Bar Council response to the Law Commission's consultation paper on Intimate Image Abuse (No.253)

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's consultation paper on Intimate Image Abuse (No.253).[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Introduction

1. The proposal to create four offences which will expand and replace the existing laws is generally to be welcomed. The current law is in part uncertain, and in part inadequate. At paragraph 1.39 the state of the current law resulting from piecemeal legislation is described as -

[1] Law Commission consultation titled, "Imitate Image Abuse no. 253"

"A patchwork of poorly fitting offences has resulted. We conclude in this paper that, without a holistic approach to intimate abuse offences, the individual offences do not fit together seamlessly, creating gaps in protection. This results in a legal framework which is unclear, unnecessarily complicated and inconsistent in application."

2. Four new offences are proposed –

1) A "base" offence which prohibits the taking or sharing of an intimate image of a depicted person where they do not consent and there is no reasonable belief in consent by the perpetrator.

2) An additional more serious offence of taking or sharing an intimate image without the consent of the depicted person, with the intention to humiliate, alarm or distress the victim.

3) A further additional serious offence of taking or sharing an intimate image, without the consent of the depicted person and the perpetrator having no reasonable belief in consent, for the purpose of either their own or someone else's sexual gratification.

4) An offence of threatening to share an intimate image where the threat is either intended to cause the depicted person to fear that the image will be shared or the perpetrator is reckless as to whether the depicted person will fear the threat will be carried out.

3. No specific intent will be required for the offences beyond the intent to make or share the image other than in those cases where intimidation by threats to share or display an intimate image are used to induce compliance by the victim or to extort a benefit or thee is an intent to humiliate, alarm or distress. The expanded scope of the offences (e.g. to include "downblousing") is sensible and will provide protection where it is currently anomalously absent.

4. However there is a risk that, as currently structured (see e.g. §14.9 – 14.11), the proposed base offence is overly complicated and in practice may be difficult for the

public or, more importantly, for a bench of lay magistrates or a jury to comprehend. It is common practice in the Crown Court for the trial judge to present the jury with a route to verdict – a series of yes/no questions in the form of a narrative flow chart, which, if followed, will guide the jury to their final verdicts. The route to verdict does not involve definitions or explanations of the elements of the offence, which feature elsewhere in the summing up. Drafting a potential route to verdict document for the base offence illustrates the degree of complexity involved: if a prosecution is presented on the basis of D sharing the intimate image, there could be (but will not necessarily be) at least nine separate questions (Q3 and Q8, in line with consent in sexual offences, would be sub-divided; others, e.g. Q5 and Q7 would almost certainly be further sub-divided) which a jury has to consider as set out below:

Q1. Are we sure that the image was an intimate image?

If yes, go to Q2; if no, NG

Q2. Are we sure that D intentionally shared the image?

If yes, go to Q3; if no, NG

Q3. Are we sure that V did not consent, and that D did not reasonably believe that V consented, to the sharing of the image?

If yes, go to Q4; if no, NG

Q4. Are we sure that the image was taken in a place to which members of the public did not have access?

If yes, go to Q5; if no, go to Q7

Q5. Are we sure that V did not voluntarily engage in a sexual or private act, and that D did not reasonably believe that V did not voluntarily engage in a sexual or private act?

If yes, go to Q6; if no, go to Q7

Q6. Are we sure that V had a reasonable expectation of privacy in the taking of the image?

If yes, go to Q7; if no, NG

Q7. Are we sure that the image had not previously been shared in a public place, or that D did not reasonably believe that the intimate image had been shared in a public place?

If yes, go to Q9; if no, go to Q8

Q8. Are we sure that V did not consent, and that D did not reasonably believe that V did not consent, to the image being shared in a public place?

If yes, go to Q9; if no, NG

Q9. Are we satisfied on the balance of probabilities that D had a reasonable excuse to share the image?

If yes, NG; if no, G

5. Some of the complexity could be avoided by redrafting the proposed elements of the offence. For example, proving negatives (necessary on the current wording because of the burden and standard of proof) could be avoided by rewording the relevant element of the offence.

6. In the Magistrates Court there is no procedure similar to the Route to Verdict document, rather the legal adviser will orally advise the lay magistrates as to the elements of the offence in open court. The detail and content of that advice varies considerably between different court centres.

Responses to Consultation Questions

Consultation Question 1 (6.46)

We provisionally propose that an image which: (1) shows something that a reasonable person would consider to be sexual because of its nature; or (2) taken as a whole, is such that a reasonable person would consider it to be sexual, should be included within the definition of an intimate image. Do consultees agree?

7. Yes. However, while there may be little distinction in practice, we consider whether it would be preferable to model this offence on the precise wording of s.78 of the Sexual Offences Act 2003, which provides as follows:

> ***s.78 "Sexual"***
>
> *For the purposes of this Part (except sections 15A and 71), penetration, touching or any other activity is sexual if a reasonable person would consider that—*
>
> > *whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or*
> >
> > *because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.*

Consultation Question 2 (6.59)

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

8. Yes.

Consultation Question 3 (6.62)

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

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

9. Yes.

Consultation Question 4 (6.71)

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

10. Yes.

Consultation Question 5 (6.75)

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

11. Yes.

Consultation Question 6 (6.79)

We consider that images where the victim is not readily identifiable should not be excluded from our offences. Do consultees agree?

12. Yes. It would potentially defeat the intended objective of criminalising (and thereby potentially deterring) "downblousing" as well as "upskirting" if the perpetrator could escape liability by rendering the subject of the image unrecognisable

Consultation Question 7 (6.88)

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

13. One example could be an image in which an individual's genitals, buttocks or breasts are covered by the hands / arms of the individual. Another is when the image is of a person in a bath and they are obscured by foam. It is not clear whether such would be covered by the offences as presently proposed.

Consultation Question 8 (6.89)

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

14. The Bar Council does not have a view; other stakeholders may be in a better position to comment.

Consultation Question 9 (6.92)

We provisionally propose that "private" images should be captured by a sharing offence as well as a taking offence. Do consultees agree?

15. Yes. The sharing of such images is typically likely to cause greater harm than the taking, and accordingly there would not seem to be any justification for excluding such conduct from the proposed scheme. There are many examples where intimate photographs are taken with consent but are misused after the relationship has ended.

Consultation Question 10 (6.125)

We welcome consultees' views on whether and to what extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted.

16. We consider that such a provision would be extremely difficult to draft in a way which ensured that the law was sufficiently clear. We also consider that proving that the perpetrator was aware that a particular image was considered intimate by the person depicted would be likely to be extremely difficult in practice. Further, this would extend the scope of an intimate image beyond (a) a plain language reading of the term and (b) the experience of most "reasonable persons".

Consultation Question 11 (6.139)

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

17. Hugging may be considered intimate by some, but has historically been widely seen in public. Similarly, holding hands. But as it is likely that neither of these would meet the test set out in Q1 above they probably do not need to be specifically excluded from the offences.

Consultation Question 12 (6.140)

Do consultees think that there should be: (1) a "not ordinarily seen in public" element to intimate image offences; or (2) a list of images that should be excluded from intimate image offences, for example images of people kissing?

18. That is really a policy question. It is not clear to us that images of people kissing are widely shared in a manner that produces cause for complaint, and there may not be the justification for criminalising such conduct.

Consultation Question 13 (7.14)

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

19. Not that we are aware of.

Consultation Question 14 (7.24)

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

20. Yes. There would often in practice be significant difficulties in proving that the 'copier' of the image had knowledge or reasonable belief that V did not consent.

Consultation Question 15 (7.28)

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

21. This is not within our experience.

Consultation Question 16 (7.34)

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

22. Yes. That would bring clarity and consistency to this area.

Consultation Question 17 (7.48)

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

23. Yes. There would not appear to be any distinction in principle between the two types of conduct, or the harm caused.

Consultation Question 18 (7.86)

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

24. Yes. It would likely be extremely difficult to prove lack of reasonable belief in consent on the part of the person in possession of the intimate image, and it would not be appropriate to criminalise such conduct absent any fault element on the part of such a person.

Consultation Question 19 (7.107)

We invite consultees' views on the following three questions:

> **(1) How prevalent is making intimate images without consent, without subsequently sharing or threatening to share the image?**
>
> **(2) What motivates individuals to make intimate images without consent, without sharing or threatening to share them?**
>
> **(3) How, and to what extent, does making intimate images without consent (without sharing or threatening to share them) harm the individuals in the images?**

25. This is not within our experience.

Consultation Question 20 (7.124)

We provisionally propose that "sharing" an intimate image should capture:

> **(1) sharing intimate images online, including posting or publishing on websites, sending via email, sending through private messaging services, and livestreaming;**
>
> **(2) sharing intimate images offline, including sending through the post or distribution by hand; and (3) showing intimate images to someone else, including storing images on a device for another to access and showing printed copies to another. Do consultees agree? We invite consultees' views on whether there any other forms of sharing, not outlined in the paragraph above, that should be included in the definition of "sharing"?**

26. Yes. We do not propose any other forms of sharing.

Consultation Question 21 (7.138)

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

27. Yes. There are "reasonable grounds" defences to be available –

> *"Our proposals also include a defence of reasonable excuse which would cover taking or sharing an image if:*
>
> > *the defendant reasonably believed it was necessary for the purposes of preventing, detecting, investigating or prosecuting crime, for legal proceedings or for the administration of justice.*
> >
> > *they were taking or sharing for a genuine medical, scientific or educational purpose.*
> >
> > *taking or sharing an image was in the public interest."*

Legal proceedings should include the taking of legal advice.

28. Paragraphs 4.27 to 4.29 and 10.45 to 10.47 explain why it is undesirable to include "joke" as a defence. We agree when the perpetrator knows the victim does not consent or has no reason to think that (s)he does consent.

Consultation Question 22 (7.153)

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

- **images depicting sexual assault being shared with the person in the image;**
- **intimate images that were taken without consent, or where the person in the image was assured that the image had been deleted, being shared with the person in the image; and**
- **intimate images being shared with the person in the image by someone who did not take the image and was not originally sent the image with consent?**

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

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

29. This is not within our experience.

Consultation Question 23 (8.23)

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

30. Yes – ss.74 to 76 deal with the issue of what constitutes consent. The Bar Council does not regard these provisions as entirely satisfactory, but this is not the opportunity for a comprehensive review of the law of consent.

Consultation Question 24 (9.12)

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

31. Yes. It is obvious that the law should protect victims against distress, alarm and humiliation by others using intimate images of the victim. This is consistent with the remedies provided by the Data Protection Act 2018.

Consultation Question 25 (10.40)

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

32. Yes. The law would fall into disrepute if an accidental and unintended image – e.g. a photograph which requires substantial enlargement to reveal that it does contain

an intimate image when the obvious focus is on an innocuous subject - were to fall within the ambit of the criminal law.

Consultation Question 26 (10.60)

We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if — (a) V does not consent to the taking or sharing; and (b) D does not reasonably believe that V consents.

33. We agree.

Consultation Question 27 (10.73)

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

> **(a) V does not consent; and**
> **(b) D does so with the intention of humiliating, alarming or distressing V or with the intention that D or another person will look at the image for the purpose of humiliating, alarming or distressing V. Do consultees agree?**

34. Yes.

Consultation Question 28 (10.79)

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

> **(a) V does not consent;**
>
> **(b) D does not reasonably believe that V consents; and (c) D does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at the image of V. Do consultees agree?**

35. Yes

Consultation Question 29 (10.67)

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

36. This question is one of policy rather than law reform *per se* - as stated in paragraph 10.86 of the consultation, evidence on the need for this offence should be sought from relevant stakeholders.

Consultation Question 30 (10.93)

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

37. As suggested in paragraph 10.92, the intent to humiliate, alarm or distress could adequately cover coercive or controlling behaviour without the need for such an additional offence.

Consultation Question 31 (10.95)

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

38. Provided all elements are set out clearly, we cannot foresee any such impediment.

Consultation Question 32 (11.81)

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

39. Yes. The Law Commission's analysis demonstrates why such an element of the offence would be unnecessary. It would also unjustifiably complicate further the task of the tribunal of fact.

Consultation Question 33 (11.108)

We provisionally propose that where:

> **(1) an intimate image is taken in a place to which members of the public had access (whether or not by payment of a fee); and**
>
> **(2) the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude, the prosecution must prove that the victim has a reasonable expectation of privacy in relation to the taking of the image. Do consultees agree?**

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?

40. Yes, subject to the observations below.

41. A 'public place' is defined by whether it is a place to which members of the public have access, whether or not by the payment of a fee. That definition though does not address how a person comes to have access, assuming that they did not pay. A trespasser does not pay but by definition has access to the place; that fact does not make the place a public place. The reason he is a trespasser is that he does not have permission to enter. An additional element of the definition of a 'public' place could therefore be a place to which others have access by express or implied invitation or

permission. This would be consistent with Section 9 of the Public Order Act 1936 (as amended), Section 57(4) of the Firearms Act 1968 and Section 91(4) of the Criminal Justice Act 1967 which provide:

42. "Public place" includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise"

43. A 'semi-public' place is, as far as the Bar Council is aware, a novel concept in criminal legislation. On the proposed (or the above enhanced) definition, a changing room could be, depending on the facts, either a public place or a non-public place. This issue is binary – either a place is public or it is not. But the status of the place is not fixed. Just as a person can be invited into a building for one purpose and yet be a trespasser for another purpose (see the caselaw on burglary under section 9(1)(b) Theft Act 1968: for example *R v Smith and Jones* (1976) 63 Cr App R 47), so can a public place become a private place if the invitation or permission to enter is vitiated by the action of the person who entered; hence the emphasis on 'at the material time' in the above definition. It is not clear therefore why a person in a changing room needs to be qualified as being in both a public and a semi-public place. The invitation/permission granted to enter a 'public' changing room would not extend to the taking of intimate images – it will no longer be a public place (assuming it was in the first place) and the person changing his/her clothes will not need the added statutory protection envisaged by Question 33. The same would apply to a person attending a rugby match at Twickenham – does the permission (licence) to enter include permission to take an intimate image? It will be a jury issue to determine whether the place is public or not for the purpose of taking an image; for example, many changing rooms have signs which forbid photography. The examples given at §11-130 rightly identify the variety of factual scenarios which may apply in both the on-line and the off-line world; they do not easily fit into a single definition of 'semi-public'. However, if the focus is on the purpose of the access, those scenarios can be accommodated within the public/non-public enhanced definition suggested above.

Consultation Question 34 (11.138)

44. **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?

45. Yes, subject to the definition of 'public place'.

Consultation Question 35 (12.21)

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

46. Yes, this appears to be a notable omission to s75 SOA 2003 and it would achieve consistency with the other purposes of the proposed new offences to add this to the presumptions.

Consultation Question 36 (12.23)

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

47. The Bar Council is not in a position to provide such examples. Other stakeholders may be better placed to do so.

Consultation Question 37 (12.116)

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

48. The Bar Council is not in a position to provide such examples. Other stakeholders may be better placed to do so.

Consultation Question 38 (12.119)

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

49. The Bar Council is not in a position to provide such examples. Other stakeholders may be better placed to do so.

Consultation Question 39 (12.137)

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

50. The Bar Council is not in a position to provide such examples. Other stakeholders may be better placed to do so.

Consultation Question 40 (12.138 and 12.139)

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

a) **D intends to cause V to fear that the threat will be carried out; or**
b) **D is reckless as to whether V will fear that the threat will be carried out.**

Do consultees agree?

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

51. Yes, the concept of putting the complainant in fear is sufficient to ensure the fault element as identified at paragraph 12.127, and it is right that the same definition of "intimate image" is used throughout both to ensure simplicity and consistency and to meet the issue identified in paragraph 12.126.

Consultation Question 41 (12.143)

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

52. No, for the reasons set out in the consultation the criminality being addressed is the threat and not the harm caused by it, and so in circumstances where the complainant did consent but the defendant did not anticipate this, and believed they were making a threat that would put the complainant in fear (even if it did not), the fact that no harm was in fact caused would lessen the seriousness of the offence but would not negate the criminality of the offence itself. The prosecution should not therefore be required to prove that the person depicted did not consent.

Consultation Question 42 (13.193)

We provisionally propose that there should be a defence of reasonable excuse available in the context of our provisionally proposed base offence which includes: (1) taking or sharing the defendant reasonably believed was necessary for the purposes of preventing, detecting, investigating or prosecuting crime; (2) taking or sharing the defendant reasonably believed was necessary for the purposes of legal proceedings; (3) sharing the defendant reasonably believed was necessary for the administration of justice; (4) taking or sharing for a genuine medical, scientific or educational purpose; and (5) taking or sharing that was in the public interest. Do consultees agree?

53. It is assumed that the 'reasonable excuse' defence will incorporate a reverse burden of proof (legal not evidential) and that the proposed new offence(s) provisions will expressly say so. This approach would be in line with the appellate authorities which have set out the criteria for assessing the compatibility of a reverse burden with Article 6(2) ECHR (eg. *R v Johnstone* [2003] UKHL 28; *Sheldrake v DPP; Att-Gen's reference (No.4 of 2002)* [2004] UKHL 43).

54. The Bar Council agrees that it is important to set out the full extent of the statutory defence. If appropriate, an exhaustive list is preferable to an inclusive list as it provides certainty and consistency. There will always be unusual and unforeseen

factual scenarios which may or may not justify the application of a 'reasonable excuse' defence, but that eventuality can be addressed by the use of the prosecutorial discretion. The examples provided in §13-24 are clearly not unforeseen, but it is suggested their prevalence should be considered before determining whether to leave the list open-ended.

55. It is agreed that the statutory defence is not compatible with a threats offence (§3.9)

56. In respect of '(4) taking or sharing for a genuine medical, scientific or educational purpose' (§13-78 – 13.100), the Bar Council is not aware of a similar provision in a statutory defence to any other criminal offence. The proposed circumstances in which the defence would apply (§13-99) are narrow, but the statutory wording of the excuse could in theory, extend far beyond and be exploited by defendants seeking to take advantage of the broad statutory language. The prospect of the Crown Prosecution Service determining that it is in the public interest to prosecute legitimate medical research professionals for sharing an intimate image in the course of their employment is surely remote. Any breach of internal research protocols will no doubt be covered by the relevant disciplinary procedures. It may be that, again, the use of the prosecutorial discretion is sufficient protection for medical researchers. 'Educational purposes' is also a broad term, and its ambit is not directly addressed in the Consultation. Is it proposed to be limited to formal, institution-based education? Again there is a risk that such a defence will be exploited. Also, 'genuine' may require further definition; it may be that it is defined in the comparable legislation in New South Wales and Western Australia. Is it to be a wholly objective test? How is it to be determined which sharing is 'genuine' and which is not: for example, must there be an existing research protocol?

57. In respect of '(5) taking or sharing that was in the public interest' (§13-100 – 13.191), the Bar Council make the following observations.

1) The Consultation states that "We cannot preclude the possibility that an intimate image of a person may engage the public interest" (13-102), so as to engage Art 10. Whilst photographs constitute a form of expression (13-117), it is not clear in what realistic circumstances it is envisaged that the taking or sharing of an *intimate* image of V taken without consent (or reasonable belief of consent) where the activity took place in public and where V had an expectation

of privacy, and where the image had not been previously shared in a public place (i.e. in summary form, the commission of the base offence absent the statutory defence), would nevertheless require the protection from interference with Art. 10 rights (see also §13-109). The example given to justify the need of a statutory defence (§13-142) is that of intimate images taken in private, which was the factual position in *Mosley v NGN* [2008] EWHC 1777 QB. In that case the High Court determined that the critical factor for the Art. 8/Art. 10 balancing exercise was the expectation of privacy, which on the facts of that case did not justify the intrusion relying on Art. 10 rights. The Court held [132] that in circumstances of an expectation of privacy: "There can be little doubt that intimate photographs or recording of private sexual activity, however unconventional, would be extremely difficult to justify at all by Strasbourg standards" – which provides a steer away from the necessity of a public interest defence. The fact that there are possible theoretical examples which might contribute to a debate of public interest, and so tilt the balance in favour of publication or sharing of the image, does not necessarily counterbalance the wider legitimate aim, achieved by criminalisation, of protection from and deterrence of the personal and social harm caused by the taking and sharing of intimate images (Art. 10(2); see also 13-113, 13-120, 13-125).

The balance between the competing protected rights will always be fact specific. It is of note that the facts of many of the principal ECtHR cases cited in the consultation are far removed from the publication of *intimate* photographs. For example:

- in *Couderc and Hachette Filipacchi Associés v France* [2015] ECHR 992 (App No 40454/07), the images were of a European prince holding his 18 month old child in the context of an expose of an extra-marital affair and the hereditary rights of a child born out of marriage;

- in *Von Hannover v Germany (No 2)* [2012] ECHR 228 (App No 40660/08), the images were of adult members of a European royal family in public whilst on a skiing holiday – a court judgement which, at [104] repeated that Member States enjoy a margin of appreciation "in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary" and at [107] stressed that "Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts";

Whilst it is agreed that it cannot be said that the taking or sharing of an intimate image could never raise legitimate Art. 10 concerns, it is appropriate to consider the likelihood of that occurring in the context of the State determining how to exercise its margin of appreciation. It is important that, in assessing the balance to be struck in the context of the proposed base offence of taking and sharing an intimate image, sufficient weight is accorded to the nature of the images themselves – which will always involve nudity and/or be in sexual context. However, on balance the Bar Council agrees that a public interest defence is justified. The prospect of a photographer, journalist or editor being unable to avail him/herself of a defence in a criminal prosecution which is available in civil law, is unappealing.

2) A concern with this limb of the statutory defence centres around its practical application in a criminal trial. It will ultimately be for the tribunal of fact (lay magistrates and juries) to determine the balance to be struck by competing Art. 8 and Art. 10 rights and it is ill-suited to the task without further guidance. The numerous domestic and ECtHR civil appellate court decisions addressing the balancing exercise are testament to the complexity and breadth of the issues of law and fact with which the professional judiciary regularly grapple. Whilst juries routinely hear and decide upon extremely technical and detailed areas of, for example, scientific evidence and financial structures, they are assisted by qualified experts called by both the prosecution and defence to assist in their comprehension of the issues. It is difficult to envisage such happening here. It is of note that none of the comparable provisions in other jurisdictions provide a definition of the 'public interest' for these purposes. Whilst the defence does already exist for other statutory offences, such as Section 33(4) Criminal Justice and Courts Act 2015 (see §13-162) and Section 170(2)(c) Data Protection Act 2018 (presumably an intimate image could constitute personal data), the Bar Council is not aware of any appellate decisions from criminal prosecutions in which the 'public interest defence' (in the sense of Art. 10) was litigated. Since factors central to the Art. 8/Art. 10 balancing, as identified in *Murray v Big Pictures (UK)* [2009] EWCA Civ 446 (see §11-7), are already incorporated into the base offence (i.e. content, consent, prior sharing, expectation of privacy), it may be possible to provide a list of factors which the court should have regard to when considering the public interest defence. It may also be that further definition is possible along the lines of 'media activity purposes' in the comparable statute in Western Australia (§13.180-183).

Note

The arguments for and against a public interest defence have been previously considered by the Law Commission in its Consultation Paper (No.230 February 2017) on Protection of Official Data at §7.50-64. Concerns were there raised about a jury assessing a public interest defence (that is, of the holder of the official secret making an unauthorised disclosure), some of which have general application. The Bar Council's Response to the Consultation (May 2017) at §69-89 sought to address those concerns. In addition the Law Commission at §7.67-75 specifically considered the availability of the defence for journalists and the application of Art. 10, drawing on observations of Leveson L.J.'s Inquiry into the Culture, Practices and Ethics of the Press (2012), including the use of the prosecutorial discretion.

3) If it is appropriate to have a public interest defence to protect Art. 10 rights, then it is suggested that the difficulties which a lay tribunal will face could be ameliorated to some extent by the defence being that D 'reasonably believed' that taking/sharing was in the public interest (§13-184 et seq). That would not require a determination of the Art. 8/Art. 10 balance, but rather whether (i) D honestly held the view that Art. 10 trumped Art. 8, and (ii) that view was reasonable.

Consultation Question 43 (14.85)

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

58. All the relevant arguments for and against victim anonymity have been clearly set out in the consultation. Ultimately the determination of the issue is a question of policy, balancing the requirement for open and fair justice and the protection of victims from further harm. The Bar Council does not express a view as to where the balance lies.

Consultation Question 44 (14.89)

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

59. In practice, the additional evidential and procedural hurdles which apply if the charge is not a sexual offence are relatively easily met and would almost certainly be so if the intimate image abuse offences did involve a sexual element. The availability of special measures of itself may not justify the categorisation of the offence as a sexual offence.

Consultation Question 45 (14.93)

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

60. Since the aggravated offence incorporates either the element of intent to humiliate, alarm or distress or for the purpose of obtaining sexual gratification, there is a significant risk that a defendant so charged may dispense with representation in order specifically to increase the distress of the victim and so compound the gravity of the offence. The justification for imposing restrictions on cross-examination for the basic offence or the threatening offence is not so clear-cut.

Consultation Question 46 (14.103)

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

61. Yes.

Consultation Question 47 (14.114)

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

62. Yes

Bar Council[2]

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[2] Prepared by the Law Reform Committee