

Cyberflashing: Consent, Reform and the Criminal Law

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journals.sagepub.com/home/clj**Professor Clare McGlynn**

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Abstract

In the context of growing calls for a new law criminalising cyberflashing – the digital distribution of penis images to another without consent – this article makes the case for a comprehensive, ‘consent-based’ criminal offence specifically targeting cyberflashing. It justifies this approach by examining the core wrongs of cyberflashing and suggests draft legislative text for such an offence. In making this case, the article analyses and rejects the Law Commission’s recent proposal for a ‘motive-based’ cyberflashing law. Ultimately, it is argued that while the Law Commission’s proposal is a welcome recognition of the harms of cyberflashing and need for reform, it does not go far enough to offer the redress victim-survivors are seeking, nor does it provide an appropriate normative foundation for education and preventative initiatives.

Keywords

Cyberflashing, unsolicited dick pics, image-based sexual abuse, sexual intrusion, exposure, flashing, intimate image abuse

Introduction

There are growing calls in England and Wales to introduce a new law to criminalise cyberflashing – the digital distribution of penis images to another person without the recipient’s consent.¹ For example, the

1. The term ‘cyberflashing’ is used here in preference to others such as (unsolicited) ‘dick pics’ as the latter risks minimising and trivialising the practice. The term cyberflashing emphasises the digital nature of the behaviour and connects it to physical exposure of the penis (‘flashing’), emphasising women’s interconnected experiences of sexual intrusions, harassment and sexual violence. For a more detailed discussion, see Clare McGlynn and Kelly Johnson, *Cyberflashing: Recognising Harms, Reforming Laws* (Bristol University Press 2021) 3–5. See also Laura Thompson, ‘DickPics are no joke: cyber-flashing, misogyny and online dating,’ *The Conversation* (3 February 2016) <https://theconversation.com/dickpics-are-no-joke-cyber-flashing-misogyny-and-online-dating-53843> and Rachel Thompson ‘It’s time to stop saying ‘unsolicited dick pics.’ And here’s why,’ *Mashable* (19 July 2019) <https://mashable.com/article/cyberflashing-unsolicited-dick-pics-terminology/?europe=true>.

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Government has identified cyberflashing as a particular concern and is considering law reform options², while the Law Commission has recommended a new criminal law offence covering some forms of cyberflashing where specific motives of the perpetrator can be proven.³ These proposals are part of the growing international recognition of the need for legislative action against what is also known as sending ‘unsolicited dick pics’, with recent offences introduced in Singapore and some states in the US.⁴

This recognition of the need for reform is the result of sustained and effective campaigning and journalism reporting the experiences of victim-survivors.⁵ In addition, in summer 2021, a review of sexual misconduct and violence in English schools revealed exceptionally high levels of online harassment of girls, including cyberflashing.⁶ Further, while we have known of the phenomenon of cyberflashing for many years⁷, it has become more common in recent years and, as with all forms of online abuse, has grown through the covid-19 pandemic.⁸

Accordingly, in this article, I put forward the case for a comprehensive, ‘consent-based’ criminal offence specifically targeting cyberflashing. Developing previous research which justifies a criminal law response and bespoke cyberflashing offence⁹, I detail here what a new consent-based criminal law might look like, including draft legislative text. In making this case, I also critique the recent Law Commission recommendations for a ‘motive-based’ cyberflashing law. Ultimately, I argue that while the Law Commission’s proposal is a welcome recognition of the harms of cyberflashing and need for reform, it does not go far enough to offer the redress victim-survivors are seeking, nor does it provide an appropriate normative foundation for education and preventative initiatives.

Cyberflashing and the Current Law in England & Wales

Before outlining the current gaps in legal provision, it is worth briefly identifying the spectrum of practices that fall within the term ‘cyberflashing’, all of which involve the sending of an unsolicited genital image to another, and most commonly involves men sending pictures of their penises to other individuals, mostly women, without their prior agreement or consent.¹⁰ Victim-survivor testimonies

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2. Home Office, *Tackling Violence Against Women Strategy*, 12 October 2021, available at: [Tackling violence against women and girls strategy \(accessible version\) - GOV.UK \(www.gov.uk\)](#). See also the recent statement by the UK Prime Minister that cyberflashing should be illegal: Emily Braeger and Michael Knowles, ‘Cyberflashing should be made illegal, says Boris Johnson’ *Daily Express* 18 November 2021 available at [Cyber flashing should be made illegal, says Boris Johnson | UK | News | Express.co.uk](#).
 3. Law Commission, *Modernising Communications Offences - A final report* (20 July 2021).
 4. For detailed discussion of cyberflashing laws in Singapore, Scotland, the US and Ireland, see Clare McGlynn and Kelly Johnson, ‘Criminalising cyberflashing: options for law reform’ (2021) 85(3) *Journal of Criminal Law* 171–188 and McGlynn and Johnson (n 1).
 5. See, in particular, the journalism of Sophie Gallagher giving voice to many victim-survivors, including ‘Cyber Flashing: 70 Women on what it’s like to be sent unsolicited dick pics’, *Huffington Post*, 21 May 2019, available at: https://www.huffingtonpost.co.uk/entry/cyberflashing-70-women-on-what-its-like-to-be-sent-unsolicited-dick-pics_uk_5cd59005e4b0705e47db0195.
 6. Ofsted, *Review of Sexual abuse in schools and colleges*, 10 June 2021, available at: [Review of sexual abuse in schools and colleges - GOV.UK \(www.gov.uk\)](#).
 7. See, for example: Sarah Bell, ‘Police investigate ‘first cyber-flashing’ case’, *BBC News*, 13 August 2015, available at: <https://www.bbc.co.uk/news/technology-33889225>.
 8. See for example: Sophie Gallagher, ‘“A pandemic in itself”: lockdown hasn’t stopped the spread of cyber flashing”, *The Independent*, 143 May 2021, available at: [How cyber flashing got worse in lockdown | The Independent](#); UN Women, *Online and ICT facilitated violence against women and girls during COVID-19* (2020) UN Women Headquarters, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-online-and-ict-facilitated-violence-against-women-and-girls-during-covid-19-en.pdf?la=en&vs=2519>.
 9. See McGlynn and Johnson (n 1 and 4).
 10. The focus of this article is the dominant practice of men distributing penis images to women and girls. The contexts and impacts of unsolicited penis images varies in differing communities, with Alexandra Marcotte et al finding that men identifying as gay or bisexual experienced similar rates of cyberflashing to women, though there were marked differences in men’s reactions relative to women, with men in these communities being more receptive to unsolicited penis images: ‘Women’s and Men’s Reactions to Receiving Unsolicited Genital Images from Men’ (2021) 58(4) *The Journal of Sex Research* 512–521.

demonstrate that women frequently experience cyberflashing in public spaces, with recent examples taking place in supermarkets, libraries, restaurants, museums, train stations and airports, as well as on various forms of public transport.¹¹ In many of these circumstances, unknown men located nearby send penis images to women's mobile phones through the use of 'Airdrop' or other WiFi and Bluetooth-based forms of technology. Cyberflashing is also a common experience on dating apps and, for many women and girls, it's an everyday experience when engaging with social media and other technologies in professional and personal capacities, with senders including acquaintances, colleagues and family members. Most recently, with the mass-shift to online working during the covid-19 pandemic 'zoomflashing' and 'zoombombing' have come to the fore with men exposing themselves or flashing unwanted penis or other pornographic images online.¹²

The growing body of research into online abuse and cyberflashing is revealing that cyberflashing is a common experience, with women, and young women in particular, disproportionately facing the highest rates of victimisation and disclosing the most negative impacts.¹³ Studies consistently find that around half of younger women (18–25) have received unsolicited penis images.¹⁴ Amongst under 18 s, the incidence is even higher, with Jessica Ringrose and colleagues finding that 76% of girls had received an unsolicited penis image.¹⁵ This finding is echoed by the report of the schools' regulator in England, Ofsted, which found that the vast majority of girls (9 in 10) said that being sent sexual images, being coerced into sharing images, or having their images re-shared was common.¹⁶ Further, data from police reports show that the majority of those reporting cyberflashing are under thirty, and that while still the 'tip of the iceberg', reports are increasing.¹⁷ Moreover, evidence suggests that the incidence has increased further since the covid-19 pandemic began as online abuse has risen considerably, with black and minoritised women particularly affected.¹⁸

As the occurrence of cyberflashing has grown, the focus has turned to the criminal law and the extent to which it offers some redress for this form of abuse. While there is a sexual offence of exposure covering some forms of physical 'flashing' in England and Wales, this is generally assumed to be limited to live, physical exposure of the genitals. There are other offences which may apply to some cases of cyberflashing, such as public order and harassment offences and the offence of outraging public decency, but the thresholds and definitions of these offences make prosecutions unlikely. This leaves the communications offences that may provide redress, if the various thresholds are established, such as proof of

11. For detailed discussion of victim-survivor experiences, see McGlynn and Johnson (n1 pp 14–23).

12. See, for example, *Crime Online* 'Florida man exposes himself to middle schoolers during online math class,' (4 May 2020) available at: <https://www.crimeonline.com/2020/04/05/florida-man-exposes-himself-to-middle-schoolers-during-online-math-class/>.

13. See further McGlynn and Johnson (n1 pp 12–14).

14. See, for example, YouGov 'Four in ten female millennials have been sent and unsolicited penis photo' (2018) <<https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic>> and Alexandra Marcotte et al, 'Women's and Men's Reactions to Receiving Unsolicited Genital Images from Men' (2021) 58(4) *The Journal of Sex Research* 512–521.

15. Jessica Ringrose, Kaitlyn Regehr and Sophie Whitehead, 'Teen Girls' experiences negotiating the ubiquitous dick pic: sexual double standards and the normalization of image based harassment' (2021) 85 *Sex Roles* 558–576. See also Jessica Ringrose, Kaitlyn Regehr and Sophie Whitehead (2021) "'Wanna trade?'" Cisheteronormative homosocial masculinity and the normalization of abuse in youth digital sexual image exchange' *Journal of Gender Studies*.

16. Ofsted, above n 6.

17. Emma Bowden 'Cyberflashing on trains "largely unreported"' *YahooNews* 19 February 2020 available at: <<https://www.yahoo.com/news/cyberflashing-on-trains-largely-unreported-despite-rise-in-incidents-19022020.html>> and Sophie Gallagher, above n 8.

18. See, for example, Glitch UK and End Violence Against Women, 'The Ripple Effect: COVID-19 and the Epidemic of Online Abuse', September 2020, available at: <<https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Glitch-and-EVAW-The-Ripple-Effect-Online-abuse-during-COVID-19-Sept-2020.pdf>>. Therefore, while women in general are particularly affected by online abuse and cyberflashing, there are differences between and among women which mean that some are targeted more than others, particularly younger and/or black and minoritised women. This intersectional context is vital to understanding the prevalence and experience of online abuse and cyberflashing, see further Bridget Harris and Laura Vitis 'Digital intrusions: technology, spatiality and violence against women' (2019) *Journal of Gender Based Violence* 4(3) 325–341.

intention to cause distress and that the images or videos can be said to be indecent or grossly offensive.¹⁹ However, the specificities of these provisions²⁰, coupled with a lack of knowledge of their potential applicability and disinclination to take cyberflashing seriously, mean that the criminal law in England and Wales offers little redress in practice to victim-survivors of cyberflashing.²¹

Therefore, English law is confusing, piecemeal, has significant omissions, the evidential hurdles are many and, consequently, prosecutions are extremely unlikely. The fact that cyberflashing is not clearly against the law in England and Wales is a source of great surprise and complaint for victim-survivors.²² The criminal law has ultimately failed to keep pace with the ways in which sexual harassment and abuse are perpetrated against women through new and evolving technology.²³ It was in this context that the English Law Commission was tasked with investigating the law on harmful and abusive online communications, including cyberflashing, and making appropriate recommendations for reform.²⁴

When considering the options for introducing a bespoke criminal offence targeting cyberflashing, I suggest that there are broadly three models from which to choose.²⁵ The first is a ‘consent-based’ model, the normative foundation of which is that the core wrong of cyberflashing lies in it being non-consensual sexual conduct. A consent-based offence will encompass all incidents of non-consensual distribution of penis images and is, broadly, the approach adopted in Texas and proposed in a number of other US states.²⁶ A second option, proposed by the Law Commission, is labelled here as a ‘motive-based’ offence where it is not the lack of consent that is key, but the sending of penis images with particular motives that is prohibited. The focus in this approach is on only criminalising particular malign motives, with non-consensual conduct motivated by humour, for example, falling outside of this particular model. A third option combines both consent and motives, as is the case in recent Singaporean legislation.²⁷ The discussion here focuses on the consent and motive-based options.

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19. Police record any reports of cyberflashing under section 1 of the Malicious Communications Act 1988. For a discussion of the current law in England and Wales applied to cyberflashing, see McGlynn and Johnson, n1 and 4.
 20. For example, section 1 of the Malicious Communications Act requires proof of an intention to cause distress, as well as the image being held to be indecent or grossly offensive. Crown Prosecution Service guidance states that for a message to be grossly offensive, it must be more than ‘offensive, shocking or disturbing’. Further, it is not clear that adult nudity is necessarily indecent. Overall, therefore, not all forms of cyberflashing could be prosecuted under these provisions. For a more detailed discussion, see McGlynn and Johnson n1 and 4. The Law Commission have proposed replacing the communications offences with a harm-based offence that would likely cover some cases of cyberflashing, though not all: Law Commission, above n 3.
 21. For a detailed discussion of the current law, see McGlynn and Johnson (n 1 and 4).
 22. See the discussion in Sophie Gallagher, ‘What Is Cyber Flashing – And Why Isn’t It Illegal In England And Wales?’, *Huffington Post* (10 July 2019) <https://www.huffingtonpost.co.uk/entry/flashing-is-illegal-offline-so-why-do-we-still-tolerate-it-online_uk_5cee8d67e4b0ae67105a3ed8>.
 23. This is similar to the law relating to image-based sexual abuse on which see further Clare McGlynn et al *Shattering lives and myths: a report on image-based sexual abuse* (2019) available at: <<http://dro.dur.ac.uk/28683/3/28683.pdf?DDD34+DDD19+>> and Erika Rackley et al, ‘Seeking justice and redress for victim-survivors of image-based sexual abuse’ (2021) 29 *Feminist Legal Studies* 293–322.
 24. See Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (2018) and Law Commission, *Harmful Online Communications: The Criminal Offences Consultation Paper No 248* (2020).
 25. These options apply in respect of an offence specifically targeting cyberflashing. A further alternative is to introduce a broader provision covering all forms of sexual intrusion or harassment, not only cyberflashing, similar to Sweden’s provisions on sexual molestation. For a discussion of such a legislative approach, see McGlynn and Johnson (n1 pp 120–124) and Linnea Wegerstad, ‘Theorising sexual harassment and criminalisation in the context of Sweden’ (2021) *Bergen Journal of criminal law and criminal justice*.
 26. For a detailed discussion of the US measures, see McGlynn and Johnson (n 1 pp 96–101). Note that such provisions apply to a far broader range of sexual and pornographic images. See also Erin Horan Mendez, ‘Don’t be a Dick by Sending a Pic: Texas attempts to attach the ‘dick pic’ epidemic by criminalising the sending of unsolicited sexually explicit photographs’ (2020) 58 *Houston Law Review* 511–536.
 27. Discussed in McGlynn and Johnson n1 pp 94–96.

Law Commission Proposals for a ‘Motive-Based’ Cyberflashing Offence

In July 2021, the Law Commission published its final report on harmful online communications which included a proposal for a sexual offence targeting some forms of cyberflashing.²⁸ The offence would apply where a defendant intentionally sends an image of any person’s genitals to another person, and it can be proven either the defendant intended that the victim would see the image or video recording and be caused alarm, distress or humiliation, or the defendant sent the image for the purpose of obtaining sexual gratification, and was reckless as to whether the victim would be caused alarm, distress or humiliation.²⁹

This proposal is a welcome recognition of the need for legislative interventions in light of the high incidence and harmful impacts of cyberflashing. Nonetheless, in recommending a ‘motive-based’ offence, the proposals do not offer a comprehensive response, with the result that some of the most common forms of cyberflashing will likely fall outside the scope of any legislation. Further, introducing a layer of complexity and additional thresholds is likely to result in fewer reports, investigations and prosecutions.

Law Commission Justifications for Criminalisation – the Prevalence of Cyberflashing

In setting out its rationale for law reform, the Commission emphasises that the ‘scale of cyberflashing is significant’.³⁰ The Commission specifically refer to recent increases in reports of cyberflashing to transport police, as well as the latest evidence of the high incidence of cyberflashing experienced by girls under 18.³¹ While the Commission use this prevalence data to justify recommendations for a new criminal law, as noted above, the offence would be limited to those cases where the specific motives identified by the Commission can be proven. However, such a limitation to only specific motives is not justified by the prevalence data which does not identify cyberflashing motivated by these purposes as being more common.

Nonetheless, we do know more about the experiences of girls under 18 who receive unsolicited penis images via social media, the majority of times from (older) strangers, but also commonly from their peers.³² One recent study found that 78% of young girl teenagers had been sent a penis image without their consent (data also referred to by the Law Commission). It is plausible that the older male strangers are sending unsolicited penis images for purposes of sexual gratification, but studies suggest that teenage boys are doing so often with the aim of receiving a nude in return.³³ Further, in seeking nudes, Ringrose et al. discuss how the boys are not necessarily doing so for their own sexual gratification, but for the purposes of further sharing images among their peers, as part of how boys’ ‘homosocial bonds’ are fostered.³⁴ The main point is that young teenage girls experience exceptionally high levels of cyberflashing, but the motivations of the young boys sending those images are more about seeking ‘digital trophies’ as part of the ‘cultural currency of reward’ for younger men, than about direct intentions to cause distress (or sexual gratification in sending a penis image).

28. Law Commission n3.

29. Law Commission n3 para 6.133. The definition of image would include still images as well as video recordings.

30. Law Commission n3, para 6.21–6.24.

31. The Commission also cite the evidence submission of McGlynn and Johnson which, they state, ‘referenced a wealth of data showing the scale of the problem’ (n3, para 6.24). This submission is available at: <<https://claremcglynn.files.wordpress.com/2020/12/mcglynnjohnson-law-comm-cyberflashing-december-2020-final.docx>>

32. Ringrose et al, ‘Teen Girls’, above n 15.

33. It is important to note that this is commonly experienced by girls as coercive. See Ringrose et al, ‘Wanna trade’ (n 15) and Jessica Ringrose et al, ‘Teen Girls’ (n 15).

34. Ibid.

Therefore, while the Commission cite the high rates of cyberflashing as justifying action, the evidence does not indicate that this prevalence is only or specifically attributable to the particular motives to be subject to criminal sanctions. Indeed, it seems likely that for some groups of women, particularly young girls, the most common experiences will not be covered by the Commission's proposals. Put another way, if prevalence is a justification for criminal sanctions, there is no justification in the prevalence data for limiting the scope of the offence to the specific motivations identified.

Law Commission Justifications for Criminalisation - the Harms of Cyberflashing

As well as considering prevalence to justify criminalisation, the Law Commission grounded its approach on evidence of the direct, consequential harms cyberflashing may induce, including some women experiencing this abuse as 'worse' than physical flashing.³⁵ It also expanded its analysis from its earlier consultation and now also identified humiliation as a harm experienced by women.³⁶ This development drew on consultation responses reporting women being embarrassed, disturbed, shocked, utterly horrified and ashamed, with one describing the 'heatwave of embarrassment' and how she was left 'feeling humiliated and with no ability to stand up for myself'.³⁷

The Commission's stance is a valuable recognition of some of the ways in which cyberflashing induces potentially significant harms. The overall emphasis, however, on direct psychological harms neglects the significance of autonomy and dignitarian harms, particularly the infringement of sexual autonomy and experience of sexual violation.³⁸ From this latter perspective, cyberflashing violates the dignity of victim-survivors by its deliberate infringement of their self-worth and failure to treat them with respect.³⁹ Dignity centres on an individual's status as a member of society in good standing and generates demands for recognition and treatment that accord with that status.⁴⁰ These ideas of dignity take the moral relevance of an act seriously, independent of its consequences, such that the dignity of a cyberflashing victim-survivor is violated simply by a 'failure to show respect' to the individual as an equal in society, regardless of the fact that she *also* may have suffered physical, psychological or other harms.⁴¹

It is from this normative foundation and understanding of autonomy and dignitarian harms that McGlynn and Johnson developed the conceptualisation of cyberflashing as a 'sexual intrusion'.⁴² Their approach focuses on the deliberately wrongful action of sending an unsolicited penis image – the 'intrusion' – regardless of the perpetrator's motives, or the victim-survivor's response. Intrusion also helps explain the phenomenological experience of cyberflashing, where an individual's inner

35. Law Commission n3, para 6.13–6.20.

36. Law Commission n3, para 6.14.

37. See, for example, the identification of humiliation of one of key harms experienced by victim-survivors in McGlynn and Johnson (n1 pp 45–46) and McGlynn and Johnson submission to Law Commission consultation, available at: <<https://claremcglynn.files.wordpress.com/2020/12/mcglynnjohnson-law-comm-cyberflashing-december-2020-final.docx>> See also Law Commission n3, para 6.87–6.91.

38. In its 2020 consultation paper, the Commission did discuss what it refers to as 'constitutive' harms, meaning online speech that can be harmful in and of itself without reference to further consequential harms (n 24, para 2.15). However, beyond labelling such harms, there is little further analysis of constitutive harms in the context of cyberflashing.

39. See further, Denise Reaume, 'Discrimination and Dignity' (2003) 63 *Louisiana Law Review* 645. For a discussion of the dignitarian harms of image-based sexual abuse, see Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) *Oxford Journal of Legal Studies* 37(3): 534–561.

40. Jeremy Waldron, 'Dignity and Defamation: The Visibility of Hate' (2010) 123 *Harvard Law Review* 1596, 1611–1612.

41. See, for example, one teenage girl referred to cyberflashing as being 'disrespectful', another the practice as 'morally unacceptable': Jessica Ringorse, Kaitlyn Regehr and Betsy Milne, *Understanding and Combatting Youth Experiences of Image Based Sexual Harassment and Abuse*, December 2021, p 52, available at: [Understanding-and-combatting-youth-experiences-of-image-based-sexual-harassment-and-abuse-full-report.pdf](https://www.ascl.org.uk/understanding-and-combatting-youth-experiences-of-image-based-sexual-harassment-and-abuse-full-report.pdf) (ascl.org.uk).

42. Drawing on Fiona Vera-Gray's research, particularly: 'Men's stranger intrusions: rethinking street harassment' (2016) 58 *Women's Studies International Forum* 9–17 and *Men's Intrusions, Women's Embodiment – A Critical Analysis of Street Harassment* (Routledge, London 2017).

world is violated.⁴³ It is also a *sexual* intrusion, not least because it often takes place in conjunction with other forms of sexualised harassment, threats and abuse, and victim-survivors commonly characterise their experiences of cyberflashing as one of sexual violation and/or sexual assault. Conceptualising cyberflashing as a sexual intrusion, therefore, ensures we recognise the specific nature of the wrongful act as intrusive, as sexual and as an infringement of dignity.

This conceptual approach shifts us beyond a focus on only consequential, direct harms, to a broader understanding of the nature of this invasive, intrusive practice. It foregrounds the harms of cyberflashing as an infringement of sexual autonomy and dignity, and experience of sexual violation, as evidenced by victim-survivors' testimonies of their experiences. For example, some victim-survivors have described their experience of cyberflashing in terms of lacking control and autonomy, an infringement of their sexual autonomy.⁴⁴ Cyberflashing denies an individual the ability to choose whether or when they view a penis image, with victim-survivors described it as an 'invasion' of their personal space.⁴⁵ Similarly, victim-survivors describe feeling 'totally' and 'utterly' violated.⁴⁶ This is echoed in research by Alexandra Marcotte et al. who found that almost one third of women reported feeling 'violated' after being sent unsolicited penis images.⁴⁷ As one victim-survivor stated: 'I felt super violated. It's a way of assaulting somebody without touching, of getting into my personal space without getting close'.⁴⁸

Accordingly, it is vital to understand cyberflashing is a wrong even if there are no consequential physical or mental adverse impacts. This approach draws parallels with wider debates on the harms of sexual violence, including recent discussions over non-consensual condom removal in respect of which Lise Gotell and Isabel Grant argue that the harms are 'located in its particular violation of the subjective, bodily integrity of the survivor, whose personhood is denied'.⁴⁹ It is this understanding of sexual autonomy and sexual violation, of the non-consensual nature of the act regardless of its consequences, that should provide the normative foundation for a criminal law response to cyberflashing.⁵⁰

Law Commission Justifications for Motive-Based Thresholds

Nonetheless, as noted above, the Law Commission's proposed offence is based on proof that either the defendant intended to cause the victim alarm, distress or humiliation, or the defendant sent the image for the purpose of obtaining sexual gratification and was reckless as to whether the victim would be caused alarm, distress or humiliation.⁵¹ In analysing this recommendation, it is important to clarify, first, that motive requirements are not common to all criminal offences, or even to all sexual offences. In fact, it is only in exceptional cases that a motive is specified in the criminal law, such as for racially aggravated

43. See Vera-Gray 2017, *ibid*, 11.

44. See, for example, one woman who stated: 'It just came into my inbox and . . . I had no control over that happening . . . I felt kind of shocked and like disgusted by it . . . it was quite violating of my personal space and privacy. So, I didn't feel like I had an awful lot of autonomy in terms of dealing with the invasion': quoted in Rikke Amundsen (2020) "'A male dominance kind of vibe': Approaching unsolicited dick pics as sexism', *New Media & Society*, 20(3): 1085–1102 and discussed in McGlynn and Johnson (n1, pp 40–41).

45. See discussion in McGlynn and Johnson n1, pp 41–45.

46. *Ibid*.

47. Above n 10.

48. Quoted in Samantha Beattie, 'Canada's laws can't handle 'cyberflashing,' a new type of sexual harassment', *The Huffington Post* (13 December 2018) <https://www.huffingtonpost.ca/2018/12/13/cyberflashing-canada-airdrop-dick-pics-subway-sexual-harassment_a_23617459/>.

49. Lise Gotell and Isabel Grant, 'Non-Consensual Condom Removal in Canadian Law Before and After R. v. Hutchinson' (2021) *Dalhousie Law Journal*, forthcoming.

50. For recent judicial discussion of sexual offences being designed to protect against violations of sexual autonomy and sexual integrity, see the Canadian Supreme Court decision *R v Jarvis* [2019] 1 SCR 488, particularly paras 122–125.

51. Law Commission n3, para 6.133.

offences.⁵² The criminal law is generally concerned with an individual's intention to carry out the particular act, rather than *why* they have done a particular act. The why (motive) becomes relevant in terms of evidence-gathering and sentencing; but it is not relevant to the elements of the crime itself. In terms of sexual offences specifically, approximately three-quarters of offences in the Sexual Offences Act 2003 do not require a specific motive.⁵³

Nonetheless, having decided on a motive-based offence, it is welcome that the Commission expanded the range of motives to be proven. First, it included humiliation alongside intention to cause distress and alarm, as recommended by some consultees and following the Scots law on coercing someone to view a sexual image and English law on 'upskirting'.⁵⁴ As discussed in McGlynn and Johnson, humiliation can best be understood in these circumstances as lowering someone's dignity or self-respect and can therefore extend the scope to include actions aimed at shaming, demeaning or degrading the victim-survivor.⁵⁵ In particular, the Angelou Centre, which works with black and minoritised women experiencing sexual violence, noted that humiliation is a particularly relevant motive where there is an intention to undermine the 'honour' of women within their families and wider communities.⁵⁶ Humiliation also has a close connection to international understandings of sexual harassment where creating a 'hostile, intimidating, degrading or humiliating environment' is to be prohibited.⁵⁷ If this approach to humiliation is adopted, it will broaden the range circumstances subject to potential criminal sanctions. However, while such interpretations may in time underpin any new law, the extent to which police and prosecutors are likely to engage in this level of analysis in the early years of this offence is open to doubt.

The other motivation now part of the proposed offence, but which was also not included in the original consultation, is that of sexual gratification. This motivation again broadens the scope of the proposal, which is welcome, though it also provides another example of the problems generated by a motive-based approach. The Law Commission rightly note that sending a penis image to someone for the purposes of sexual gratification is not per se wrongful.⁵⁸ What is wrongful, is sending such an image *without consent*. However, having rejected a consent-based approach, the Commission wanted to find a way of including sexual gratification, but without the straightforward focus on consent. They therefore recommend the additional element of demonstrating recklessness as to causing alarm, distress or humiliation. To prove this element of the offence, therefore, not only must there be proof of a purpose of sexual gratification, but also proof of recklessness as to causing distress, alarm or humiliation.

In relation to 'for the purposes of sexual gratification', such an intention may appear obvious to some, but this is not always, or perhaps even often, the motivation for cyberflashing; and, even where it may be, providing proof raises many challenges. Broadly, there are two senses in which sexual gratification may be relevant in cyberflashing cases. The first is where the sexual gratification is experienced by the actual exposure of the penis to others without their consent, a form of sexual exhibitionism or sexual pathology, similar to many cases of physical exposure.⁵⁹ The sexual gratification comes from the exposure of the

52. Indeed, the Commission notes that 'purpose is not a particularly common way of defining the fault element in crimes' (n3, para 2.198).

53. It is also notable that in the Law Commission's review of intimate image offences, it is recommending amending the criminal law to introduce a base offence centred on non-consent, albeit with a recommendation of a more 'serious' offence on proof of specific motives: Law Commission, *Intimate Image Abuse – A Consultation Paper* (February 2021).

54. In their earlier research on law reform options, McGlynn and Johnson had recommended extending any motive requirements to include humiliation (n 1, p 114 and n 4), an approach followed by a number of other consultees in their evidence submissions (Law Commission n3, paras 6.87–6.91).

55. Above n1, p 114 and n4 p 186. See also Alisdair Gillespie, (2019) 'Tackling Voyeurism: Is The Voyeurism (Offences) Act 2019 A Wasted Opportunity?', *Modern Law Review*, 82: 1107–1131.

56. Quoted in Law Commission, above n3, para 6.87.

57. See Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), Article 40 discussed in McGlynn and Johnson, n1, p 114.

58. Above n3, para 6.116.

59. For a discussion, see McGlynn and Johnson (n 1 pp 26–28).

penis, here in image form, and the fact that the actions are non-consensual. This might also be described as ‘immediate’ or ‘simultaneous’ sexual gratification.⁶⁰

The second scenario is where an image is sent in the hope of some sexual activity or gratification in the future, perhaps via sexual activity with the recipient, or receiving nude or other sexual images in return. This is often described as a ‘transactional’ purpose and is the ostensible motivation of many men and younger teenagers when sending unsolicited penis images.⁶¹ There are two particular challenges in such ‘transactional’ scenarios. The first is providing evidence to support a prosecution claim that the cyberflashing was carried out with such ‘deferred’ gratification as the purpose.⁶² The second is whether this is in fact the motivation. Research with young men and teenagers finds that even when sending penis images in the hope of gaining nudes in return, this is done so as to boost their social status amongst their peers by subsequently sharing the nude images, rather than for their own sexual gratification.⁶³

Ultimately, evidence is going to be required and it is commonly accepted that proving ‘immediate’ sexual gratification is challenging, even more so ‘deferred’ gratification.⁶⁴ Pornography use might be put forward to substantiate a prosecution case of immediate sexual gratification as a motivation, and in some more conventional sexual offence cases this might be left to the jury without much further debate. However, it is not so obvious in cases such as cyberflashing that there is a sexual motivation or evidence to support such a charge. Further, in each case, securing the evidence itself requires resources and commitment from police to such an investigation, choices to be made in the face of likely defendant responses of being motivated by humour or similar explanations.⁶⁵ In practice, it is the fact that some evidence is going to be required to demonstrate this element of the offence that is likely to significantly restrict the number of cases being taken forward.

There may also be challenges in establishing the second limb to this motivation threshold, namely recklessness as to causing distress, alarm or humiliation. This may not be as easy to demonstrate as the Law Commission hopes. The Commission states that their formulation would cover the ‘paradigmatic’ case of a stranger on public transport sending penis images without consent, as ‘few adults would be unaware of the *risk* of harmful consequences when sending digital images to strangers’.⁶⁶ They also suggest that their formulation will exclude instances of where a man sends a message ‘uncertain of whether there was consent but where they genuinely believed that no harm would result’ or where through a ‘lack of maturity, they were entirely unaware of such a risk’.⁶⁷

The assumption here is that there is some general public awareness of the potential harm of cyberflashing, particularly when sending images to strangers. While this may be the case, it is not clearly so, in view of the general minimisation and trivialisation of cyberflashing. Indeed, this has been recognised by the

60. See *R v Abdullahi* [2006] EWCA 2060 where the Court of Appeal considered the meaning of ‘for the purposes of sexual gratification’ and referred to purposes involving both ‘short-term and long-term gratification, immediate or deferred’ (para 17).

61. It must also be noted that some of the same men reporting being motivated by the possibility of sexual activity, recognise that for some recipients, receiving the image is harmful and experienced as coercive: see Flora Oswald et al (2020) ‘I’ll Show You Mine so You’ll Show Me Yours: Motivations and Personality Variables in Photographic Exhibitionism’, *The Journal of Sex Research*, 57(5): 597–609 and discussion of motivations in McGlynn and Johnson n 1, p 23–30.

62. See *R v Abdullahi*, above n 60.

63. Ringrose et al, ‘Teen Girls’ above n 15.

64. See, for example, Andrew Beetham, ‘Sexual Gratification’ and the Presence of a Child’ (2019) 83 *Journal of Criminal Law* 416 and David Ormerod, ‘Sexual offences: Sexual Offences Act 2003 - sexual gratification’ (2007) Feb *Criminal Law Review* 184–186.

65. In one Canadian voyeurism case, the defendant’s claim to have taken nude photos for aesthetic rather than sexual purposes was accepted: *R. v. Lebenfish*, 2014 ONCJ 130. In a more recent case, whether a teacher was acting for a sexual purpose under Canadian voyeurism laws when taking covert photos of students’ clothed breasts was the subject of legal action up to the Ontario Court of Appeal (*R v Jarvis* [2019] 1 SCR 488). These cases demonstrate that proof of sexual purpose or motivation is not straightforward.

66. Above n3, para 6.117, emphasis in original.

67. *Ibid.*

Commission which noted that online abuse is commonly normalised and dismissed, often with the excuse of ‘banter’ or ‘humour’.⁶⁸ Therefore, a stranger may well argue that he was not aware his conduct would cause harm, not least because he is likely to claim his actions were humorous or simply flirtatious. Again, the mere fact that proving this element of the crime will require investigation and evidence will hinder prosecutions.

Notwithstanding the challenges of proving reckless intention, some consultees did recommend recklessness be included in relation to both motivation requirements, such that the threshold would be satisfied on proof of awareness of causing distress, alarm or humiliation, even if that was not the perpetrator’s direct intention.⁶⁹ The Commission rejected such suggestions on the basis that this would be ‘too low a bar’ for what is a ‘relatively serious offence, and certainly one that carries weighty moral and social opprobrium’.⁷⁰ The Commission continued that they do not think it appropriate to include scenarios where the sender appreciated that there was a risk of harm but ‘believed *on balance* that their message would be well received’.⁷¹

In essence, this means that the Commission does not wish to criminalise the man who sends a penis image to another without their consent where he hopes that the recipient *might* not be harmed and *might* appreciate it. It means privileging, in practice, a man’s freedom to send penis images to whomever he wishes, free from any ‘opprobrium’, so long as he has the vain hope that it might be ‘well received’. Such actions are at the direct expense of the recipient, most often a young woman, who does not wish to receive such images and may well experience it as a sexual violation with further harmful consequences. What makes this position of the Commission regrettable is that these are scenarios where avoiding the harm is extremely simple and involves just asking. Seeking consent is straightforward and should be secured in all sexual relations and activities, not just hoped for or assumed.

It can be seen, therefore, that a major problem with the motive thresholds is that they introduce evidential hurdles to any investigation and prosecution which will inevitably result in fewer reports and fewer prosecutions. We already know from the law on the non-consensual distribution of sexual images that the requirement to demonstrate an intention to cause distress has constrained investigations and prosecutions.⁷² Adding these layers of complexity to the law makes it more confusing for victim-survivors and criminal justice personnel which, in turn, leads to fewer reports, investigations and prosecutions.

Further, these thresholds create an unjustifiable hierarchy among victim-survivors, as only some forms of cyberflashing are subject to the criminal law. This difference in treatment is not based on victim-survivors’ experiences, or the extent or nature of harms, but on the purposes of perpetrators. Further, there is no evidence that the experience of cyberflashing is ‘worse’ where perpetrated with the specific motives identified by the Commission. Indeed, there is evidence to suggest the alternative in some cases, with girls under 18 reporting that being sent unsolicited penis images by their peers, which would not commonly meet the Commission’s motive requirements, is worse and more coercive than those sent by male strangers (which may satisfy the motive threshold).⁷³ Young girls have talked about it being ‘more of a big deal’ when you know the person who has sent the image due to the breach of trust and the emotional labour of having to manage the ongoing relationship.⁷⁴ This hierarchy among victim-survivors unjustifiably diminishes and negates the experiences of some victim-survivors. Further, if, following all the public rhetoric telling them that cyberflashing has been criminalised, victim-

68. Law Commission 2020 consultation, n24, para 2.15.

69. See McGlynn and Johnson (n1 p 114) and their evidence submission, above n 31, and submissions discussed in Law Commission n3, paras 6.100-6.103.

70. Law Commission report n3, para 6.114. It is worth noting that there are examples of where this standard is employed in similar offences, such as the Scots law on non-consensual distribution of intimate images which includes recklessness: see section 2 of Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

71. Above n3, para 6.114, emphasis in original.

72. See, for example, McGlynn et al above n23 and North Yorkshire Police Fire and Crime Commissioner. (2018) ‘No More Naming’, available at: <https://www.northyorkshire-pfcc.gov.uk/content/uploads/2018/11/Suffering-in-Silence-Report.pdf>

73. Ringrose et al, ‘Teen Girls’ Experiences Negotiating the Ubiquitous Dick Pic’, above n 15.

74. *Ibid.*

survivors seek redress, only to be informed that their experience of cyberflashing does not in fact fit the paradigm classed as criminal wrongdoing, their faith in criminal legal responses is likely to be seriously undermined.

Penis Images and the Nature of Cyberflashing

When it comes to the scope of the images to be within any new law, the Commission did row back on its original proposal to only include images of the sender's own penis.⁷⁵ While this issue had not arisen in other jurisdictions, the Commission had been concerned that otherwise the offence would be too broad, as discussed further below. Their second concern was more conceptual. They characterised sending images of someone else's penis as distributing unwanted pornography which 'may be harmful' and 'akin to forms of sexual harassment' but that this 'is not to say that such behaviours should be governed by a law primarily focused on exposure'.⁷⁶ In other words, sexual harassment should not be covered by the criminal law, but sexual exposure, akin to the existing sexual offence of exposure, should.

While the Commission has moved away from their original position⁷⁷, it clearly still has some qualms. It states that while the cyberflashing offence is limited to genital images, it continues that it is not sure what the real difference is between unsolicited penis images and being sent pornography without consent.⁷⁸ The Commission asks, 'is it really the fact that the image contains genitalia specifically that renders that image different from other sexual content'.⁷⁹ Further, it questions why would we criminalise one and not the other, noting that there 'may well be a very good answer to this', but declining to comment further as it is not directly within their remit.⁸⁰

There is a good answer, and it goes to the heart of understanding many women's experiences of cyberflashing. Cyberflashing constitutes a sexual intrusion which violates a person's personal, embodied space, and which is perpetrated *with a penis*.⁸¹ This is why it is a sexual intrusion and related to broader patterns of men's sexual violence against women.⁸² For example, some victim-survivors have explicitly compared cyberflashing to the threat of rape, with others experiencing cyberflashing alongside explicit rape threats.⁸³ In another case, a man sent a woman a picture of an erection alongside the blade of a

75. Law Commission 2020 consultation, above n 24, para 6.6.

76. *Ibid* para 6.139-6.140 and n3, para 6.57.

77. The original proposal was challenged on the basis that it failed to understand that the harms of cyberflashing are not dependent on the sure knowledge that the image was of the perpetrator's penis, and that any such requirement would provide an almost insurmountable evidential hurdle. See, for example, the submission of McGlynn and Johnson, above n 29, and discussion in the Commission's final report, above n3, paras 6.54-6.79.

78. Above n3, para 6.77.

79. *Ibid*.

80. One response is to recommend extending the offence to include a broader range of pornographic material, as in similar US legislation. The US states have taken this approach as the cyberflashing behaviours have largely been conceptualised in public and legislative debates as a form of sexual harassment. However, such provisions raise questions about justifications for criminalisation and possible constitutional challenges. See further McGlynn and Johnson above n1, pp 96-101.

81. Any criminal offence should apply to images of genitals, rather than only penis images, to adhere to principles of gender neutrality in the law and to cover the rare incidence of images of women's genitals being distributed without consent. This does not detract from the mischief being targeted by the criminal offence being that of men sending penis images.

82. McGlynn and Johnson argue (n1, pp 34-35) that the sexual intrusion of cyberflashing is best understood as part of the 'continuum of sexual violence' identified by Liz Kelly: *Surviving Sexual Violence* (1988) (Cambridge: Polity).

83. See, for example, one victim-survivor who was sent an unsolicited penis image on public transport and who reflected that 'we can't walk home alone at night without fear of being raped... and now they're getting into our phones too', quoted in Gallagher, above n 5. Another woman who had been sent penis images without her consent reported that the perpetrator repeatedly sent her images, 'along with a message saying I 'wanted it' and that he was 'going to give it to me': quoted in Rosie Gizauskas, 'Anti-Social Media: From WhatsApp to dating apps, Fabulous investigates the cyber flashers invading your inbox and why d**k pics have gone next-level', *The Sun*, 16 December 2018, available at: <https://www.thesun.co.uk/fabulous/7966974/cyber-flashers-invading-your-inbox/>.

kitchen knife after she rejected his advances.⁸⁴ As Laura Thompson writes of this example, the subtext is of the ‘penis as a weapon, with the ability to hurt or “punish” this woman for her apparent “transgression” by rejecting him’.⁸⁵

These experiences are necessarily connected to the unsolicited images being of penises, rather than pornography more generally, because of the centrality of the penis to acts of rape and sexual assault.⁸⁶ This is not to say that the penis is inherently threatening in image or form. As Susanna Paasonen et al. argue, penis images, like penises, are multivalent objects which ‘move in and across different frames of interpretation shaped by the affective registers of, for instance, shame, desire, disgust, interest, amusement and aggression’.⁸⁷ However, as the authors also note, when deployed in a context of non-consent, penis images function as a figure of phallic power, imbued with gendered heterosexual dynamics of male sexual aggression, and a fundamental lack of sexual safety commonly experienced by women.⁸⁸

Therefore, while the Commission has moved away from its original proposal confining the offence only to images of the perpetrator’s penis, it appears to have done so with reluctance, rather than considering the revised approach as more normatively appropriate. This is regrettable as understanding why this is an offence of sending *penis* images is crucial to recognising the nature and harms of this behaviour and why a consent-based offence is appropriate.

Proposing a Consent-Based Cyberflashing Offence

Having identified the flaws in the Law Commission’s proposals, this section provides an alternative, consent-based approach to criminalising cyberflashing which is comprehensive and recognises cyberflashing as a sexual intrusion infringing sexual autonomy and integrity. I suggest a new cyberflashing offence could be crafted as follows:

Distribution of Genital Images Without Consent

A person (A) commits an offence if –

- (a) *A intentionally distributes a photograph or film of A’s or any other person’s genitals to another (B) and*
- (b) *B does not consent to the distribution and*
- (c) *A does not reasonably believe that B consents to the distribution.*

This provision would introduce a new criminal offence specifically targeting cyberflashing. The offence is proven on showing (a) that the image was intentionally distributed to the other person without that person’s consent and (b) the person making the distribution did not have a reasonable belief that the recipient consented. This offence foregrounds consent as the core element, without requiring any specific motive or purpose to be established.

In defining consent, the most straightforward approach would be to adopt the definition of consent in section 74 of the Sexual Offences Act 2003, in view of its established role in determining the scope of

84. Laura Thompson, above n1.

85. *Ibid.*

86. Though there is debate on the ‘centrality’ point. See, for example, Natasha McKeever, ‘Can a Woman Rape a Man and Why Does It Matter?’ (2019) 134 *Criminal Law Philosophy*, 599–619.

87. Susanna Paasonen et al (2019) ‘The Dick Pic: Harassment, Curation, and Desire’, *Social Media + Society*, 2: 1–10, at 2. See also Rebecca Hayes and Molly Dragiewicz, (2018) ‘Unsolicited dick pics: Erotica, exhibitionism or entitlement?’, *Women’s Studies International Forum*, 71: 114–120.

88. *Ibid.*

sexual offending, albeit that there have been continual calls for its revision.⁸⁹ The offence should be one of distribution of the image, without the need for proof that the image was viewed or received, making it more straightforward to prosecute.⁹⁰

The offence should cover the distribution of images of the perpetrator's or another's penis, to ensure straightforward prosecutions and recognising that the harms experienced by victim-survivors are not dependent on the sure knowledge that the penis in the image is that of the sender. The scope of the material to be included should extend to photographs as well as video recordings.⁹¹ Crucially, the images must include those that might be altered by means of technology including artificial intelligence, so as to include material commonly referred to as 'fakeporn' or 'deepfakes'.⁹² No further definition of genitals should be required.⁹³

Justifying Consent-Based law Reform

The Law Commission rejects a consent-based approach as they suggest it would result in 'an offence that is very broad'.⁹⁴ Specifically, such an offence would 'undoubtedly catch behaviours that are either not harmful or not criminally so'.⁹⁵ They continue that the criminal law should be directed at behaviour, like physical exposure, that 'causes real harm and is covered by a clearly wrongful purpose'.⁹⁶ In making these claims, the Commission gives some examples of conduct that it does not think should be subject to criminal sanctions. For example, it refers to a 'shared picture of a friend on a nudist beach' that may 'technically' fall within the scope of a non-consent offence 'but would not be meaningfully harmful'.⁹⁷ This scenario, and the assumptions drawn from it, raise a number of concerns about the Commission's approach.

First, the Commission refers to the criminal law only addressing 'meaningful' harms, in the way that it earlier referred to only criminalising conduct inducing 'real' harms. There are clearly some harms which the Law Commission consider are not sufficiently serious to warrant recognition via the criminal law, though it is not clear how this is to be defined. However, while the assumption is that no 'meaningful' harms arise from this scenario, this is not so obvious. It may be that the recipient experiences adverse impacts, perhaps due to previous experiences of harassment and abuse, or a previous experience with the person in the image, or the sender. Being a 'friend' does not insulate someone from experiencing

89. See, for example: Vanessa Munro, 'Shifting sands? consent, context and vulnerability in contemporary sexual offences policy in England and Wales', (2017) 26(4) *Social and Legal Studies* 417.

90. Section 34 of the Criminal Justice and Courts Act 2015 (disclosing private sexual images with intent to cause distress) provides a definition for disclosure/distribution which could be adapted for this purpose. The focus on distribution also follows the approach in the Singapore Penal Code which provides: section 377C(2): 'For the purposes of the definition of "distribute" in subsection (1), a person is treated as having distributed an image or recording whether or not another person views or gains access to the image.' This approach is preferable to Scots law on causing a person to look at a sexual image which requires not only a causal connection between the sending of the image and its viewing, but also that the actual image was viewed. For further discussion, see McGlynn and Johnson n1, pp 89-96.

91. A definition can be adopted following that in section 34 of the Criminal Justice and Courts Act 2015 which provides a definition of 'photograph or film' used in the offence of disclosing private sexual images with intent to cause distress and makes clear that cartoon and CGI images are not included.

92. While English law currently excludes altered images from the scope of the law against non-consensual distribution of private, sexual images, this is recognised as a significant failing of the law requiring urgent revision. See, for example: Tamsin Selbie and Craig Williams, 'Deepfake pornography could become an epidemic, expert warns' 27 May 2020, *BBC Deepfake pornography could become an 'epidemic', expert warns - BBC News*.

93. The draft provision refers to a 'person's' genitals, such that images of animals would not be included. Dictionary definitions suggest that the term 'genitals' is confined to male and female external reproductive organs, ie penis or vulva. The scrotum is included within a definition of male genitals. It is possible, therefore, that an image of the scrotum only could be included within this definition. It is suggested, nonetheless, that a definition for the legislation excluding the scrotum is not required. Simplicity of the law is a more important aim.

94. Above n3, para 6.35.

95. *Ibid*.

96. Above n3, para 6.9.

97. Above n3, para 6.35.

harm in these contexts. Indeed, in one recent study, many young teenage girls being sent unsolicited penis images found it more difficult to deal with images being sent by ‘friends’ at school, rather than older strangers, as the former involved breaches of trust, possible on-going coercion and the ‘emotional labour’ to ‘protect the boys by not reporting or telling anyone’.⁹⁸ That is, the girls experience unsolicited penis images from ‘friends’ as *more* harmful than from strangers. Other victims have also shared how being sent unsolicited penis images by colleagues, wider family members and acquaintances is deeply troubling, not least because it breaches trust, as well as being a particularly unexpected and unwanted violation.⁹⁹

The assumptions in the Law Commission’s scenario also neglect to understand that in some circumstances, such as with young teenage girls, they can be subject to harassment following *receipt* of a penis image without consent, due to assumptions that they must be in some way implicated or responsible.¹⁰⁰ Such victimisation on receipt of images has also been noted by those working with black and minoritised women experiencing violence and abuse.¹⁰¹ Therefore, the ‘friend’ sending a penis image to another ‘friend’ without consent may indeed be harmful and have direct consequences in ways that do not appear to have been recognised. Or, if such harms were considered, they were not considered sufficiently ‘meaningful’ to override the entitlement of the ‘friend’ to send the nude image without consent. Further, it is important to emphasise again that in these scenarios avoiding any harm (and any potential criminal liability) is straightforward and simply involves asking, would you like to see an image of X’s penis?

The Commission also suggested that where someone in a ‘loving relationship’ sends an image of their genitalia to their partner without consent, this should not meet a ‘threshold for criminality’.¹⁰² While it may be that in such a scenario there are no consequential harms experienced by the partner, it remains the case that this is non-consensual sexual conduct. The *wrong* therefore of cyberflashing has been committed, even if there are no demonstrable, consequential harms. Holding on to the core wrong in sexual offending is important if we are to refrain from only legislating where there is evidence of consequential harms, or only where an individual victim can prove they have experienced harm.

Further, it seems that the Law Commission’s hypothetical rests on assumptions about types of relationships, and assumptions around lack of harm, that may not be borne out in practice. Even in ‘loving relationships’ consent should be sought for sexual activity and while it might be assumed here that sending a penis image is unlikely to cause harm, this may not always be the case. It is not difficult to imagine situations where being sent a penis image, without warning, may not be experienced as ‘loving’, but concerning and potentially threatening. In addition, if we were to shape the law around this example and assume there will never be any harm, we risk denying protection, recognition and redress to those who do not experience receipt of the penis image in the ways imagined.

Another scenario that the Law Commission put forward as justifying its rejection of a consent-based approach is that it wishes to exclude from the scope of any criminal law, the ‘genuine (even if misguided) attempt at humour’ by ‘the immature juvenile’.¹⁰³ This behaviour, the Commission argues, ‘cannot be categorically characterised as criminally culpable’.¹⁰⁴ This raises two issues: the ‘humour’ justification and the concern with criminalising young people.

It is not exactly clear here what is meant by ‘humour’, though some men do self-report sending unsolicited penis images for this purpose.¹⁰⁵ The problem with this is that humour, as with many other

98. Jessica Ringrose et al, ‘Teen Girls’, above n15.

99. McGlynn and Johnson, n1.

100. Jessica Ringrose et al, ‘Teen Girls’, above n15.

101. Consultation response from the Angelou Centre, cited at n3, para 6.44.

102. Law Commission consultation 2020, above n31, para 1.148.

103. Above n3, para 6.35.

104. *Ibid*.

105. Oswald et al, above n 61, report 12% of men thinking it was ‘funny’ to send a penis image to someone who did not request one. Note specifically that the humour here was not only in sending a penis image, but that it was sent to someone who did not consent.

emotions or motivations, may guide the perpetration of a range of criminal offences, but does not usually protect the perpetrator from liability. For example, the sending of racist messages may be ostensibly deemed funny by a perpetrator, but this does not and should not insulate them from prosecution. It seems that not only does the Commission wish to protect the man purporting to find humour in sending unsolicited penis images, but it acknowledges that this may be 'misguided'. It recognises that the sending of the images may be harmful, but the balance of risk is to be borne by the recipient, in order to protect the potential humourist.

The second concern, the criminalisation of young people, is a legitimate issue to be addressed. The text of this proposed consent-based offence provides that the defendant must not have a reasonable belief in consent. This is a variable standard that shifts to reflect the characteristics of individuals. While not wanting to give carte blanche to young men to cyberflash, there is some manoeuvre in such a formulation to take account of differing understandings of consent. Further, as with other sexual offences committed by under 18s, police and prosecutors do exercise discretion in pursuing investigations and prosecutions. This discretion can be formalised through prosecutorial guidance, as indeed recommended by the Commission.¹⁰⁶

Most importantly, however, a key aim of a cyberflashing criminal law is to provide a normative foundation for essential educative and prevention initiatives. In this context, a consent-based law provides a more appropriate normative foundation for challenging these behaviours. The educative emphasis needs to be that cyberflashing is wrong, and young boys should not be doing it; not just because they might in specific instances be aiming to cause distress to a particular girl, but because it is non-consensual sexual conduct and all non-consensual sexual conduct is wrong.

Prosecutorial Discretion

While the Commission does recommend prosecutorial guidance in relation to young people, it is reluctant more generally to acknowledge the reality of prosecutorial discretion in the criminal justice system to address its concerns with 'too-broad' legislation.¹⁰⁷ It accepted that the Crown Prosecution Service should only prosecute where there is a 'public interest', but suggests that such guidelines are not sufficient to 'curb the reach of an offence drafted so broadly' as to encompass behaviour that 'should clearly not be criminal within its purview'.¹⁰⁸ The Commission was responding to submissions that their scenarios involving 'friends' or 'loving partners', with supposedly benign motives and unharmed victims, may be technically within the law, but would be unlikely to be reported to the police and prosecuted.¹⁰⁹ The Commission responded that the 'simple fact is that we do not know this to be the case' and therefore took the view that any draft law needed to be more circumscribed than one based on consent.¹¹⁰

This is a question of balance and priorities. It is correct that we cannot know in advance whether a specific series of events will be taken sufficiently seriously to be investigated and prosecuted. Nonetheless, in the context of an exceptionally low reporting rate, and high attrition rate, for sexual offences in general, including intimate image abuse offences, it seems unlikely that we are at risk of an over-zealous police force investigating cyberflashing cases which are genuinely 'innocuous', to use the Commission's phrase.¹¹¹ Further, it is possible to think of many examples of actions that technically fall foul of the criminal law, but should not in practice be subject to prosecution, such as the theft of one penny. In such cases, there is not an attempt to write into the text of the law a minimum value for

106. Above n3, para 6.119.

107. Above n3, para 6.36.

108. Above n3, para 6.35.

109. McGlynn and Johnson, evidence submission to the Law Commission, n24.

110. Above n3, para 6.36.

111. *Ibid.*

prosecuting thefts, as the greater priority is to make clear that the actions are wrong in principle and potentially subject to criminal sanction.

Another example may be found in laws on non-consensual sharing of intimate images. There may be cases where an intimate image is shared without consent, but for a potentially benign motive, such as for amusement, and the victim experiences no demonstrable harm; indeed, they may even perhaps welcome it having been shared.¹¹² Technically, these actions would constitute a criminal offence in many jurisdictions which have chosen not to limit the offence to either proof of a limited set of motives, or to proof of actual harm to the victim, because to do so would fail to capture the core wrong of these actions (non-consent) and hinder prosecutions by introducing challenging thresholds.¹¹³ Criminalising all non-consensual distributions is appropriate because in each case there is a wrongful act: the privacy and sexual autonomy of the person in the image has been breached. As the Australian Legal and Constitutional Affairs References Committee stated when reviewing such offences, consent should 'be the central tenet of any non-consensual sharing of intimate images offences'.¹¹⁴ The emphasis, therefore, is on the significance of the wrong of non-consensual conduct in sexual contexts and that where there are no consequential harms, in practice, prosecutions are unlikely as there will be no report to the police and no incentive or public interest in pursuing any such case.

It is also an issue of where the balance of risk lies and priorities for acting. In recommending a consent-based offence, the focus is on the clarity of the message that non-consensual sexual conduct is always wrong, and that gaining consent, and avoiding criminalisation, is straightforward. The risk is to be borne by the person who has not sought consent, rather than the potential victim. The focus, therefore, should be on a comprehensive law that provides redress options for all those who are sent unsolicited penis images, rather than protecting and privileging those who fail to seek and secure consent to their behaviours.

Conclusions

Cyberflashing, as with so many harms experienced predominantly by women, falls between the gaps and categories of English criminal law. But with the growing incidence of this behaviour and increasing recognition of the seriousness of online harms and abuse, the time is ripe for legislative reform. However, if such reform is to fully recognise and address women's experiences, it must be comprehensive and based on the core wrong of non-consent. This means recognising the autonomy and dignitarian harms women experience. Unfortunately, securing such recognition has long been a challenge, with Catharine Mackinnon noting that women's experiences of 'dignitary harms, because immaterial, are ephemeral to the legal mind'.¹¹⁵ Unfortunately, decades on, this remains true, with Law Commission proposals centring on the motives of offenders, rather than the infringement of sexual autonomy and sense of violation experienced by many women. This article has recommended an alternative, consent-based approach which offers all victim-survivors a redress option through the criminal justice system. Such a law would also provide the appropriate normative foundation for the development of essential educative and prevention initiatives to challenge online abuse and non-consensual sexual conduct.

112. As discussed in Nicola Henry et al, (2021) *Image-based Sexual Abuse: a study on the causes and consequences of non-consensual nude or sexual imagery* (London: Routledge), p 6.

113. There are defences in some jurisdictions based on reasonable grounds for acting, though such defences would be unlikely to be satisfied in this type of scenario. See further Thomas Crofts and Tyrone Kirchengast, (2019) 'A Ladder Approach to Criminalising Revenge Pornography', *Journal of Criminal Law*, 83(1): 87–103.

114. Australian Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016), p 51, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/Report

115. Catharine A MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge: Harvard University Press, 1989) at 173, also cited in Gotell and Grant, above n 49.

While there are many advantages to a bespoke cyberflashing offence, not least in its expressive role in both raising awareness of such harms and in signalling that sending penis images without consent is wrong, there are also limitations.¹¹⁶ The risk is that while a specific offence may cover the forms of sexual intrusion of which we are currently aware, perhaps before too long, we will discover its limitations, as perpetrators find ever new ways of abusing and harassing others. Another option, therefore, is developing a broader offence which has more general applicability and which would help to future-proof the law. There are possible models for such an approach, including Swedish laws on sexual molestation and proposals from the Hong Kong Law Commission on sexual acts likely to cause fear, degradation or harm.¹¹⁷ While each of these more general offences have much to commend them, the boundaries and specific requirements would be best considered as part of a broader review of sexual offence laws and possible reforms. Such a review can begin to consider the role of the substantive law in creating or sustaining the current ‘justice gap’ in sexual violence cases, examine the shifting means and motivations for perpetrating abuse, as well as the role of advancing technology and online behaviours.

Ultimately, we must recognise that the harms experienced by women from cyberflashing are gendered and stem from women’s broader experiences of living in a society where sexual violence is commonplace, and gender continues to shape and permeate sexual and everyday relations, offline and online. It is such inequalities that must be challenged and addressed if we are to imagine a way of living for women that does not involve everyday sexual intrusions, harassment and abuse.

116. A bespoke offence may also facilitate and encourage prosecutions as victim-survivors and criminal justice personnel can look to a particular offence that clearly covers the conduct at issue.

117. As discussed in McGlynn and Johnson, above n1, pp 120–124.