penis images are commonly sent for motives not included in the current proposed offence, leaving significant gaps in coverage.
- The community standards of dating apps such as Grindr, where exchanging penis images is said to be common, are clear that consent should be secured before sharing penis images.
- A recklessness standard, while not as clear and comprehensive as consent, is one option for reform that will cover a broader range of conduct than the current proposal. A proposed recklessness offence is appended.

Differing approaches to wrongfulness of sending genital images without consent

In essence, the Law Commission do not consider that sending genital images without consent is always or necessarily wrongful conduct that should be criminalised, hence why they propose a motive-based, more limited offence. They consider that sending a genital image 'even if sent non-consensually' does not 'inevitably cause harm'. They also state that the offence covers 'so broad' a range of conduct that the offence ought not to be made out 'merely because' the recipient had not consented. They state that their proposal only covers 'culpable cyberflashing', implying that there are cases of cyberflashing which do not constitute wrongful, culpable conduct.

On the contrary, the argument in favour of a consent-based cyberflashing offence is that sending a genital image to someone without their consent is wrongful conduct per se and that we should take steps to prevent and reduce this behaviour through criminalisation. Consent should be the foundation for all sexual activity, including sending penis images. A consent-based law is comprehensive and sends a straightforward message to society that all non-consensual sexual activity, including cyberflashing, is wrong. The consent approach also draws on experience in other countries, particularly the United States, where consent, not motives, forms the basis of cyberflashing laws in Texas, with similar provisions in other states.

Concerns that 'non-harmful' conduct covered by consent-based offence

The Law Commission state that without their motive requirements, the law might cover 'non-harmful' behaviours, such as medical images shared by doctors or images of streakers. However, if someone takes a photo of a streaker's genitals and wishes to send it to another, the argument from a consent standard is that they should seek consent first, rather than just send the genital image. In relation to doctors, if genital images are shared *for medical purposes*, this is part of the professional job and role for which there will be consent to take, share and receive these images (and reasonable belief in consent).

On a similar theme, one of the DCMS officials, in her evidence to your Committee, justified the motive-based provision on the basis that it would exclude the sending of an image with a nudist sunbather in the background, as well as young people who lack maturity of judgment. In fact, an accidental image taken and sent of a nudist sunbather would not be covered by a consent-based offence, as indeed [confirmed](#) by the Law Commission in their summary report on intimate image abuse, where they reject such an argument and make the case for a consent-based intimate image abuse offence.

As regards young people, again the Law Commission in their recent [report](#) on intimate image abuse make clear that offences should continue to apply to both adults and young people, noting that the criminal justice system is long used to responding to the specific interests and needs of young people and risks of criminalisation. The Law Commission highlight the importance of CPS guidance that ensures prosecutions are only taken in the public interest and that other measures are in place, such as education. The same points apply, particularly the importance of CPS guidance, to cyberflashing offences.

Overall, the consent standard is justified on the basis that action should be taken in light of the realities of this behaviour in the real world, with surveys suggesting 47% of young women

experience cyberflashing, with even higher levels (76%) for under 18 girls. These should be the experiences at the forefront of reform debates.

Whether harms experienced by all victims

The Law Commission state that in some cases recipients of genital images do not experience any harm and that the level of harm experienced varies across victims. It may be that a particular recipient of a penis image is not harmed, sometimes because they are so inured to being sent them and/or seek to minimise the conduct as a way of carrying on everyday life.

However, just because some individuals may not experience *direct* harm does not mean there should be no offence. Indeed, the Law Commission propose a consent-based offence of sharing intimate images without consent (with no motive requirement), yet this includes circumstances where some individuals do not experience harm and indeed welcome the image being shared (as found in [research](#) where some individuals experience this as 'funny' or 'flattering').

The point is that whether it is sending a penis image or sharing an intimate image, doing so without consent is wrongful and potentially harmful conduct that should be criminalised, regardless of the perpetrator's motive and without requiring evidence that all individuals affected report direct harms.

The Law Commission state that it would 'stretch credibility' to argue that harm is equivalent between receiving a dick pic from a stranger on a train and a photo from a friend of a nude political protest. I am not aware of any arguments being put forward that all victims experience the same harms. Indeed, many of the arguments about criminalisation of cyberflashing and intimate image abuse are based on the notion that the harms experienced by women vary considerably depending on their own perspectives, history and experiences, rather than on the specific type of offence or method of perpetration (understood as the continuum of sexual violence).

If the challenge is to the argument that motive should be irrelevant for establishing a basic consent-based offence (as I have argued), this is not on the grounds that all offences are experienced at the same level of harm, but precisely because it is not possible to say that an offence motivated by sexual gratification, for example, is necessarily experienced as worse and more harmful, than one motivated by humour, banter or similar. In any event, the Law Commission also make the case for motives not being relevant in the context of intimate image abuse offences and the same principles apply to cyberflashing.

Investigation and trial processes and possible impact on complainants of consent standard

The Law Commission state that we should be wary of the impact on complainants of a cyberflashing law based on consent, as this would direct the investigative and trial process onto the behaviour of complainants. This argument, also made by the Ministry of Justice, rightly recognises the problems with current criminal justice processes which focus unduly on the behaviour of complainants.

However, the problems with current investigatory and trial processes in sexual offence cases should not be used as the basis for introducing a more limited cyberflashing offence. Indeed, the Government has invested millions in funding projects such as Project Soteria Bluestone to reform police practices to make them more defendant focussed. The law on cyberflashing should be based on consent, at the same time as criminal justice processes are reformed.

Difficulties of prosecuting motive thresholds

In fact, the real investigatory and prosecutorial challenge, if the Law Commission's motive-based offence is enacted, will be meeting the high threshold of proof of specific motives. Chris Philp MP, in his evidence to your Committee, noted that the motive requirements dictate 'a slightly higher threshold'.

We know from existing offences of sharing sexual images without consent and with intent to cause distress, that the motive threshold limits investigations and prosecutions. This evidence has been gathered in numerous [studies](#) over recent years and is the [experience](#) of the Revenge Porn Helpline. This is also now accepted by the Law Commission in their intimate image abuse report (eg para 6.38).

While the Law Commission state that the CPS 'did not raise concerns about the intention elements of the offence', with respect, the CPS does not have a strong track record in prosecuting non-consensual sharing of sexual images, nor many other sexual offences, especially those involving technology and online abuse. Rather, experience shows that prosecution rates are low and motive thresholds are one of the reasons.

In his evidence to your Committee, Chris Philp MP did not foresee problems with the CPS establishing motives due to the 'context' in which penis images are shared being 'very persuasive' in helping the CPS. This neglects to recognise that there are many reasons why men send penis images without consent that are not captured by the motive requirements and there is therefore simply no evidence on which to base a prosecution. For example, studies have found that men commonly send penis images as a way of 'showing off, complimenting, hooking up with or getting nudes in return', with another finding that 77% sent images in hope of getting nudes in return or meeting up in real life. Only 18% sent images for sexual gratification and only 15% for reasons of power, control, to cause distress.

Therefore, the motive-based offence is problematic due to;

- (a) there being many cases where the penis images are sent for motives other than causing distress or sexual gratification and
- (b) even in those cases where this is the dominant motive, there is often not contextual evidence to prove this and
- (c) even where there might be evidence, practice from similar offences suggest this high threshold limits investigations and prosecutions.

CPS discretion

The Law Commission state that it is 'no answer to the problem of over-criminalisation to argue that the CPS would not prosecute'. Nonetheless, in relation to their proposal for a consent-based intimate image abuse offence, the Law Commission explain that CPS guidance will limit the application of the law to young people (and therefore reduce risks of criminalisation). It also states the following:

'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](#))

Option of a recklessness standard for cyberflashing offence

The Minister raised in his evidence the possibility of revising the offence to include recklessness, following a suggestion from Dame Maria Miller MP in the Public Bill Committee. The Law Commission state that this is a 'relatively low threshold' and reject this argument.

The Committee will know that recklessness is used in similar laws in other jurisdictions, such as in Scotland where the offence of non-consensual sharing of intimate images can be committed where 'A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress'.

Further, the recently enacted upskirting and downblousing offences in Northern Ireland, in section 1(c) of the [Justice \(Sexual Offences and Trafficking Victims\) Act \(Northern Ireland\) 2022](#), introduce a recklessness standard. This was specifically introduced following the report of the Northern Ireland Assembly's Justice Committee expressing concerns that the originally proposed motive-based offences were too limited in scope.

As an Appendix to this letter, I have drafted an amendment that would introduce a recklessness element, in addition to the motive-requirements, based on the wording of the Northern Irish provisions. A recklessness standard is not as clear and comprehensive as consent, but would still catch a wider range of conduct than the current motive-based offence.

Responding to Minister's and official's evidence to the Committee

The Minister, Chris Philp MP, in his evidence to your Committee, stated that: 'Most criminal offences do have a mens rea component ... Where you have a purely consent-based offence, one is departing from the general approach that the criminal law has taken for hundreds of years.'

This is an incorrect statement regarding the proposed consent-based offence. As drafted (see my [evidence](#) to the Public Bill Committee), the proposed offence clearly requires proof of mens rea, namely the intention to distribute a genital image without consent and without reasonable belief in consent. This formulation of mens rea is very familiar in the criminal law and indeed in many sexual offences. I have written to the Minister on this point.

The Minister also 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'. It should be noted that, in fact, the community standards of such dating websites, such as [Grindr](#), are very clear that consent should be sought before penis images are shared.

A further, more detailed response to the Law Commission's proposals can be found in my article ['Cyberflashing: consent, reform and the criminal law'](#) (2022) *Journal of Criminal Law*.

Please do let me know if I can be of any further assistance in your inquiry into these matters.

Yours sincerely



PROFESSOR CLARE McGLYNN QC (Hon)

APPENDIX – Cyberflashing offence including recklessness

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) 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,
- or**
- (c) A intends that B will see the genitals and is reckless as to whether B will be caused alarm, distress or humiliation and B is alarmed, distressed or humiliated.**

...

- (7) A person who commits an offence under this section is liable –
- (a) on summary conviction, to imprisonment for a term not exceeding ~~6~~12 months or a fine (or both);
 - ~~(b) on conviction on indictment, to imprisonment for a term not exceeding two years.~~