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Response to	<b>Consultation on the taking, making and sharing of intimate images without consent</b>
Issued by	<b>Law Commission</b>
Link to consultation	<a href="https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/">https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/</a>
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## About the Magistrates Association

The Magistrates Association is an independent charity and the membership body for the magistracy. We work to promote the sound administration of the law, including by providing guidance, training and support for our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the courts and the broader justice system. With over 14,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

## Consultation Questions

### Consultation Question 1.

**6.46 We provisionally propose that an image which:**

**(1) shows something that a reasonable person would consider to be sexual because of its nature; or**

**(2) taken as a whole, is such that a reasonable person would consider it to be sexual, should be included within the definition of an intimate image.**

Yes, we agree.

### Consultation Question 2.

**6.59 We provisionally propose that the definition of an intimate image should include nude and semi-nude images, defined as images of a person's genitals, buttocks or breasts, whether exposed or covered with underwear, including partially exposed breasts, whether covered by underwear or not, taken down the depicted person's top.**

Yes, this approach seems sensible.

### **Consultation Question 3**

**6.62 We provisionally propose that the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue should be included in a definition of a nude or semi-nude image.**

**Do consultees agree? Do consultees think there are additional examples that should be included in a definition of nude or semi-nude?**

Yes, we agree. We offer no additional examples in the definition of nude or semi-nude.

### **Consultation Question 4.**

**6.71 We provisionally propose that any garment which is being worn as underwear should be treated as underwear for the purpose of an intimate image offence.**

Yes, we agree. We note that it may also be sensible to include other transparent, non-underwear garments in the definition. For example, a t-shirt which is wet would be intimate, but would not be included in the definition of a garment which is being worn as underwear.

### **Consultation Question 5.**

**6.75 We provisionally propose that the definition of “nude or semi-nude” should include images which have been altered but leave the victim similarly exposed as they would be if they were wearing underwear. Do consultees agree?**

Yes, we agree. Within the context the context that there is a reasonable implication that the image is exposed as they would be wearing underwear or semi-nude.

### **Consultation Question 6.**

**6.79 We consider that images where the victim is not readily identifiable should not be excluded from our offences.**

Yes, we agree that images where the victim is not readily identifiable from the image itself should not automatically be excluded from the offences, and will be dealt with as an evidential matter. We note that the act of removing the identification of the individual does presuppose that they were aware of the potential harm that could be caused if they were identifiable.

### **Consultation Question 7.**

**6.88 Can consultees provide us with examples of images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear? Can consultees provide insight into the harm caused by the non-consensual taking or sharing of these kinds of images?**

In the example raised, Clare notice that Peter is trying to take a picture of her in her underwear. The harm caused to Clare is the emotional and psychological harm of his intent, together with possible fear of what he or someone else might try to do in the future.

#### **Consultation Question 8.**

**6.89 Do consultees think that images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear, should be included within the definition of an intimate image?**

Yes, we agree.

#### **Consultation Question 9.**

**6.92 We provisionally propose that “private” images should be captured by a sharing offence as well as a taking offence.**

**Do consultees agree?**

Yes, it is sensible to have the same approach to both sharing and taking for the reasons stated.

#### **Consultation Question 10.**

**6.125 We welcome consultees' views on whether and to what 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.**

The perpetrator might be aware that the image is intimate, but to be an offence it should have to be proved that there is sufficient culpability – that they intended to cause distress, harm or humiliation. We note that it may be helpful to widen the definition from ‘considered intimate by the person depicted’ to one which is considered intimate within the religious group in question.

#### **Consultation Question 11.**

**6.139 Are consultees aware of any images “of a kind ordinarily seen in public” that should be excluded from the scope of intimate image offences (other than images of people kissing)?**

No.

### **Consultation Question 12.**

**6.140 Do consultees think that there should be:**

**(1) a “not ordinarily seen in public” element to intimate image offences; or**

**(2) a list of images that should be excluded from intimate image offences, for example images of people kissing?**

We agree that the element ‘not ordinarily seen in public’ should be included. However, having a definitive list of exclusions is inflexible and can become outdated. It may be preferable to have a list which is not definitive but is used to assist prosecutors and judges/magistrates.

### **Consultation Question 13.**

**7.14 Are there any forms of “taking” that the current voyeurism or “upskirting” offences, or the taking offence in section 1 of the PCA 1978, fail to capture?**

No, not that we know of.

### **Consultation Question 14.**

**7.24 We provisionally propose that a taking offence should only include such behaviour where, but for the acts of the perpetrator, the image would not otherwise exist.**

**Do consultees agree?**

Yes, we agree that this is a sensible definition. For example, victims may not be aware that a Snapchat photo, due to be deleted soon after, can be copied and saved on another device.

### **Consultation Question 15.**

**7.28 Do consultees have evidence of, or a comment on the prevalence of, installing equipment in order to take an intimate image without consent, where the taking did not then occur?**

No, we do not.

### **Consultation Question 16.**

**7.34 We provisionally propose that the behaviour prohibited by the current voyeurism and “upskirting” offences should be combined in a single taking offence. Do consultees agree?**

Yes, this would simplify the law and make it easier for Police and Prosecutors and mitigate against any gaps in the law.

#### **Consultation Question 17.**

**7.48 We provisionally propose that taking or recording an image of someone’s breasts, or the underwear covering their breasts, down their top without consent (“downblousing”) should be a criminal offence. Do consultees agree?**

Yes, we agree. Like up-skirting, this is a gross invasion of privacy and a form of harassment which makes women feel insecure and vulnerable. The wording used in the New South Wales legislation is clear.

#### **Consultation Question 18.**

**7.86 We provisionally propose that it should not be an offence to possess an intimate image without consent, even when there was never any consent to possession. Do consultees agree?**

We have concerns about how it would be practical to bring a case based on this approach. The harm is caused having obtained/retained the image without the consent, or sharing the image. Some cases where images are obtained by hacked accounts would be covered by existing legislation.

#### **Consultation Question 19.**

**7.107 We invite consultees’ views on the following three questions:**

**(1) How prevalent is making intimate images without consent, without subsequently sharing or threatening to share the image?**

No comment.

**(2) What motivates individuals to make intimate images without consent, without sharing or threatening to share them?**

No comment.

**(3) How, and to what extent, does making intimate images without consent (without sharing or threatening to share them) harm the individuals in the images?**

No comment.

#### **Consultation Question 20.**

**7.124 We provisionally propose that “sharing” an intimate image should capture:**

**(1) sharing intimate images online, including posting or publishing on websites, sending via email, sending through private messaging services, and live-streaming;**

**(2) sharing intimate images offline, including sending through the post or distribution by hand; and**

**(3) showing intimate images to someone else, including storing images on a device for another to access and showing printed copies to another.**

**Do consultees agree?**

Yes, we agree.

**7.125 We invite consultees' views on whether there any other forms of sharing, not outlined in the paragraph above, that should be included in the definition of "sharing"?**

No comment.

#### **Consultation Question 21.**

**7.138 We provisionally propose that a sharing offence should include images which have been altered to appear intimate (e.g. images which have been photoshopped to appear sexual or nude and images which have been used to create "deepfake" pornography).**

**Do consultees agree?**

Yes, we agree. The harm caused can be very great and the prevalence of deepfake porn websites has increased exponentially in recent times, and is so advanced that images can appear to be very realistic with the added likelihood of wide scale distribution making the harm caused greater.

#### **Consultation Question 22.**

**7.153 Can consultees provide us with examples, or comment on the prevalence, of:**

**(1) images depicting sexual assault being shared with the person in the image;**

No comment

**(2) intimate images that were taken without consent, or where the person in the image was assured that the image had been deleted, being shared with the person in the image; and**

No comment

**(3) intimate images being shared with the person in the image by someone who did not take the image and was not originally sent the image with consent?**

No comment

**7.154 We invite consultees' views as to whether there are there other examples of sharing an intimate image with the person in the image without consent, not included in the paragraph above, which should be criminalised?**

No comment.

**7.155 Can consultees describe the harm that sharing an intimate image with the person in the image without consent can cause?**

As suggested by A Whiston-Dew & T Thompson, sharing the image would remind them of the control they can exert and potential for blackmail which would be highly distressing. The distress would be even greater if the image had been either taken without the person's consent or if they had refused to destroy it.

### **Consultation Question 23.**

**8.27 We provisionally propose that the consent provisions in sections 74 to 76 of the Sexual Offences Act 2003 should apply to intimate image offences. Do consultees agree?**

Yes, it makes sense to extend these two provisions to these new offences.

### **Consultation Question 24.**

**9.12 We provisionally propose that proof of actual harm should not be an element of intimate image offences. Do consultees agree?**

Yes, we agree and harm can be taken into account at sentencing.

### **Consultation Question 25.**

**10.40 We provisionally propose that any new offences of taking or sharing intimate images without consent should have a fault requirement that the defendant intends to take or share an image or images without reasonably believing that the victim consents. Do consultees agree?**

Yes, we agree.

### **Consultation Question 26.**

**10.60 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —**

**(a) V does not consent to the taking or sharing; and**

**(b) D does not reasonably believe that V consents.**

**Do consultees agree?**

Yes, we agree.

**10.61 We invite consultees' views as to whether there are examples of behaviours which would be captured by this provisionally proposed offence, taking into account our provisionally proposed defences, which should not be criminalised?**

No comment.

**Consultation Question 27.**

**10.73 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —**

**(a) V does not consent; and**

**(b) D does so with the intention of humiliating, alarming or distressing V or with the intention that D or another person will look at the image for the purpose of humiliating, alarming or distressing V.**

**Do consultees agree?**

Yes, we agree and this creates a consistent approach.

**Consultation Question 28.**

**10.79 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —**

**(a) V does not consent;**

**(b) D does not reasonably believe that V consents; and**

**(c) D does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at the image of V.**

**Do consultees agree?**

Yes, we agree but note that when re-sharing it may be difficult to prove the intention that a third party would be sexually gratified.

**10.80 We invite consultees to provide examples where D intentionally shares an intimate image of V without V's consent for the purpose of obtaining sexual gratification (whether for themselves or another).**

No comment.



### **Consultation Question 29.**

**10.87 We invite consultees' views as to whether there should be an additional offence where the intent is to make a gain.**

This could be an additional offence, but this would increase the seriousness of the offence as it would be more likely to be part of a wide scale operation with increased harm and culpability. Alternative, culpability provisions could be made which cover intent to make financial gain.

### **Consultation Question 30.**

**10.93 We invite consultees' views as to whether there should be an additional offence of intentionally taking or sharing an intimate image without consent with the intent to control or coerce the person depicted.**

Yes, we agree that this should be an additional offence.

### **Consultation Question 31.**

**10.95 We invite consultees' views as to whether having a separate base offence and more serious additional intent offences risks impeding the effective prosecution of intimate image abuse.**

No comment.

### **Consultation Question 32.**

**11.81 We provisionally propose that where an intimate image was taken without consent in a private place, a reasonable expectation of privacy test should not apply. Do consultees agree?**

Yes we agree on the grounds that it would add an extra element for the prosecution to prove, and would be an addition hurdle to successful prosecutions.

### **Consultation Question 33.**

**11.108 We provisionally propose that where:**

**(1) an intimate image is taken in a place to which members of the public had access (whether or not by payment of a fee); and**

**(2) the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude,**

**the prosecution must prove that the victim has a reasonable expectation of privacy in relation to the taking of the image.**

**Do consultees agree?**

Yes, we agree.

**11.109 We provisionally propose that legislation implementing this test make clear that a victim who is breastfeeding in public or is nude or semi-nude in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of any image. Do consultees agree?**

Yes, we agree.

**Consultation Question 34.**

**11.138 We provisionally propose that it should not be an offence to share an intimate image without the consent of the person depicted where:**

**(1) the intimate image has, or the defendant reasonably believed that the intimate image has, previously been shared in a place (whether offline or online) to which members of the public had access (whether or not by payment of a fee), and**

**(2) either the person depicted in the image consented to that previous sharing, or the defendant reasonably believed that person depicted in the image consented to that previous sharing.**

**Do consultees agree?**

Yes, we agree.

**Consultation Question 35.**

**12.21 We invite consultees' views as to whether threats to take, make or share an intimate image with the intent of coercing sexual activity should raise an evidential presumption that there was no consent to sexual activity.**

No comment.

**Consultation Question 36.**

**12.23 We invite consultees to provide examples where threats to take, make or share intimate images have been used to procure or engage in sexual acts with a person with a mental disorder and information about the use of sections 34 to 37 of the Sexual Offences Act 2003 to prosecute such cases.**

No comment.

**Consultation Question 37.**

**12.116 We invite consultees to provide examples where threats to take intimate images have been made.**

No comment.

**Consultation Question 38.**

**12.119 We invite consultees to provide examples where threats to make intimate images have been made without an accompanying threat to share the image.**

No comment.

**Consultation Question 39.**

**12.137 We invite consultees to provide examples where a threat to share an intimate image of V is not directed at V, but is made to a third party.**

No comment.

**Consultation Question 40.**

**12.138 We provisionally propose that it should be an offence for D to threaten to share an intimate image of V, where:**

**(a) D intends to cause V to fear that the threat will be carried out; or**

**(b) D is reckless as to whether V will fear that the threat will be carried out.**

**Do consultees agree?**

Yes, and we agree that additional intent requirements are unnecessary as it is an actual harm element.

**12.139 We provisionally propose that the same definition of “intimate image” is used for both the offences of sharing and threatening to share an intimate image (which will include altered images). Do consultees agree?**

Yes, we agree.

**Consultation Question 41.**

**12.143 We invite consultees' views as to whether the prosecution in a threatening to share an intimate image case should be required to prove that the person depicted did not consent.**

No comment.

#### **Consultation Question 42.**

**13.193 We provisionally propose that there should be a defence of reasonable excuse available in the context of our provisionally proposed base offence which includes:**

**(1) taking or sharing the defendant reasonably believed was necessary for the purposes of preventing, detecting, investigating or prosecuting crime;**

**(2) taking or sharing the defendant reasonably believed was necessary for the purposes of legal proceedings;**

**(3) sharing the defendant reasonably believed was necessary for the administration of justice;**

**(4) taking or sharing for a genuine medical, scientific or educational purpose; and**

**(5) taking or sharing that was in the public interest. Do consultees agree?**

Yes, we agree as this is consistent with existing legislation. We note that the public interest defence must follow that for defamation which requires proof both that the statement, or part of it, related to a matter of public interest and that the defendant reasonably believed that publishing the statement was in the public interest.

#### **Consultation Question 43.**

**14.85 We provisionally propose that victims of the new intimate image abuse offences should have automatic lifetime anonymity. Do consultees agree?**

Yes, we agree that this should be automatic and not left to the discretion of the judge/bench. There is the risk that if the latter was the case, this could lead to a postcode lottery and be a deterrent for victims coming forward.

#### **Consultation Question 44.**

**14.89 We provisionally propose that victims of the new intimate image abuse offences should automatically be eligible for special measures at trial. Do consultees agree?**

Yes, in line with Sexual Offence cases and also in Domestic Abuse cases, victims of the new intimate abuse offences should be automatically eligible for special measures.

#### **Consultation Question 45.**

**14.93 We provisionally propose that restrictions on the cross-examination of victims of sexual offences should extend to victims of the new intimate image abuse offences. Do consultees agree?**

Yes, in line with Sexual Offence cases, we agree that restrictions on the cross examination of victims should be extended to the new intimate abuse offences. We note that in Domestic Abuse cases, courts should prohibit the cross examination of victims where self-represented.

#### **Consultation Question 46.**

**14.103 We provisionally propose that notification requirements should be automatically applied for the offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification when an appropriate seriousness threshold is met. Do consultees agree?**

Yes. The seriousness threshold is well laid out and the notification requirements assist the Police in managing offenders in their community and give future partners the right to know of if a partner had a history of disclosing private intimate images. We note that it would be helpful to have guidance available regarding the length of time on the register for different offences to reflect seriousness.

#### **Consultation Question 47.**

**14.114 We provisionally propose that Sexual Harm Prevention Orders be available for all of our provisionally proposed intimate image offences. Do consultees agree?**

Yes, we agree. The Orders can go some way to protect the public by making it difficult for the offender to re-offend, e.g. by restricting foreign travel and social media access.