

Welsh Women's Aid response: Law Commission consultation on intimate image abuse

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| These are the views of: | <i>Welsh Women's Aid (Third Sector) - the national charity in Wales working to end domestic abuse and all forms of violence against women.</i> |

About Welsh Women's Aid

Welsh Women's Aid is the umbrella organisation in Wales that supports and provides national representation for independent third sector violence against women, domestic abuse and sexual violence (VAWDASV) specialist services in Wales (comprising our membership of specialist services and members of the regional VAWDASV Specialist Services Providers Forums). These services deliver life-saving and life-changing support and preventative work in response to violence against women, including domestic abuse and sexual violence, as part of a network of UK provision.

As an umbrella organisation, our primary purpose is to prevent domestic abuse, sexual violence and all forms of violence against women and ensure high quality services for survivors that are needs-led, gender responsive and holistic. We collaborate nationally to integrate and improve community responses and practice in Wales; we provide advice, consultancy, support and training to deliver policy and service improvements across government, public, private and third sector services and in communities, for the benefit of survivors.

We also deliver the Wales National Quality Service Standards (NQSS), a national accreditation framework for domestic abuse specialist services in Wales (supported by the Welsh Government) as part of a UK suite of integrated accreditation systems and frameworks. (More information on the NQSS can be found here: <http://www.welshwomensaid.org.uk/what-we-do/our-members/standards/>)

Introduction

We [warmly welcomed](#) several final amendments to the Domestic Abuse Bill when it received royal ascent earlier on 20 April¹, including criminalising threats to share intimate images without consent. Original legislation around intimate image based abuse (often referred to as ‘revenge porn’) has now been widened to include threats to disclose intimate images with the intention to cause distress.

We also welcome the chance to provide additional evidence to the Law Commission which is proposing a new framework of offences is needed to cover the behaviours identified in the [Consultation Paper](#). We welcome many of the provisional proposals made by the Commission within the consultation paper, and within our below response have outlined particularly strong stances on where we agree and if there are elements of provisional proposals that we do not agree with organisationally.

Chapter 6 – Definition of intimate image

We largely agree with the provisionally proposed definition of an intimate image as:

1. shows something that a reasonable person would consider to be sexual because of its nature; or
2. taken as a whole, is such that a reasonable person would consider it to be sexual,

The consultation asks several detailed questions on what consultees feel should be included as intimate images – Including definitions of “nude or semi-nude”, images of a person’s genitals, buttocks or breasts, whether exposed or covered with underwear, etc. We believe that isolating any part of a person’s body (whether ‘inherently sexual’ or not) with the intent of creating/ sharing an image for the purpose of sexual gratification or to humiliate the depicted person should be covered by the legislation (e.g. non-consensual pictures of a persons feet, lips, bare back, etc.). An awareness of intersecting socio-cultural identities can have on the impact of what is portrayed within an image and how it could be utilised to cause harm, threaten and control someone must be built into the definition. It must recognise that someone’s religion, ethnicity, sexuality or gender identity could further impact their

¹ <https://www.welshwomensaid.org.uk/wp-content/uploads/2021/05/Domestic-Abuse-Bill-Passed-Welsh-Womens-Aid-Briefing-.pdf>

understanding of what is of a sexual nature and further the humiliation and harm caused by the sharing of an image.

There are significant harms caused by the non-consensual taking or sharing of these kinds of images. Pictures can be used to exert control over those depicted, can harm or threaten to harm a person's job security, can be used to coerce actions, behaviour or further photographs. Photographs can be used to (or threaten to) cause a rift between the depicted person and their family or community.

We agree with the Law Commission's provisional proposal 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, along with that the behaviour prohibited by the current voyeurism and "upskirting" offences should be combined in a single taking offence.

It is our view that perpetrators primarily commit this kind of abuse to obtain or maintain control over the depicted person and perpetuate further abuse and coercive control. Violence against women and girls (VAWG) is a cause and consequence of inequality between women and men, which intersects with factors such as ethnicity, age, class, sexuality and disability to impact on experiences of abuse and routes to recovery.² An intersectional, needs led approach is key to ensuring the experience of all survivors is captured throughout.

Chapter 7 - The acts

We do not wholly agree with the current wording of the Commission's provisional proposal that a 'taking' offence should only include such behaviour where, but for the acts of the perpetrator, the image would not otherwise exist. We agree that in cases pertaining to 'taking' these offences will be driven by the actions of the perpetrator, we would like clarity however, to be made around 'coercion' and coercive control³. Consideration should be given in instances where there is perceived consent from the depicted person to the possibility of coercion in that situation. Although these instances should still be considered as the images otherwise not existing if it had not been for the actions of the perpetrator, we feel this section would benefit from additional information around coercive control to avoid this misinterpretation.

² <https://www.welshwomensaid.org.uk/wp-content/uploads/2019/11/Annual-Membership-Report-2018-19-FINAL.pdf>

³ <https://www.welshwomensaid.org.uk/information-and-support/what-is-coercive-control/>



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Chapter 8 - Without consent

Welsh Women's Aid supports the definition of consent as set out in sections 74 to 76 of the Sexual Offences Act 2003. Consent must mean someone agrees by choice, with the freedom and capacity to make that choice. It must recognise the extra protection provided someone aged under 18 engaging in sexual activity in regards to taking a photo or video. It must also recognise that consent can be withdrawn, and if done so, must be recognised and acted upon. This should include the removal and deletion of intimate images.

Chapter 9 Proof of harm

We agree with the Law Commission's provisional proposal that proof of actual harm should not be an element of intimate image offences. As stated above the very threat to cause harm is an offence in itself, which leads to a continuation of abuse and maintain power and control over the depicted person.

Chapter 11 – Intimate images previously taken or shared in public

We welcome the Law Commission's provisional proposal that where an intimate image was taken without consent in a private place, a reasonable expectation of privacy test should not apply. **However**, we do not automatically agree with the provisional proposal 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.

Expectation of total privacy should not be a requirement to the expectation that an intimate photo will be taken without consent.

We do not agree that it should automatically not be an offence to share an intimate image without the consent of the depicted person where 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. The depicted person may have consented to an image being shared in a certain context (such as with friends) but did not

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consent to this image being shared in a completely separate context (such as with employers). We believe that where there is clear intent to cause harm or distress to the depicted person by sharing an image in a space where consent has not been obtained then the defence of having been given consent to share in a different context should not be appropriate.

Chapter 12 - Threats to take, make and share intimate images without consent

In response to a call for consultee views on whether threats to take, make or share an intimate image with the intent of coercing sexual activity should raise an evidential presumption that there was no consent to sexual activity; we believe a person's full capacity to consent has been taken away if they are acting out of fear or coercion that has been placed on them by the perpetrator(s). As stated above, consent must mean someone agrees by choice, with the freedom and capacity to make that choice. Threats to humiliate and harm someone through the making and sharing of intimate images, remove a person's capacity to freely consent.

Chapter 13 - Reasonable excuse

We do not inherently disagree with the provisionally proposed 'reasonable excuses', however, with the caveat that where an argument can be made that the person taking, making or sharing the intimate images intended to cause harm or distress to, the depicted person this should override any 'reasonable excuse'.

There needs to be very clear explanations and guidance on the use of 'reasonable excuses' and monitoring of their usage in court to ensure that they are used appropriately. This should include monitoring where they are unsuccessfully used in defence cases, as this could cause distress to the victim and impact on attrition rates within cases.

The guidance on 'reasonable excuses' should be informed by expertise from specialist services and victim's groups to ensure that they are watertight and do not allow for loopholes or distressing cross examination.

Other

We agree with the Law Commission's provisional proposals of the following and welcome progressive protections such as these as a result of the Domestic Abuse Act 2021:



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- that victims of the new intimate image abuse offences should have automatic lifetime anonymity.
- that victims of the new intimate image abuse offences should automatically be eligible for special measures at trial.
- that restrictions on the cross-examination of victims of sexual offences should extend to victims of the new intimate image abuse offences.
- that notification requirements should be automatically applied for the offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification when an appropriate seriousness threshold is met.
- that Sexual Harm Prevention Orders be available for all of our provisionally proposed intimate image offences.

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