# CORKER BINNING'S RESPONSE TO THE LAW COMMISSION'S CONSULTATION ON INTIMATE IMAGE ABUSE

In our response to the Law Commission's Consultation on Intimate Image Abuse (the 'Consultation'), we address below the 17 summary questions posed of consultees. Our answers are based on our own significant experience of defending those accused of serious criminal offences.

As an overarching principle, we agree that this area of the law is ripe for review and consideration, and in today's society there needs to be a greater level of protection for those who are the victims of intimate image abuse. However, we do have concerns about the substance of the Law Commission's proposals. These concerns fall into three broad categories:

1. That the scope of the proposed offences, as drafted, will result in significant over-criminalisation, particularly of young people.
2. That certain aspects of the proposed reforms lack clarity, and definitions need far greater examination and refinement before they can form the basis of any criminal offence.
3. That the current proposals go far beyond the very similar offences contained within current legislation, and it is as yet unclear how the proposed legislation will fit into the existing patchwork of sexual/social media/intimate image offences.

***Summary Consultation Question 1***

*Do consultees agree that there should be a base offence with no additional intent?*

We are concerned that the introduction of a base offence with no additional intent creates a number of foreseeable issues, which will result in the over criminalisation of the public, and particularly of young people. In our view, the base offence is so wide that it will capture a whole host of anodyne and innocent/ill-judged actions. It requires significant modification to capture actions which would properly be considered as criminal by society at large.

<u>The definition of intimate images</u>

Our primary concern is that the definition of an intimate image under the Law Commission's current proposals is extremely broad. The definition includes images which show a person nude or semi-nude, meaning:

> '*a person's genitals, buttocks or breasts, whether exposed or covered by anything worn as underwear, or images of a person's partially exposed breasts, taken down their top.*'

For offences that include additional fault requirements or harm caused to the victim, this definition seems reasonable. However, for the base offence, there is a substantial risk that this definition will capture acts not deserving of criminalisation:

i. <u>Images of persons wearing anything worn as underwear</u> – '*Anything worn as underwear*' is a vague description and could stretch to include nightwear, a dressing gown or a vest. In the context of a relationship, a partner might not object to their partner taking such images, even if not expressly consenting. The concern arises when relationships result in acrimonious breakdowns. Just as we see sexual images being subsequently utilised as evidence of wrongdoing in the family courts or as part of police complaints, these photographs could become an available source for making malicious, yet prima facie

credible, criminal complaints. The fear is that this base offence creates a potent new weapon for warring couples.

ii. Partially exposed breasts, taken down their top – it is understood that this has been included to capture '*downblousing*'. Whilst the general objective is welcomed as a safeguard for victims, we disagree with the way it has been artificially inserted into the definition. The creation and definition of a new criminal offence must be specifically constructed to ensure it incisively tackles the specific social ill at hand, without risking becoming a 'catch-all' for more innocent deeds.

To illustrate, the natural comparator is the offence of '*upskirting*' contained within the Voyeurism (Offences) Act 2019. '*Upskirting*' is manifestly different to '*downblousing*' and this should be reflected in the law. Regarding '*upskirting*', there are almost no circumstances in which a non-consensual photograph/video taken of a person's genitalia or buttocks underneath their outer clothing can be done innocently or unwittingly. If such an image is taken, the likelihood is that the offence has been committed. We further note that the definition of '*upskirting*' as in the 2019 Act contains a caveat that the defendant's objective must be the display/observance of the relevant body parts where they 'would not otherwise be visible.'

This is not true for '*downblousing*'. Plainly, a covertly taken photograph down the top of a person which captures more than that person intended to display to the public without their consent should be prosecuted. However, to give what is likely to be a common occurrence as an example, a photograph of a woman in public wearing a low cut top will include her partially exposed breasts, and so falling within the definition of the offence subject to the public place caveat discussed below. Without the protection as built into the Voyeurism (Offences) Act 2019, there is a significant chance that far more people would be charged with an offence of '*downblousing*' than equivalent '*upskirting*' offenders. This creates a serious disparity which should be remedied.

It is appreciated that the Law Commission's proposed 'public place' caveat intends to prevent acts carried out accidentally and in the course of social events becoming an offence but there is a clear issue as to when this caveat will be applied. For example, if D and V (who is wearing a low cut top) are sat at a table in public as part of a group of friends and D takes a photograph of the group which includes V, presumably the caveat applies. However, if D stands up to take the photograph in order to, say, get a better angle for photograph, would this higher vantage point result in the commission of the base offence? Similarly, a selfie taken by D of D and V with the camera at a 90 degree angle would doubtlessly fall within the caveat but if D's arm is raised at 45 degrees, could this give rise to the base offence? This is where the protection as contained within the '*upskirting*' offence is absolutely crucial.

The distinction between a photograph of a blouse and '*downblousing*' is so marginal on the current proposed definition that a member of the public may not even be aware when they are committing the offence. The Law Commission will be aware of the need for certainty and clarity, particularly when it comes to offences which are potentially connected to actions carried out as a part of ordinary everyday life.

iii. The final point to raise regarding the definitions is the category of persons that may find themselves taking or sharing such images unknowingly and therefore in contravention of

the base offence. The prevalence of social media applications, including Whatsapp, Snapchat and Tik Tok means that schoolchildren are encouraged to share pictures habitually. Thus, the likelihood that a youth will commit this offence, given the breadth of what is considered an intimate image is inevitable.

We risk criminalising future generations for acts that should not be considered criminal in the circumstances. Under current proposals, a teenager who takes a picture of his friend whose trousers have accidentally fallen down, exposing his underwear, would be guilty of a criminal offence. It is accepted that prosecutors will examine cases and make charging decisions with the Full Code Test in mind, but exercise of discretion is not a solution to legislation drafted too widely. The onus cannot be placed upon the discretion of individual prosecutors to take a common sense approach.

## Consent

For the base offence, the Law Commission's proposal is that once an intimate image has been taken/shared, the lack of consent, or lack of reasonable belief in consent, is the only other element to be satisfied for the offence to be committed. This creates a significant problem due to the manner in which people consent, or do not, to a photograph or video being taken.

With all sexual offences, consent is of paramount importance. That is because when engaging in an intimate sexual act, it is such a private and personal experience that a lack of consent converts the act into one of violence. The consequence of this is that consent must be express or tacitly clear and the possible failure to obtain it creates a clear issue to be tested at trial. This is a well-trodden path when it comes to contact offending, where the physical nature of the acts involved necessarily involve opportunity and requirement for D to take proactive steps to ascertain consent before engaging in an act tending to violate bodily integrity. The same cannot be said for taking photographs or videos.

With the base offence, there will obviously be circumstances where images are taken or shared in which the person depicted has not consented because of the nature of the photograph and/or the circumstances in which it was taken. An example of this, would be images covertly taken of a person showering. However, the taking of photographs is so prevalent in today's society that for images that are questionably intimate (as described under the above heading) consent becomes a far less tangible issue to tackle. People refuse to consent to photographs every day for all sorts of reasons. They may not even express their lack of consent because a photograph is so commonplace. In the current offence of voyeurism, for example, a defendant must 'know' that the person does not consent to the watching. With the '*upskirting*' offence, there must be a reasonable belief in consent, but the offence has an additional element – that of the sexual gratification/humiliation purpose.

Does a lack of consent per se create the offence, or does it depend on what the lack of consent relates to? For example, assume D and V are in a cohabiting relationship and D takes a photograph of V wearing only his underwear. D objects to the photograph being taken and the reason he gives is he does not how his hair looks at the time. Under the current proposals for the base offence, there is ambiguity. D may reasonably believe that V had no concern about the intimate nature of the image and the lack of consent related solely to V's hair. The offence as drafted could preclude D from relying on their belief that V was consented to the intimate nature of the image.

## Conclusion

We appreciate that there are holes in the patchwork of image offences currently in operation, specifically with regard to the harm intended and the reasons for taking the non-consensual intimate image. However, new laws should seek to encapsulate all combinations of actus reus and mens rea so as not to leave gaping holes in the range of offences. Where parallel offences already exist, very specific care should be taken to align new laws with old in order to not create discrepancies. It should not create a new trawler net, which captures innocently taken intimate images as well.

Ultimately, we disagree with the creation of a base offence. We believe that the starting point for offences of this kind should contain additional elements of malfeasance, as proposed in Questions 2 and 3 below.

***Summary Consultation Question 2***

*Do consultees agree that there should be an additional offence where the defendant intended to humiliate, alarm or distress the victim?*

This is agreed and should form the lowest level of this offence type, along with that which is set out in Question 3.

The additional intended level of harm required is necessary to protect the public from over criminalisation. It does not diminish the protection afford to victims because if the taking of non-consensual intimate images requires prosecution, it is inevitable that an additional layer of fault requirement (intent to cause humiliation, alarm or distress, and/or for sexual gratification) will also be present in the offending behaviour.

***Summary Consultation Question 3***

*Do consultees agree that there should be a further additional offence where the defendant's purpose was to obtain sexual gratification?*

This is also agreed and should form the lowest level of this offence type, along with that which is set out in Question 2.

See reasons described in Question 2. One of the effects in the current landscape of offences is the confusion between what constitutes a 'communications' offence and what a sexual offence is. The creation of 'non-sexual intent' and 'sexual intent' tiers will assist in clarifying the law.

***Summary Consultation Question 4***

*Do consultees agree that there should be an offence of threatening to share an intimate image?*

This is broadly agreed. We add only that the offence should stipulate that it must be intended that the threat causes another to fear it will be carried out. Section 16 of the Offences Against the Person Act 1861 is a relevant comparison. A mere suggestion, inference or joke should not constitute an offence. The proposals require far greater clarity here on what would constitute a criminal 'threat'.

***Summary Consultation Question 5***

*Do consultees agree that images which:*

> *(i) show something that a reasonable person would consider to be sexual because of its nature; or*

*(ii) taken as a whole, are such that a reasonable person would consider them to be sexual*

*should be included within the definition of an intimate image?*

Yes, this is agreed. Sexual images are clearly intimate and the above descriptors of what is sexual seek to encompass a contemporaneous description of the term as per the norms of the society of the day. It allows the courts flexibility to adhere to the modes of today without creating too broad a definition. We note that the definition as proposed is consistent with current definitions within the Sexual Offences Act 2003.

***Summary Consultation Question 6***

*Do consultees agree that the definition of an intimate image should include nude and semi-nude which includes a person's genitals, buttocks, or breasts whether exposed or covered with anything worn as underwear.*

*For downblousing this would include partially exposed breasts.*

*For the sharing offences, this would also include altered images.*

The Law Commission are referred to Question 1, which addresses '*downblousing*'. In short, the definition is too broad in the context of the base offence. The definition is appropriate if combined with the perpetrator's intention to obtain sexual gratification or to humiliate, alarm or distress the victim. If the perpetrator's intention is to 'downblouse', one or both of these additional elements will be present.

In relation to sharing offences, we agree that altered images should be included. Given the technology available, the harm caused by 'deepfake' images is indistinguishable from authentic images where the original image was non-intimate and the altered image is intimate. However, we have concerns once again about the scope and the lack of clarity within the definitions. It is entirely unclear, on the current proposals, what degree of alteration would be required in order to turn a photoshopped image into a criminal offence.

***Summary Consultation Question 7***

*Do consultees agree that the definition of an intimate image should include toileting images?*

Yes. Using a toilet is plainly private and the use of photography in any manner must be consensual. There is limited scope for over prosecution under this definition. However, the Law Commission must be mindful that even photographs such as this, taken within the context of relationships, may well have innocent intent. The lack of any 'sexual in nature' threshold (as exists within the current indecent images of children framework) means that individuals are guilty of an offence if, for example, they play a practical joke on a partner or friend by taking a picture of them sat on the toilet, even if no body parts are on display. Whilst we agree in principle with the idea that toileting is a private act, we do foresee some issues with this, particularly when it comes to youth defendants who may not necessarily think through the legal implications of their actions.

***Summary Consultation Question 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 anything worn as underwear, should be included within the definition of an intimate image?*

Not in the context of the base offence for reasons described in Question 1. We have concerns at the lack of clarity involved with phrases such as 'state of undress' and 'anything worn as underwear.' These terms are particularly vague when one considers individual choices made over the selection of nightwear or beachwear. In addition, the offence as drafted creates an artificial lacuna, where criminality is dependent on the location in which the same image is taken. An image of an individual in a bikini, showering after a swim, would not be an offence if it occurred at a beachside or poolside outdoor shower but would be an offence if the photograph was taken by a private pool or hot tub.

The term 'state of undress' is archaic, and has no place within modern society. Is a person in a 'state of undress' when they are anything other than 'fully dressed,' and what can properly be said to constitute the difference between 'dressed and 'undressed?' What may be considered as 'dressed' to a person (for example) over the age of 40 may not necessarily apply to a person in the 18-24 category. The lack of certainty in these definitions make this offence, as currently drafted, entirely unworkable.

***Summary Consultation Question 9***

*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.*

We accept that the assessment of what is an 'intimate' image varies according to religious and cultural sensitivity, and we agree in principle that individuals who are aware of those sensitivities and act in violation of those standards could be included within the relevant offence framework. However, we consider that legislating for this extremely nuanced and subjective type of behaviour will be an extremely difficult task. The burden would be on the prosecution to demonstrate that a defendant was in fact aware of the subject's views about the image. This imputation of knowledge is extremely difficult to prove. We do not consider that the definition of 'intimate image' can properly cater to all sensitivities without also running the risk of significant over-criminalisation.

***Summary Consultation Question 10***

*Are there any forms of 'taking' that the current voyeurism or 'upskirting' offences, or the taking offence in section 1 of the Protection of Children Act 1978, fail to capture?*

Not that we are aware of or that immediately come to mind.

***Summary Consultation Question 11***

*Do consultees agree that a 'taking' offence should only include behaviour where, but for the acts of the perpetrator, the image would not otherwise exist?*

We agree that any offence should be limited in this manner.

***Summary Consultation Question 12***

*Do consultees agree that 'sharing' an intimate image should capture:*

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

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

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

*Are there any other forms of sharing that consultees think should be included in the definition of 'sharing'?*

Whilst we agree that 'sharing' should certainly not go further than the examples provided, we have concerns about number (iii) – 'showing' intimate images to someone else. Given the broad nature of the base offence (as already discussed), this would pose a significant risk of over-criminalisation, particularly of young people. We have significant experience of young people showing their friends (for example) pictures of people in swimwear or underwear. This is a fairly ordinary (and longstanding) habit amongst teenagers, encouraged by the prevalence of online pornography and adult magazines. Expecting young people to understand the difference between those images and images of individuals in swimwear/underwear taken at the pool or in a garden is potentially unreasonable and disproportionate.

***Summary Consultation Question 13***

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

Whilst the law of consent as contained within sections 74 to 76 Sexual Offences Act has its own problems, those fall out with the scope of the current consultation and would require its own dedicated consultation. For the purpose of this particular set of proposed reforms, we agree that the current consent model is the most appropriate reference point to use.

***Summary Consultation Question 14***

*Do consultees agree that proof of actual harm should not be an element of intimate image abuse offences?*

Requiring proof of 'actual harm' would undermine the purpose of the proposed offences (i.e. the act itself). It would also fail to protect victims who were unaware that an intimate image had been taken and are subsequently untraceable or unidentifiable. We would consider the concept of harm to be more appropriate for sentencing purposes.

***Summary Consultation Question 15***

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

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

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

We are not in a position to answer these questions. It falls outside our expertise.

***Summary Consultation Question 16***

*(i) should anonymity orders be available for all victims?*

*(ii) should notification requirements be triggered where the defendant's purpose was obtaining sexual gratification when an appropriate seriousness threshold is met?*

*(iii) should Sexual Harm Prevention Orders be available under all four offences where it is necessary to protect the public from sexual harm?*

Whilst we appreciate the harm connected with these offences for victims, and the need to protect the vulnerable, we do not accept that a blanket approach should be taken in respect of anonymity orders. Extending the provision of anonymity to 'all' complainants of this broad range of offences would be a radical departure from current practice, and potentially runs in contravention to the principles of open justice. Anonymity should be reserved to the 'sexual' category only.

We agree with the proposal in (ii).

We do not agree with (iii). We do not see how an individual convicted of the base offence could considered to pose sexual risk. SHPOs have a significant and life-changing impact on offenders, who are essentially unable to rehabilitate themselves properly into society once one is imposed. They are overused and under-regulated even within the current sexual offences framework. Given our concerns above about over criminalisation and the disproportionate impact of these proposals on young people, we do not consider that SHPOs should be available for all four offences and their application left to the discretion of the individual police officer/prosecutor. These should only be available for the sexual intent category where there is a clear risk of harm.

***Summary Consultation Question 17***

*Should there be a defence of reasonable excuse available which includes:*

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

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

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

*(iv) taking or sharing for a genuine medical, scientific or educational purpose; and v taking or sharing that was in the public interest?*

We agree that the defence of reasonable excuse should be available in all four circumstances proposed.