

Written evidence from the Law Commission [HBA0039]

Introduction

- 1.1 The Law Commission was set up by the Law Commissions Act 1965 as an independent body to review and recommend reform to the law of England and Wales. The Law Commission aims to ensure that the law is fair, modern, simple and cost-effective.
- 1.2 In 2019, the Ministry of Justice asked us to conduct a review of the existing criminal law as it relates to taking, making and sharing intimate images without consent. We looked at the current range of offences that apply in this area and identified the gaps in the scope of protection currently offered. In February 2021, we published a consultation paper¹ with provisional proposals for reform to the law, on which we then consulted the public. On 7 July 2022 we published our final report² making recommendations to Parliament, Government, and other bodies to improve the criminal justice response to this abusive conduct. Our recommendations will create an intimate image abuse regime that appropriately addresses wrongful and harmful behaviour and provides consistent and effective protection for victims.
- 1.3 As part of this project, we considered intimate image abuse in the context of so-called honour-based abuse. The evidence we heard, analysis we conducted, and recommendations we made relate to the following questions in the Committee's call for evidence:
 - (1) What forms of violence against women and girls are motivated by so-called honour? Are these different forms understood by the Government, police and other agencies?
 - (2) Is the current law in relation to honour-based abuse adequate to protect victims? If not, what should change?
- 1.4 In this evidence, we first set out briefly the scope of our intimate image abuse project. We then set out the relevant parts of our project that demonstrate that:
 - (1) intimate image abuse is a form of violence against women and girls that can be motivated by so-called honour;

¹ Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf>. A summary of the consultation paper is also available: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/03/Intimates-Images-summary-final.pdf>.

² Intimate image abuse: a final report (2022) Law Com No 407: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Intimate-Image-Abuse-Report.pdf>. A summary of the final report is also available: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Intimate-Image-Abuse-summary-of-report.pdf>.

- (2) intimate image offences are not currently reflected in the relevant CPS guidance³ as an offence that may be committed in the context of honour-based abuse; and
- (3) current criminal offences may not sufficiently address the harmful conduct of exposing someone to a risk of so-called honour-based abuse.

Intimate image abuse

- 1.5 The non-consensual taking and sharing of intimate images can have a significant and long-lasting impact on victims. The harms they experience are serious and significant. These can include psychological harm such as anxiety, depression and post-traumatic stress disorder (PTSD), worsening physical health and financial harm either through time off work or through withdrawing from online spaces which reduces access to networking opportunities. In some cases, there have been reports of attempted suicide and self-harm.
- 1.6 Currently, there is no single criminal offence in England and Wales that governs the taking, making and sharing of intimate images without consent. Instead, there is a patchwork of offences⁴ that have developed over time, most of which existed before the rise of the internet and use of smartphones. Each offence has different definitions and fault requirements, and there are some behaviours that are left unaddressed. The limitations and gaps in the current law include:
- (1) Inconsistency in the types of intimate images that are covered. For example, upskirting is currently a criminal offence but downblousing is not. Sharing an altered image, such as a deepfake, is also not covered.
 - (2) Not all motivations for taking or sharing an image without consent are covered by the current offences. Whilst motivations such as obtaining sexual gratification and causing distress are covered (although not consistently), other motivations such as sharing the images as a joke or to coerce an individual are not covered at all.
 - (3) Ancillary provisions and special measures such as automatic anonymity for complainants are inconsistently available.
- 1.7 To provide more appropriate and consistent protection for victims, we recommended a new tiered framework of offences which uses one consistent definition of an intimate image, covers the full range of perpetrator motivations, and applies protective measures for victims consistently. This framework comprises the following new offences:

³ Crown Prosecution Service “Legal Guidance: So-Called Honour-Based Abuse and Forced Marriage” (26 June 2019) <https://www.cps.gov.uk/legal-guidance/so-called-honour-based-abuse-and-forced-marriage>.

⁴ The main offences we refer to as the current offences are: the recording of a private act for the purpose of sexual gratification under section 67 of the Sexual Offences Act 2003 (the “voyeurism offence”); taking an image underneath clothing of genitals or buttocks, or of someone breastfeeding, for the purposes of either obtaining sexual gratification or to cause humiliation, alarm or distress under section 67A of the Sexual Offences Act 2003 (the “upskirting offence” and the “breastfeeding voyeurism offence”); and sharing or threatening to share a private sexual image for the purpose of causing distress under section 33 of the Criminal Justice and Courts Act 2015 (the “disclosure offence”).

- (1) A “base” offence of taking or sharing an intimate image without consent.
- (2) More serious offences:
 - (a) An offence of taking or sharing an intimate image without consent with the intention of causing the victim humiliation, alarm or distress.
 - (b) An offence of taking or sharing an intimate image without consent with the intention that the image will be looked at for the purpose of obtaining sexual gratification.
 - (c) An offence of threatening to share an intimate image.
- (3) An offence of installing equipment in order to commit a taking offence.

1.8 We have defined an “intimate image” as an image that is either sexual, nude, partially nude, or of toileting. These kinds of images show something that is inherently personal, private and intimate. Some images will fall into these categories but are less inherently private or intimate, such as images of people kissing. Consequently, we recommended that the definition of “intimate” should exclude images where they only depict something that is ordinarily seen on a public street, with the exception of intimate images of breastfeeding which would not be excluded.

1.9 In November 2022, the Government announced their intention to implement our recommended framework of new offences.⁵

Intimate image abuse as a form of violence against women and girls that can be motivated by so-called honour and the inadequacies in the current law

1.10 In our consultation paper we first described how intimate image abuse may occur in the context of so-called honour-based abuse.⁶ Stakeholders had told us about intimate images that were taken or shared without consent, causing significant harm to victims, for cultural or religious reasons which can include so-called honour-based abuse. This included, for example, an image of a woman who usually wears a hijab for religious or cultural reasons, being pictured without the hijab and with bare shoulders exposed suggesting she is topless, or pictured without the hijab kissing a man who is not her husband. Such images may not fall within the scope of the current offences, and would not, without specific provision, fall within our definition of “intimate”. We described the harm that the non-consensual taking, sharing, or threatening to share intimate images can cause to victims of religious or cultural groups.⁷ This includes financial harm, controlling behaviour, ostracisation, abuse and forced marriage. One victim was encouraged to end her own life. We considered the evidence we had heard about the conduct involving the use of images deemed intimate by religious groups and the harm that results.⁸ We asked for consultees’ views on whether and to what

⁵ “New laws to better protect victims from abuse of intimate images” Gov.uk (25 November 2022): <https://www.gov.uk/government/news/new-laws-to-better-protect-victims-from-abuse-of-intimate-images>.

⁶ Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 3.37 to 3.41.

⁷ Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 5.79 to 5.86.

extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted.⁹

- 1.11 During our three-month public consultation, we invited written responses to our consultation questions (submissions could be made by email, letter or via an online submission tool) and held a number of roundtable events and one-to-one meetings. As part of this we engaged with individuals and organisations with expertise and experience in the area of intimate image abuse in the context of so-called honour-based abuse including the Crown Prosecution Service, Karma Nirvana, Muslim Women’s Network UK, the Angelou Centre and Imkaan, and South West Grid for Learning (who run the Revenge Porn Helpline). We received 354 written responses to our consultation, and analysed these alongside our discussions from consultation events and meetings, to inform our final recommendations.
- 1.12 In our final report¹⁰ we set out the evidence submitted on this issue and identified three associated lines of policy:
- (1) We acknowledged that there are additional barriers that minoritised women and girls face¹¹ when accessing the criminal justice system as a victim of intimate image abuse. We did not make any recommendations specifically on this issue, instead noting that these barriers are not exclusive to intimate image abuse and therefore required more holistic consideration that was beyond the remit of our project.
 - (2) We concluded that for the purposes of intimate image offences, “intimate” images should be defined as images that are either sexual, nude or partially nude, or of toileting, and not of a kind ordinarily seen on a public street. We carefully considered whether images that are considered intimate by religious or cultural groups, that would not fall within this definition of “intimate”, should be included in intimate image offences. We were particularly alive to the significant harm that we had heard can be caused to victims when such images are taken and shared without consent, including in the context of so-called honour-based abuse. Ultimately though, we recommended that images that are deemed intimate by religious or cultural groups that do not meet our recommended objective definition of “intimate” should *not* be included in intimate image offences. Intimate image offences require a clear and consistent definition of “intimate”. Broadening that definition to include more subjective understandings of “intimate” would create offences that are so wide as to risk significant overcriminalisation and inconsistent application. It would lead to a lack of understanding of what behaviour is criminal and when. Instead, we considered what other protection there was against conduct involving images that causes

⁸ Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, paras 6.105 to 6.125.

⁹ Intimate Image Abuse: A consultation paper (2021) Law Commission Consultation Paper No 253, para 6.125.

¹⁰ Intimate image abuse: a final report (2022) Law Com No 407, paras 3.219 to 3.265.

¹¹ For example, lack of contextual understanding of the victim’s faith or community, language barriers and fears of deportation.

significant harm to victims, but that falls outside intimate image offences. That led us to consider the final policy issue, below.

- (3) The final issue we therefore discussed was images used to expose the person depicted to a risk of serious harm, including so-called honour-based abuse.¹² We explored whether other offences could appropriately criminalise the act of exposing someone to such abuse or violence, including:
- (a) harm-based communications offences as recommended by the Law Commission;¹³
 - (b) harassment or stalking offences under sections 2, 2A, 4 and 4A of the Protection from Harassment Act 1997;
 - (c) controlling or coercive behaviour under section 76 of the Serious Crime Act 2015;
 - (d) information offences under section 170 of the Data Protection Act 2018; and
 - (e) encouraging or assisting offences under sections 44 to 46 of the Serious Crime Act 2007.

In our view, these existing offences may cover some circumstances where someone exposes another to a risk of serious harm including so-called honour-based abuse, but not all. Such circumstances are not limited to conduct involving images deemed intimate, or even to images. Harm similar to the harm caused by taking and sharing images could be caused by: telling someone of behaviour; sharing a document (such as a birth or marriage certificate), an online profile (such as a dating profile or private Twitter account), or a physical location that similarly “exposes” the conduct or identity of an individual breaching a so-called code of honour that might lead to violence being used against that individual. Therefore, we concluded that it was not appropriate to extend the criminal law only in respect of conduct involving images, and a broader approach to the issue was needed which was beyond the remit of our project. We made two recommendations in this regard:

- (a) We recommend that the Government consider whether any further offences are necessary to ensure the behaviour of exposing someone to a serious risk of significant harm in the context of an abusive dynamic is appropriately criminalised.¹⁴

¹² For example, where that image of a woman pictured without her hijab kissing a man who is not her husband is sent to her family knowing that the behaviour pictured would be considered a breach of the family’s code of behaviour and may lead to violence being used against the woman pictured for that perceived “transgression”. We also considered images used to expose someone to a risk of serious harm in other contexts, such as homophobic or transphobic violence. For example, where an image of A kissing another person (B) of the same sex is sent to A’s family who knowingly hold extreme homophobic views and may subject A to violent abuse as a result of discovering A’s sexuality.

¹³ Modernising Communications Offences: A final report (2021) Law Com No 399. At the time of writing the intimate image abuse report, the government had included a harm-based communications offence based on these recommendations in the Online Safety Bill. That offence is not in the most current version of the Bill.

- (b) We recommend that the Crown Prosecution Service consider including intimate image offences in the list of offences in their guidance on so-called honour-based abuse and forced marriage.¹⁵

1.13 These recommendations demonstrate our view, based on the evidence and analysis conducted in our intimate image abuse project, that image abuse is conducted in the context of so-called honour-based abuse, and that the current law may not sufficiently address conduct that exposes someone to the risk of so-called honour-based abuse (as opposed to the acts of abuse or violence themselves). The Government response to our final report has not confirmed whether the Government will act on these specific recommendations.¹⁶

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¹⁴ Recommendation 10. Intimate image abuse: a final report (2022) Law Com No 407, para 3.264.

¹⁵ Recommendation 11. Intimate image abuse: a final report (2022) Law Com No 407, para 3.265.

¹⁶ Response from the Government to the Law Commission intimate image abuse final report, Rt Hon Dominic Raab MP (25 November 2022): <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/11/Annex-B-2022-11-14-Sir-Nicholas-Green-Law-Com.pdf>.