Garden Court Chambers response to
Law Commission Consultation on Intimate Image Abuse

Garden Court Chambers Crime Team

The criminal defence team at Garden Court Chambers includes 20 Queen's Counsel and have defended in – and won – many of the landmark cases that have defined modern criminal law. We regularly defend individuals charged with the most serious offences and have previously won the Legal 500 Crime Set of the Year Award. Many of our practitioners are recognised as leading individuals by the Chambers & Partners UK Bar Guide and we have the highest number of ranked silks at the Bar. As well as advocating for our clients in court, we continue to actively lobby Government on policy proposals affecting the criminal Bar, in keeping with our ethos of defending access to justice.

Foreword

We welcome the Law Commission's consultation on reforming the law in relation to taking and sharing intimate images. The harm caused by such offences has a significant impact upon victims' sexual privacy, autonomy and dignity. The current legislative framework is a patchwork, ad-hoc jumble desperately in need of consistency and principle. The careful research and consideration which has gone into the paper is obvious and appreciated.

We have responded to the questions within the consultation which fall within the scope of our expertise and set out where we foresee difficulties with the proposed solutions put forward in the paper. These essentially fall into two categories – a lack of legal certainty and clarity, and the risk of over-criminalisation.

So far as the former is concerned, legal certainty has long been a fundamental cornerstone of the rule of law. As Francis Bacon proclaimed in the 17th century:

> *'For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes… Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law… Nor should a man be deprived of*

his life, who did not first know that he was risking it.'[1]

Clarity also forms a crucial part of the European Convention on Human Rights, underpinning not just the requirement in Article Seven that there be no punishment without law, but also permeating throughout the Convention in that there can be no interference with particular rights unless it is in accordance with the law. Certainty is vital in providing a framework for social interactions, allowing individuals to regulate their behaviour accordingly. As it was put in simple terms in *Warner v Metropolitan Police Commissioner* (1968) 52 Cr App R 373; *'In criminal matters it is important to have clarity and certainty.'*

Over-criminalization is another key issue. There is clearly a need for consolidation, clarification and development of the law in order to meet changing and growing social need, and a detailed, considered and principled basis for doing so is undoubtedly preferable to knee-jerk, piecemeal legislation. However, the difficulties in carrying out a complete overhaul of any area of law are the risk of unforeseen consequences and the problem as to where to draw the line between that which should be criminalized and that which should not. Broadly drawn offences risk undermining efforts to tackle the problem in question by diverting resources to deal with cases which were never intended to be caught by the reforms. The prevalence of such images amongst young people needs particular consideration, given the risks of drawing children into the criminal justice system unnecessarily.

Legislation obviously cannot account for every eventuality and there will always be a degree of interpretation required by the courts. Yet the law should not simply pass all the responsibility for policing the boundaries of acceptable behaviour to individual prosecutors. Too wide a discretion gives rise to the risk of arbitrary decision making and discrimination. The law should aim to be as clearly defined as possible and focused on the issue at hand.

We hope that the proposals we put forward assist in producing clear, fair and effective legislation in this important area.

T.Wainwright

A.Bache

27th May 2021

[1] Quoted in *Coquillette* , Francis Bacon pp 244 and 248, from *Aphorism 8* and *Aphorism 39-A Treatise on Universal Justice*, approved in *Misra* [2005] 1 Cr App R 328

Response to Consultation Questions

Consultation Question 2.

15.2 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.

Do consultees agree?

Paragraph 6.59

We are concerned here with the lack of certainty in relation to the phrase *'down the depicted person's top'* and the potential breadth of images which would unintentionally come within this definition.

The 'upskirting' offence created by the Voyeurism (Offences) Act 2019, requires that the defendant's *purpose* is to observe (or allow to be observed) the subject's genitals, buttocks or underwear *where the genitals, buttocks or underwear would not otherwise be visible*. The proposed definition of an intimate image contains no such restrictions. Any photograph or film taken from a greater height than the individual in shot would potentially be caught. Clearly this is not the intention of the proposed offences, as the consultation paper says at 6.56:

> *'…"downblousing" images could be caught if the definition were widened to include images of partially exposed breasts, whether covered by underwear or not, taken down the depicted person's top (it could not simply include partially exposed breasts, because this would include an image of someone who is wearing a low-cut top and as a result their cleavage is visible).'*

The problem is that the requirement that the image has been *'taken down the depicted person's top'* does not clearly or sufficiently delineate the bounds of criminality. Given the huge range of images which would be captured by this definition, from those which should clearly be considered intimate to the those which clearly should not, it would be impossible for a defendant to knowingly regulate their behaviour so as not to commit an offence. The vague nature of the offence could also create undue restrictions and difficulties for any photography in public, particularly in relation to images of crowds.

Consultation Question 4.

15.4 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.

Do consultees agree?

Paragraph 6.71

We foresee that difficulties may arise in relation to nightwear, which may also be worn next to the skin and under other items. In some cases, the nightwear may be indistinguishable from underwear in appearance and may properly considered intimate. In other cases, loose and well-covering nightclothes may not be considered particularly intimate.

Consultation Question 6.

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

Do consultees agree?

Paragraph 6.79

We agree that images should not be excluded simply because the victim is not 'readily *identifiable'*. Much of the harm in these cases will be caused simply by the victim knowing that such images have been taken or shared, whether or not any other person would be able to identify them from that image. However, some restriction should be considered in cases where the victim has not been *identified*.

Without an identified victim, the prosecution must rely solely on inference to prove that the depicted person did not consent to the image being taken or shared. There are likely to be instances of photographs and footage designed to look like voyeurism but which in fact involve willing participants. Similarly, there may be instances in which a person was not aware of the footage being taken at the time but afterwards consenting to it being shared. There is a significant risk in such cases of a person being convicted despite the fact that no offence has taken place, particularly where the defendant is several steps removed from the original taking.

Consultation Question 8.

15.8 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?

Paragraph 6.89

Again the difficulty is with drawing offences too widely and too vaguely. Is a person who is anything other than fully dressed 'in a state of undress'? The point at which a person's state of undress becomes such that taking an image without their consent should be criminalised is far from obvious. Nor does there appear to be any evidence of such images being particularly prevalent.

Similarly, although showering and bathing may be private acts to be protected, this will not always be the case. Photographs of a person bathing in a private pool or hot tub and showering afterwards, all whilst dressed in a swimming costume, may not be considered such as should ordinarily give rise to criminal liability.

The definitions proposed elsewhere, together with laws on inchoate offences as referred to in the consultation paper at paragraph 6.86, would appear to be sufficient to capture that which may be considered deserving of criminal liability and there is a real danger in drawing the net too widely.

Consultation Question 16.

15.16 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?

Paragraph 7.34

We agree that there should not be more than one offence on the statute book dealing with essentially the same behaviour. However, the current voyeurism offence covers not just taking images but simply observing an individual in particular circumstances. The offence would not therefore be entirely replaced by a new offence which simply deals with taking images.

Should the voyeurism by observation offence remain unchanged alongside a new image taking offence, we are concerned that different definitions for the two offences may create unjustified distinctions and

illogical outcomes. It may be therefore that the offence of voyeurism will need to be amended to bring it into line with the draft offences proposed by this consultation.

Consultation Question 17.

15.17 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?

Paragraph 7.48

We have raised concerns above in our response to question 2 as to the broad and ambiguous nature of such an offence. We note further that the examples of given at paragraphs 7.43 and 7.44 of the consultation paper in relation to other jurisdictions in which 'down-blousing' has been criminalized, contain other elements which must be proved beyond simply taking such an image without consent.

Consultation Question 21.

15.22 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?

Paragraph 7.138

Some consideration would need to be given to the interplay between such a provision and the consent element of the offence. As currently drafted, it would only seem to cover cases in which the original image was non-intimate and has been altered to appear intimate. Would it also cover offences in which the victim consented to a semi-nude image being shared, which was then altered to appear fully nude? Would it cover a consensually shared nude image being altered to appear sexual? What degree of change would be required in order to vitiate consent?

Consultation Question 25.

15.28 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?

Paragraph 10.40

Whilst a 'reasonable belief in consent' works as a fault requirement in offences involving physical contact, where there is clearly scope to take steps to ascertain whether consent is in fact given, the same does not necessarily apply to image offences, as reflected in the current offences:

- In the current s.67 voyeurism offence, the fault element is that the defendant *knows* that the person does not consent to their action;
- In the current s.67A 'upskirting' offence, the fault element is a reasonable belief in consent but the offence is limited to the original taker of the image and the offence further requires that the purpose is sexual gratification or humiliation of the victim;
- The issue does not arise in cases of indecent images where consent could not be given.

The risk is that the offence captures the individual several steps removed from the original taking who may not be able to ascertain consent, or who fails to consider the question of consent even if - had they done so - most reasonable people would have concluded that consent was given.

Consultation Question 26.

15.29 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?

15.30 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?

Paragraph 10.60

We are particularly concerned about the creation of a basic offence, particularly given the extremely

wide ambit of the definition of an intimate image.

For example:

1. A rugby club in their communal changing room, or a family at home, take a photo of a member walking around in their underwear. The image is passed around within the group as a joke knowing that the individual does not agree or find it funny, before being deleted;
2. A photograph is taken in which a woman is breastfeeding in the background. The photographer only notices the woman after taking the photo but she then uploads it to her social media anyway not giving the matter any further thought;
3. A photograph is taken looking down on a crowded dancefloor, such that the image shows down a number of women's tops. No attempt is made to ascertain their consent;
4. CCTV captures a man walking down the street when his trousers fall down. The video is uploaded and goes viral.

In all these examples, the basic offence could be committed. The basic offence proposed is, so far as we are aware, wider than that in effect in any other jurisdiction and in our view too wide. It would capture not just the malicious, but the misjudged, the naïve and the innocent. The various additional intents proposed further on in the paper serve a vital function in limiting the offence to that which may be properly considered criminal.

Consultation Question 31.

15.36 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.

Paragraph 10.95

As set out above, we are concerned that the base offence risks over-criminalization and draws the focus away from the core wrongdoing the paper intends to tackle, thereby impeding the effective prosecution of intimate image abuse.

Consultation Question 33.

15.38 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?

15.39 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?

Paragraph 11.108

We have some concerns about the complexity of such legislation and the difficult route to verdict a jury would have to follow in such cases.

It may be suggested that a reasonable belief that a person is voluntarily semi-nude would provide a defence to the basic offence which would otherwise be committed in the example above of a person's trousers falling down in public. This would however be stretching the concept and meaning of 'voluntary' far beyond its proper bounds and would not provide a clear and proper solution. It is also difficult to reconcile with the observation in the paper that being semi-nude against one's will in public is *always* such a serious violation that taking an image is clearly wrongful and invokes the full protection of the criminal law.

The ambiguity and consequent lack of clarity is compounded by the fact that there would be no requirement that the defendant knew or realized that the victim had a reasonable expectation of privacy. Such a requirement could be added, but such back-and-forth would potentially make the offence too unwieldy.

Consultation Question 34.

15.40 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?

Paragraph 11.138

We echo the concerns in relation to reasonable belief providing sufficient protection as set out above. Furthermore, such a defence would not avail individuals who would otherwise commit an offence by sharing articles from magazines or tabloid newspapers containing paparazzi photographs of celebrities coming within the definition of private or sexual images. Whilst the taking and publication of such images undoubtedly requires better regulation, the solution cannot be to criminalise the readership of lawful publications.

The authors are happy to discuss further any of the issues raised within this response.