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Changing the Law on Intimate Image Abuse: a new Paradigm for Image-Based Domestic Abuse?

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Abstract:	<p>Whilst the disclosure of private sexual images without consent was first criminalised by s. 33 of the Crime and Courts Act 2015, there remain significant gaps in the legislative framework. This is particularly true in relation to 'image-based domestic abuse' and there are important barriers to legislative intervention when intimate imagery is disclosed as a tool of coercion in domestically abusive and controlling relationships. The Online Safety Act which, in October 2023, finally completed its painfully slow journey through Parliament, promises to plug these legislative gaps by implementing recommendations from the Law Commission, set out in its recent project on the Taking, Making and Sharing of Intimate Images. This paper examines its provisions in this regard, exploring whether and how the Act will improve the legislative landscape. It concludes that, in setting out an improved but not comprehensive, new offence framework, the Act will, in fact, confuse and complicate this landscape, frustrating the response that women experiencing image-based domestic abuse will receive from the criminal law and justice system.</p>

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Changing the Law on Intimate Image Abuse: a new Paradigm for Image-Based Domestic Abuse?

Introduction

Since the Online Harms White Paper was introduced in April 2019, the road to delivering the government’s manifesto commitment to make the ‘UK the safest place to be online’ has been far from smooth. The Online Safety Act finally received Royal Assent in October 2023; its corresponding Bill having outlived four prime ministers. This Bill changed several times over its lifetime, and, for a long time, its ultimate appearance in law remained far from guaranteed. One of the many online harms the Online Safety Act 2023 seeks to tackle is the phenomenon which is often called ‘revenge porn’ but which is more appropriately termed ‘the non-consensual disclosure of sexual images’ and falls within the range of behaviour known as ‘intimate image abuse’. Whilst the disclosure of private sexual images has been criminalised since 2015,¹ there remain huge gaps in this legislative framework. This is particularly true in relation to ‘image-based domestic abuse’ and, elsewhere,² I have noted the enduring barriers to conviction when intimate disclosure takes place in coercive and controlling relationships. The Online Safety Act promises to plug these legislative gaps. As part of a remit which has ballooned over the years, the Act seeks to implement recommendations from the Law Commission, set out in its recent project on the Taking, Making and Sharing of Intimate Images, and introduces new offences to this end. Its provisions in this regard are the specific concern of this paper.

Whilst the Act has generated extensive commentary, its sheer size and scope mean that discussion thereof is necessarily broad brushed. Alongside, the developing academic analysis of the Law Commission’s recommendations reflects the broad and ambitious ambit of the project itself and, with notable exceptions,³ there has been limited evaluation of whether and how these recommendations, codified in the Act, will improve the legislative landscape for women⁴ who have intimate images released in the context of a controlling relationship. In focusing very particularly on the Law Commission’s recommendations and the Act’s provisions as they relate to intimate disclosure as a matter of domestic abuse, this paper speaks to the gap in, and provides an important contribution to, both policy and literature discussions in this area.

The paper begins by detailing the conduct associated with coercive and controlling relationships, including the disclosure of intimate images to this end. It notes that, just as other tools of coercion are used in abusive relationship to limit and restrict women’s lives and possibilities, so intimate disclosure abuse also serves to limit women, leaving them trapped in abusive relationships and lives. The paper moves to detail how the law has sought, often unsuccessfully, to intervene in the conduct associated with non-consensual disclosure of intimate images, including in abusive relationships,

¹ Crime and Courts Act 2015, s. 33

² [REDACTED], ‘Responding to Image-Based Domestic Abuse’ (2023) 75 International Journal of Law, Crime and Justice

³ C. Bishop, ‘The impact of proposed intimate image abuse offences on domestic violence and abuse’ (2022) 77 Northern Ireland Legal Quarterly 125

⁴ In this paper, I focus on the domestic victimisation of women who were assigned female at birth and who identify as heterosexual by men who were assigned male at birth and who also identify as heterosexual. I refer to ‘man’, ‘men’, ‘woman’ and ‘women’ accordingly.

before going on to examine whether the Online Safety Act 2023 represents a new paradigm in this regard. In exploring whether and how the Act's provisions on image disclosure will improve the legislative landscape for women having images released as a tool of coercion in abusive relationships, it suggests that these provisions set out an improved, but not comprehensive, new offence framework and that, as such, the Act will, in fact, confuse and complicate this landscape. The paper further details how the new offences could actually serve to distract from more appropriate offences in relation to image-based domestic abuse – simultaneously failing to be robust and comprehensive offences in and of themselves but serving as a diversion from more suitable provisions. The paper concludes that, notwithstanding its stated aims, the Act will ultimately frustrate the response that women experiencing image-based domestic abuse will receive from the criminal law and justice system.

Abuse, Technology and the Law

The release of sexual images online is '... yet another example of the multiple possibilities for online socio-sexual violences, violations and abuses...'.⁵ These multiple possibilities are sometimes positioned along a 'continuum of image-based sexual abuse'.⁶ Indeed, there is a growing awareness that men's abuse of women is not restricted to their real lives but extends into their virtual worlds too, with increasing access to technology and smart phones leading to an explosion of 'technology-facilitated sexual violence'⁷ against women and girls.

This increasing understanding has been especially seen in relation to domestic violence and abuse as studies have started to reveal that the patterns of control typically exercised in coercive relationships are readily and reliably transferable to women's virtual lives. These patterns of control are now understood within Evan Stark's pioneering framework of 'coercive control',⁸ which has provided an important conceptual tool with which to prioritise and mainstream the centrality of the specific notion of coercive control as the underlying dynamic in abusive relationships. Within this framework, domestic abuse rests on a systematic and ongoing strategy of intimidation, isolation and control⁹ that impacts on all areas of women's lives.

Intimidation, coercion and continuous limitations on a woman's choices and space for action result in a condition of unfreedom¹⁰ that is highly gendered in its construction, conveyance and consequence. Domestic abuse comes to be seen as a 'liberty crime', since the need to live within the limits and restrictions placed upon them and standards set by abusive partners causes women to restrict and limit their 'life space', ultimately resulting in women's 'entrapment' in personal lives and relationships. Violence is used in order to control but is often not needed to this end. The real devastation, then, comes to women's choices, options and possibilities around what they and their

⁵ J. Hearn and M. Hall "This is my cheating ex': Gender and sexuality in revenge porn' (2018) 2 Sexualities 860 at p862

⁶ C. McGlynn, E. Rackley, E. and R. Houghton, 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse' (2017) 25 Feminist Legal Studies 25

⁷ N. Henry and A. Powell, 'Beyond the "sext": Technology facilitated sexual violence and harassment against adult women' (2015) 48 Australian & New Zealand Journal of Criminology 104; N. Henry and A. Powell, A, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 Social & Legal Studies 397

⁸ E. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press: Oxford, 2007)

⁹ T.L. Kuennen, 'Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?' (2007) 22 Berkeley Journal of Gender Law & Justice 1

¹⁰ Above n. 8

children do or are and is in the repeated, sustained and systematic attack on their soul and sense of self and is not (necessarily) from violence, physicality and incidents thereof.

The coercive control framework provides an opportunity for a woman to narrate the relationship in full, thus ‘...allow[ing] the victim to tell her story – the whole story – and have it matter...’.¹¹ No longer is the focus on isolated and *identifiable* physical injuries but on the context in which they were inflicted. Men’s conduct can no longer be reduced to an incident that can be explained away and for which responsibility can be avoided. Each incident is located in the gendered context that makes violence and abuse possible and sustainable and accounts of harm are narrated by women themselves. This means, in turn, that conduct which, when seen in isolation, is not significant becomes relevant.

Although not traditionally associated with domestic abuse, evidence now suggests that these ‘socio-sexual violences’ are not the preserve of (male) strangers and we are starting to realise the, almost limitless, possibilities for constant harassment; monitoring; surveillance; and omnipresence that are offered to abusive partners by modern technology. Technology has added to men’s suite of abusive options¹², serving to expand the repertoire of behaviours¹³ available to abusers, with this conduct being termed, variously, ‘technology facilitated coercive control’;¹⁴ ‘technology-facilitated domestic violence’;¹⁵ digital coercive control’;¹⁶ and ‘techniques of agile technological surveillance’.¹⁷

Alongside, there is a growing recognition that the (ab)use of intimate images forms part of the ‘constellation’¹⁸ of behaviours that partner abusers use to broaden their ‘sphere of control’¹⁹ – a ‘tactic’²⁰ of coercive control. This ‘image-based domestic abuse’²¹ can range from pictures being shared when the relationship is going well²² to abusers recording intimate partner sexual violence.²³ It can also include women ‘agreeing’ to intimate images being taken within a relationship in which not agreeing would be an unsafe option, with other images obtained under coercion or pressure.²⁴ Sometimes, images are obtained without the victim/survivor being aware an image has been

¹¹ C. Hanna, ‘The paradox of progress: Translating Evan Stark’s coercive control into legal doctrine for abused women’ (2008) 15 *Violence Against Women* 1458 at 1462

¹² [REDACTED], above n. 2

¹³ H. Douglas, ‘Legal systems abuse and coercive control’ (2018) 18 *Criminology & Criminal Justice* 84

¹⁴ M. Dragiewicz et al. ‘Technology facilitated coercive control: domestic violence and the competing roles of digital media platforms’ (2018) 18 *Feminist Media Studies* 609

¹⁵ H. Douglas, B.A. Harris and M. Dragiewicz ‘Technology-facilitated domestic and family violence: women’s experiences’ (2019) 59 *The British Journal of Criminology* 551

¹⁶ B.A. Harris and D. Woodlock, ‘Digital coercive control: insights from two landmark domestic violence studies’ (2019) 59 *The British Journal of Criminology* 530

¹⁷ T.E. Havard and M. Lefevre ‘Beyond the Power and Control Wheel: how abusive men manipulate mobile phone technologies to facilitate coercive control’ (2020) 4 *Journal of Gender-Based Violence* 223

¹⁸ Above n. 14

¹⁹ Ibid. at 611

²⁰ Bishop, above n. 3 at 137

²¹ [REDACTED], above n. 2

²² D. Cuomo and N. Dolci, ‘New tools, old abuse: Technology-Enabled Coercive Control (TECC)’ (2021) 126 *Geoforum* 224

²³ N. Henry, N. Gavey, and K. Johnson, K ‘Image-Based Sexual Abuse as a Means of Coercive Control: Victim-Survivor Experiences’ (2023) 29 *Violence Against Women* 1206

²⁴ A. Huber, ‘A shadow of me old self’: The impact of image-based sexual abuse in a digital society (2023) 29 *International Review of Victimology* 199

captured, such as when they are asleep, intoxicated or showering/undressing.²⁵ Abusers then show or threaten to show sexual imagery to women's children, family or others should, for example, the woman report or seek assistance regarding the relationship abuse or attempt to leave or end the relationship;²⁶ in order, for example, to gain access to children or to pressure the woman into having sex; or, more broadly, in order to make sure that more general demands are met and limits/restrictions are observed.²⁷

The controlling possibilities in this regard are vast and '...victim/survivor experiences of image-based sexual abuse demonstrate the diverse ways in which abusive partners use non-consensual intimate images as a means of exerting coercion and control, alongside other behaviours...'.²⁸ Importantly, just as other tools of coercion are used to limit and restrict women's lives and possibilities, so intimate disclosure abuse also serves to limit women, leaving them unable to leave the house and resulting in their entrapment in personal lives and abusive relationships.²⁹ As such, '...the disclosure of a private image is a very particular manifestation of the reduction to 'no-thingness' (Lungren, 2004) that accompanies men's curtailment of women's life space in domestic abuse...'.³⁰

There have been attempts over the last fifteen years or so to reflect developing understandings about all these behaviours by introducing criminal sanctions in relation to them. These legislative interventions, including, for example, early provisions set out in the Sexual Offences Act 2003³¹ and more recent ones in the Voyeurism (Offences) Act 2019, are a welcome recognition both of the impact of these gendered harms and of the role they play in serving and sustaining men's abuse of women, individually and collectively. For women who have intimate images disclosed without consent, including in the context of an abusive and controlling relationship, legislative intervention was first provided by the general disclosure offence at s.33 Crime and Courts Act 2015. This, rather hastily introduced,³² offence requires that a person 'disclose a private sexual photograph or film' without the consent of the individual featured and with the intention of causing them distress. Threats to disclose the same are now the subject of criminalisation through an amendment to s.33 by s.69 Domestic Abuse Act 2021. There are several problems with this offence, which seems clearly to have been developed with a paradigm case in mind, involving an ex-partner who discloses a classically sexualised ('pornographic') image in a one-off act of revenge. Disclosure to the person featured in the images, for example, is not included, nor is disclosure of computer generated images (so-called, Deep Fakes). Yet, both experiences are potentially devastating, with research clearly showing that disclosure in these circumstances is experienced as sexual abuse – 'it's still a picture of you ... it's still abuse'³³ – and is deeply distressing, having paralysing consequences for victims.³⁴ In

²⁵ Henry et al., above n. 23

²⁶ A. Powell and N. Henry 'Policing technology-facilitated sexual violence against adult victims: police and service sector perspectives' (2018) 28 Policing and Society 295

²⁷ A. Eaton et al. 'Nonconsensual Porn as a Form of Intimate Partner Violence: Using the Power and Control Wheel to Understand Nonconsensual Porn Perpetration in Intimate Relationships' (2021) 22 TRAUMA, VIOLENCE & ABUSE 1140

²⁸ Henry et al., above n. 23 at 1217

²⁹ Cuomi and Dolci, above n. 22; Huber, above n. 24

³⁰ [REDACTED], above n.2

³¹ For example, the Voyeurism offence at s. 67(1)

³² S. Pegg 'A matter of privacy or abuse? Revenge porn in the law' (2018) 7 Criminal Law Review 512

³³ C. McGlynn et al., Shattering lives and myths : a report on image-based sexual abuse (University of Kent 2019)

both experiences the message is clear and powerful – one's sexual security and safety has been compromised and could be again, more widely and graphically.

Alongside, there are additional, significant problems in this legislative regime when women are subject to the disclosure of sexual images in the context of an abusive relationship. The problems in relation to s.33 in this regard derive largely from its focus on the paradigm 'revenge porn' situation. Yet, this paradigmatic disclosure is far removed from the experience when images are disclosed in coercively controlling relationships. Indeed, the further from the easily packaged case a disclosure is, the more difficult it becomes to shoehorn it into the narrow legal categories set out in s.33.

Since the offence does not include situations when images are disclosed to the person pictured, excluded from its reach are situations where a former abusive partner sends an intimate image to his former partner with the caption 'you will always be mine'.³⁵ Equally excluded is where an abuser sends an intimate image to his partner in order to demean and denigrate and thus achieve compliance with whatever specific or general limits and restrictions he has placed upon her. Yet, domestic abuse rests on a systematic belittling of women as wives, mothers and lovers in order to limit and restrict their possibilities and potential and results, ultimately, in a reduction of their space for action. An abuser sending to his partner an intimate picture of her, especially one taken without consent or which captures her in a compromising position, has huge reducing, constraining and controlling currency. Despite now criminalising threats to share private images with others, s.33 does not criminalise the same to the person featured. Yet, even a threat to share with the woman pictured could be distressing and, when she complies with the threatener's demands in order to avoid seeing it, highly controlling. Clearly, in all circumstances here, the messaging is also strong about possible future disclosures.

Nor does s.33 provide for or give any weight to the experiences of the individual pictured who *themselves* feel that the image is sexual. To fall under the current offence, an image must be both 'private' and 'sexual'. 'Private' is defined as 'something that is not of a kind ordinarily seen in public' and an image is 'sexual' if, (a) it shows all or part of an individual's exposed genitals or pubic area, (b) it shows something that a reasonable person would consider to be sexual because of its nature, or (c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.³⁶ This definition raises significant concerns with the offence at s.33 which, although generally relevant, are important in examining how it applies to intimate-image domestic abuse.

Images of women in their underwear, for example, are likely to be excluded. But what of a woman in her underwear who has been coerced into posing for a 'sexy' image or who has just been raped? This image might not be objectively sexual but, when used as a trophy of sexual violation, would surely feel both deeply private and sexual. Equally, what of woman who is pictured in her underwear by an abuser who is, for example, monitoring her weight, restricting her intake of food or otherwise denigrating her in relation to her size; weight; physical appearance; sexual performance? Again, the definitions of private and sexual mean that this image would fall outside the provisions of s.33. Clearly, the legislative assumption is that the disclosure of an intimate image is about 'porn' – a moment that captures female, sexual objectification and commoditisation. Yet, the eroticisation of

³⁴ Ibid.

³⁵ Law Commission, 'Intimate Image Abuse: A Consultation Paper (Law Com No 253)' (HMSO: London, 2021)

³⁶ Crime and Courts Act 2015, s. 35(3)

the conduct here significantly compromises how s.33 operates when images are shared or threatened to be shared in controlling and abusive relationships.

For conviction under s.33, it must be proved that the disclosure was without the consent of the individual who appears in the photograph or film. Consent, though, is not defined and, under s.33, is governed by general criminal law principles which are applied as a question of fact by the jury. A key principle here is duress, which can negative valid consent, but the law provides little guidance as to what would amount to duress that could so negative and how much pressure would need to be shown. Since the tools of coercive control are often only seen by others when we foreground their context,³⁷ when disclosures within abusive relationships are considered, it will be almost impossible, without this guidance, for the fact finders to evaluate any duress and its impact on the victim's consent in any meaningful way.

Perhaps, though, the most problematic aspect of s.33, including in relation to domestic abuse, is its very specific *mens rea* element, which requires disclosure with intent to cause distress to the individual featured. This requirement has been strongly criticised, with the legislation failing to capture the diverse motivations for the creation or distribution of intimate images.³⁸ Yet, in situations where the disclosure's primary motivation is control (rather than causing distress), s.33 is particularly ill-equipped to respond and this will be especially relevant when intimate images are disclosed in the context of domestic abuse. Men do not abuse their intimate women partners to cause distress. They do so in order to control. Whilst the disclosure or threatened disclosure of private sexual images is, undoubtedly, distressing, all studies show that it is a means to operationalise control within abusive relationships.

Acknowledging these and other problems in the '...piecemeal...' ³⁹ legislative framework as it relates to intimate image abuse, including in relation to non-consensual disclosure, in June 2019, the Law Commission commenced a major review thereof. Its motivations in doing so were clearly stated:

'What is clear is that technological progress has outpaced attempts by successive Governments to protect the public from harm resulting from those who take, make and/or share intimate images without consent.'⁴⁰

As regards s.33 in particular, the Law Commission was clear about the '...well-documented...' '...criticisms of this offence...' acknowledging the 'collective agreement' that '...there were significant limitations to the disclosure offence...'.⁴¹ In February 2021, it published its Consultation Paper and, in September 2022, its recommendations for reform of the existing legislative framework. The government announced in November 2022 that the Law Commission's proposals would be incorporated into a new package of criminal offences including into the much awaited, but highly controversial, Online Safety Bill. Whilst significantly diluted from earlier versions, the Online Safety Act 2023 did, indeed, introduce new criminal offences relating to intimate image disclosure.

³⁷ K.E. Crossman et al. 'He Could Scare Me Without Laying a Hand on Me': Mothers' Experiences of Nonviolent Coercive Control During Marriage and After Separation' (2016) 22 Violence Against Women 4 454

³⁸ N. Henry et al., Image-based sexual abuse: A study on the causes and consequences of non-consensual nude or sexual imagery (Routledge: London, 2020)

³⁹ Ibid.

⁴⁰ Above, n. 35 at para. 1.7

⁴¹ Ibid. at para. 1.36

The incorporation therein of the Law Commission’s proposals on intimate image abuse is also significantly diluted, most obviously in its failure to bring the taking, making and sharing of intimate images without consent together under one offence. The Commission had recommended a hierarchy of new offences to replace and reframe the existing law around the taking, making and sharing of intimate images without consent but only those relating the latter are included in the Act’s offences.

A New Paradigm?

Thus, the Online Safety Act includes a ‘base’ offence:

A person (A) commits an offence if—

- (a) A intentionally shares a photograph or film which shows, or appears to show, another person (B) in an intimate state,
- (b) B does not consent to the sharing of the photograph or film, and
- (c) A does not reasonably believe that B consents.⁴²

It also includes additional, more serious offences. One, of intentionally sharing a photograph or film which shows, or appears to show, another person in an intimate state (hereafter, an intimate image) without the consent of the depicted person, with the intention to humiliate, alarm or distress the depicted person. A further additional serious offence of intentionally sharing an intimate image of another person, without the consent of the depicted person and the accused having no reasonable belief in consent, for the purpose of obtaining sexual gratification for themselves or another. Finally, an offence of threatening to share an intimate image of another person 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.⁴³

The base offence carries a maximum sentence upon summary conviction of 6 months’ imprisonment, whilst the more serious offences, when tried on indictment, each carry a maximum sentence of 2 years’ imprisonment. These provisions will be inserted into the Sexual Offences Act 2003, thereby guaranteeing anonymity to complainants and allowing the use of, so called, special measures in court.⁴⁴ There will, however (and contrary to the recommendation of the Law Commission) , be no reference made, for the purposes of establishing ‘consent’ here, to the provisions at ss.74-76 of the same Act.⁴⁵

Henceforth, the taking or making of private sexual images without consent will continue to be covered by the voyeurism offence at s.67 and the sharing of these images without consent by this new offences at s.66B. It remains to be seen whether and how the Commission’s recommendations on taking and making without consent will be incorporated into the legislative framework⁴⁶ but the failure to include them at this stage means that, when examining the proposed offences through the

⁴² Online Safety Act 2023 , s. 188 (1)

⁴³ Ibid (2)-(4)

⁴⁴ <https://www.cps.gov.uk/legal-guidance/special-measures>. Last accessed 13/12/23

⁴⁵ K. [REDACTED], ‘Intimate image disclosure, consent and the Sexual Offences Act 2003 – an opportunity missed or a potential Pandora’s box? (forthcoming)

⁴⁶ See, most recently, <https://www.gov.uk/government/publications/criminal-justice-bill-2023-factsheets/criminal-justice-bill-intimate-images>. Last accessed 08/12/23

lens of domestic abuse, we immediately see that these offences will only capture some of the conduct and harms therein. Thus, for now (and in this paper), the focus is on the how the 2023 Act seeks to remedy problems in the existing s.33 offence and how successful it is in addressing the disclosure without consent of private, sexual images as a tool of coercion in abusive relationships.

The first changes to note are that the Act, following the Law Commission's recommendations, broadens the focus in s.33 and will now criminalise both 'deep-fakes' and disclosure or threatened disclosure to the person pictured. This broadening focus is welcome in acknowledging the impact, which we noted above, of having a computer generated image disclosed and also of having an intimate image disclosed of and to *oneself*. This impact will be particularly devastating when the disclosure is made by a former partner and especially so when used to exert control over a woman escaping or attempting to move past a coercive and abusive relationship. The move to broader criminalisation will mean that both situations mentioned above will be covered and will make the legislative framework much more available to those who are sent their intimate images by abusers.

A further change is that the Act no longer speaks of 'private/sexual' images, as set out in s.33, but rather of photographs or films showing a person in an 'intimate state'. This, rather strange wording, did not come from the Law Commission's recommendations, which focused on 'intimate images', though the overall meaning here does build on these recommendations. It remains to be seen quite what 'an intimate state' will come to mean. The connotations of being 'reduced to a state' are unfortunate, as are those that suggest the person pictured was in a situation/circumstance/position – 'state' – that they could or should have avoided. The term also somewhat others the experience of intimate image exchange. Yet, provided that those involved are aged over 18,⁴⁷ 'sexting', the exchange of sexual imagery between partners with consent, has become a recognised form of sexual expression and is certainly not the problem that the proposed offence here seeks to address. This is the *further sharing without consent*. It is unfortunate that the term 'intimate state' rather obscures this reality and tends to shift the focus away from the conduct which is (rightly) being targeted.

An 'intimate state' is:

- '...(a) the person participating or engaging in an act which a reasonable person would consider to be a sexual act,
- (b) the person doing a thing which a reasonable person would consider to be sexual,
- (c) all or part of the person's exposed genitals, buttocks or breasts,
- (d) the person in an act of urination or defecation, or
- (e) the person carrying out an act of personal care associated with the person's urination, defecation or genital or anal discharge...'⁴⁸

This does, then, go some way to addressing concerns with s.33. A picture taken and then disclosed of a woman in her underwear who has been coerced into posing for an image would be covered. Equally, a picture of a woman wearing the same underwear she was wearing when her abuser raped her or by an abuser who is monitoring her weight, etc would also be captured. Its inclusion in the new offence is an acknowledgement, not only of the potential impact of such images, but also that there is a need to challenge their use in weaponising abusers' control.

⁴⁷ Protection of Children Act 1978, s. 1

⁴⁸ Online Safety Act 2023, s. 188

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The Act stops short, however, of including within its definitions a subjective element in determining whether the image is intimate. It also does not include reference to whether the context makes it so. Both exclusions reflect the Law Commission’s review and recommendations, the Commission having concluded that to include protections for those who themselves feel an image is sexual when, objectively, it appears otherwise would be ‘unworkably broad’.⁴⁹ Clearly, an entirely subjective definition would mean that almost all conduct could be considered sexual and, given the uncertainties and inconsistencies in the current framework, a definition of intimate which would make any new offence so wide as to make it unworkable must be avoided. Indeed, when developing Scotland’s disclosure offence, the Scottish Government ultimately decided that an image should not fall within the definition of ‘intimate’ if ‘the person featured in the image and the person sharing the image considered it to be so, concluding that it would make the law too ambiguous.’⁵⁰ Ultimately, the Commission’s conclusion that ‘...it is [not] possible to introduce subjectivity in a way that ensures sufficient clarity, certainty, and culpability...’⁵¹ seems fair.

It does, though, mean that the new offences stand in contrast to ontological developments on domestic abuse, the significance of which have been to prioritise the opportunities for women to narrate the relationship in full and explain the particular meanings in their abuse. These meanings are often highly individual, understood only by abuser and abused and only become relevant in context. Yet, there is no room for them in the Commission’s recommendations as incorporated into the Act, which will thus not accommodate some disclosures which occur within a domestic abuse context.

Whilst the exclusion of an entirely subjective definition seems fair, more difficult questions appear in situations when it is the *context* which makes the picture sexual. It is possible, for example, that a woman pictured wearing the same *dress* she was wearing when her abuser raped her or which is used as a trophy of a particular occasion of sexual violation would not be covered by the proposed offence. In addition to both parties surely viewing such an image as ‘intimate’, here it is the context which makes the picture intimate and, in turn, so impactful. Not only would such images operate as an infringement upon the woman pictured’s sexual or bodily privacy and autonomy⁵² but they are also harmful because of what they communicate about her (i.e. that she is being controlled and abused).⁵³ It is perhaps inevitable that a project on the scale of the Law Commission’s review could not take into account these highly specific situations. This was an ambitious project, which looked at intimate image abuse as it occurs in a range of different settings and situations, including disclosure in the context of abusive and controlling relationships. Equally, the same concerns about the unworkability of a subjective approach also seem relevant to these situations. Perhaps it is correct that these sorts of situations where it is the *context* which makes the picture sexual are excluded from the law here. Nonetheless, the aim in this paper is to comment on the Act’s potential coverage in relation to image-based domestic abuse and, on this point at least, it can be said that it will leave out several relevant situations in this regard.

⁴⁹ Law Commission, ‘Intimate Image Abuse: A Final Report (Law Com No 407)’ (HMSO: London, 2022) at para. 3.31
⁵⁰ Above n. 35 at para. 6.96
⁵¹ Above n. 49 at para. 3.54
⁵² Above n. 35 at para. 6.101
⁵³ Ibid

What, then, of the other significant change – the extended *mens rea* in the new offences, which includes disclosure with an intention to humiliate, cause alarm or distress? This is clearly a step forward, but does it go far enough? The broader intention certainly reflects the equivalent Scottish offence at s.2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. When first enacted, this offence attracted positive comment, especially as compared to the law in England and Wales.⁵⁴ Yet, just as men's conduct in domestic abuse is not about distress (however distressing the experience of this conduct), so this abusive conduct is not about humiliation or causing alarm. Rather, as we have noted, the ontological framing of domestic abuse that has come to prevail is one which centralises coercion and control. Thus, in criminalising only those disclosures made with intention to humiliate, cause alarm or distress, there is a concern that, whatever its initial reception, the Scottish offence in fact fails fully to capture the abusive conduct here.

With this in mind, the Law Commission Consultation Paper specifically invited 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 depicted⁵⁵ but such an offence was not, ultimately, recommended. Nor was an intention to control or coerce included alongside the other specified intents of humiliation, alarm and distress. The Commission had questioned whether an additional offence would be '...substantially different...' ⁵⁶ but '...ultimately conclude[d] that the existing offences are better placed to address the behaviour concerned...' ⁵⁷

But does this conclusion hold? As for the conclusion that existing offences are better placed to capture the conduct in image-based domestic abuse, the Commission was clearly satisfied that s.76 of the Serious Crime Act 2015, which criminalised, for the first time, repeated or continuous 'controlling and coercive behaviour' which has a 'serious effect' on the victim, was the more appropriate offence. It is submitted that the Commission's conclusion in this regard is somewhat optimistic since, as a legislative response to image-based domestic abuse, s.76 is not without its problems. The need for repeated or continuous controlling behaviour will be impossible to prove in cases where there was just one disclosure or threat to disclose but most problems in this regard occur because women who are having images released or facing threats thereof must prove that this caused them serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities. Whilst this might be possible for a woman in such circumstances, '...[f]or a woman who is routinely photographed in (gender) compromising or otherwise denigrating circumstances, it could, indeed, be difficult to draw the line here...' ⁵⁸

When image-based abuse is used alongside other tools of coercion and within the context of a systematic programme of control in abusive domestic relationships (assuming this wider pattern of coercion and its impact can be evidenced), then s.76 will surely have a role. Yet, whether or not, *definitionally*, the legislation has the potential to capture image-based domestic abuse, as currently operationalised by the police and within a criminal justice system that remains fundamentally

⁵⁴ C. McGlynn and E. Rackley 'Image-based sexual abuse' (2017) 37 Oxford Journal of Legal Studies 534; McGlynn et al., above n. 5

⁵⁵ See above, n. 3 at para. 10.93

⁵⁶ Ibid. at para. 10.92

⁵⁷ See above, n. 35 at para. 6.165

⁵⁸ Above, n. 2

premiered on single, violent incidents that potential is not realised.⁵⁹ An emerging body of research suggests that the difficulties in this regard are, in large part, because of the continued prioritisation of physical violence in police attitudes and their belief that there is a very high threshold for evidencing the s.76 offence.⁶⁰ There is, then, a concern that the s.76 framework remains potentially unavailable to women who have images disclosed in controlling relationships.

This is not, though, to suggest that this framework should *not* be available to these women and I detail in the following section why s.76 is, indeed, the more appropriate offence in image-based domestic abuse and why the Commission's conclusion in this regard is ultimately sound. Of course, it remains unclear why this, in itself, should have precluded the inclusion of an intent to control in the new offence. Optimistic or not, and regardless of any conclusion that s.76 is, or ultimately could be, the *better* offence, surely the new offences would, themselves, have been *bettered* in their ability, in and of themselves, to address the relevant behaviour by the inclusion of an intent to control. More generally, of course, the eventual position taken in the paper that s.76 is the preferred legislative response also does not, in itself, mitigate the concerns it sets out about the new provisions, which should surely have been developed to be as comprehensive as possible?

In relation to the Commission's conclusion that the proposed offences will capture the conduct in image-based domestic abuse, the difficulty is that which we started to elucidate above and rests on a failure fully to include in the narrative an acknowledgement of the centrality of coercion as the underlying dynamic in domestic abuse and, in particular, of image disclosure as a key tool in this regard. Whilst more research is needed in order to detail the conduct, it is increasingly clear that, in abusive relationships, disclosure is used strategically, just as other tools are used, to control, limit, restrict and reduce. Ultimately, disclosure with intent to coerce or control is different from disclosure with intent to humiliate, alarm or distress. As Baroness Morgan in her consultation response put it, '...victims [of image-based domestic abuse] are often compelled to change their behaviour – including, for example, allowing an abuser to have contact with children or failing to give evidence in court about an abuser – and it seems to me that this [is] sufficiently different from intending to cause harm or distress to the victim...'.⁶¹

There are several consequences that flow from the Commission's failure adequately to have incorporated this into its analysis and its omission of an intent to control and coerce from the ulterior intent set out in its recommendations (and, thus, the Act). The first, very simply, is that the inclusion of an intent to control or coerce better captures what is going on here, more clearly reflecting the harm experienced; representing the role intimate disclosure has in abusive relationships; and, in turn, accommodating within the legislative framework what the abuser is seeking to do. This is important in making the connections between offline and online conduct in domestic abuse and in highlighting the concurrent experiences therein. An intention to humiliate, alarm or distress does not replicate the real world experiences of women in abusive relationships to the same extent. This means, of course, women's experiences are not named and their needs as disclosure in order to control operates as an additional and amplifying factor in their victimisation are not accommodated. Importantly, it means, further, that the motivations and culpability of the perpetrator are obscured.

⁵⁹ Ibid.

⁶⁰ Ibid

⁶¹ See above n. 49 para. 6.152

A mens rea requirement which explicitly includes disclosure with intent to control or coerce would be a recognition that there are links here and would have a declaratory benefit which, as Bishop⁶² has made clear, would have importance in and of itself. Yet, there would be further benefits, both within and without criminal justice, '...so that those investigating know to look for it...' ⁶³ and women's needs in negotiating this harm, alongside the many other risks from the relationship, are better recognised and responded to by the police and other services. Its specific inclusion would also provide a framework in which men could be held to account should they seek to claim an alternative 'intent'. Whilst they might claim that it was not their aim/purpose⁶⁴ to control, an accused who appreciates that control was a virtual certainty of the disclosure could, when this appreciation is shared by the jury,⁶⁵ be seen, together with other evidence,⁶⁶ to have intended this result.

More generally, there would be benefits in challenging the disservice that is done to women by requiring them to fit their lived experiences into the narrow categories which give them a privileged position in the legislative framework. There would be further benefits in acknowledging the higher culpability here. Disclosure with intent to control or coerce is a strategic decision and serves to operationalise and further the abuser's controlling programme and, crucially, results in him achieving certain outcomes (contact with children, for example). In this sense, it is both more harmful and culpable.

On this point, and in ultimately rejecting the inclusion of an offence which included an intent to control and coerce, the Law Commission was satisfied that coercion *as prohibited conduct* was sufficiently accommodated throughout the proposed framework. It noted that, in cases where the taking and sharing was coerced, the prohibited conduct would be the coercion, since that would negative consent, and so would be accommodated. It also noted the part that the threats offence would play in this regard. Given the greater culpability here, it is disappointing that it was less inclined to include coercion as a *fault element*, given that culpability is recognised and expressed through the *mens rea* or fault element in criminal law frameworks.

In relation to the proposed threats offence itself, when images are threatened to be released, the harm is in the threat itself rather than in the sharing that might or might not follow so a separate threats offence is to be welcomed. Also to be welcomed is that, for this offence only, the *mens rea* can be established with reference to recklessness. The Act has codified the Law Commission's recommendation that an additional intent requirement, such as the intent to cause distress/alarm/humiliation, is not needed for the threats offence. Doctrinally, this seems appropriate. As the Commission put it, '[i]nherent in a threat which the defendant intends the victim to fear will be carried out (or is reckless thereto) is an intention to cause the victim distress (or recklessness as to whether distress is caused)...', thus making such an additional intent requirement unnecessary.⁶⁷ Practically, it will surely make the offence attractive to prosecutors who need not prove any additional intent requirement. In capturing the conduct and harm in image-based

⁶² Above, n.3

⁶³ Bishop, above n. 49 at para. 6.145

⁶⁴ *R v Mohan* [1976] QB 1

⁶⁵ *R v Woollin (Stephen Leslie)* [1999] 1 AC 82

⁶⁶ *R v Matthews and Alleyne* [2003] EWCA Crim 192

⁶⁷ Above n. 35 at para 12.133

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domestic abuse, though, does it again fall short? The Act, also on the Commission’s recommendations, does not include a threats offence with an intent to control or coerce the person depicted. This is clearly consistent with the offences which cover completed disclosures. Yet, surely a threat to disclose in order to control is more harmful and the person making the threat more culpable? That the proposed threats offence does not accommodate this greater harm and culpability is again a failure to capture the conduct here.

Thus, whilst the decision not to include within the proposed framework an ulterior intent to control or coerce was made on the basis that existing offences and the other proposed intimate image offences would satisfactorily include within their reach a large range of intimate image abuse conducted to control or coerce the person depicted, as seen here, that decision is not altogether without concern. More generally, and as is discussed in the following section, in reflecting on the proposed offence framework through the lens of domestic abuse, many aspects thereof give cause for some significant concern.

Discussion

The most obvious concern is that, whilst the Act *will* strengthen the law when images are disclosed in controlling and abusive relationships, it will not do so enough fully to bring it in line with what we are beginning to understand about intimate image disclosure as a tool of coercion therein. This will inevitably mean that the new offence framework will be compromised in its ability effectively to respond to disclosure without consent as coercive conduct in domestic abuse. Of course, the framework includes changes that should be applauded. The ladderred arrangement will surely increase coverage and its incorporation into the Sexual Offences Act is important in guaranteeing anonymity but also in prioritising the sexual dimension when narrating and responding to non-consensual disclosure of intimate images. It is disappointing that this incorporation was not used to provide some much-needed guidance on how consent might be understood here.⁶⁸ The inclusion within its reach of ‘deep fakes’ and of disclosure to the person pictured in the image is, though, a positive move and the wider meaning of ‘intimacy’ goes some way to developing the narrative beyond that of the paradigm disclosure of a highly sexualised and objectified image. These changes are all welcome in relation to non-consensual image disclosure generally and image-based domestic abuse in particular.

Yet, there are several features of the proposed offence framework which will mean it will likely not address image-based domestic abuse in any meaningful way. The failure, most obviously, to include in its remit the taking and making of images has hugely frustrated its reach but, even on sharing, it is less effective than it could have been in relation to disclosures which occur within abusive relationships. Whilst the wider meaning of intimacy has gone some way to develop the narrative, the reference to ‘intimate state’ does rather frustrate this development. More broadly, the failure to make provision in the definition of intimacy for subjective meanings and context makes the new offences far less responsive to the specific interpretations and impacts of domestic abuse. There is also a real possibility that, under the new offence framework, police and prosecutors might continue to face challenges in making out the *mens rea* in domestic abuse cases, due to the focus on distress, alarm and humiliation and the failure to include reference to control and coercion.

⁶⁸ Above, n. 45

On this last point, clearly an abuser who is disclosing images in order to control but who cannot also be shown to be doing so in order to humiliate, alarm or distress will fall under the base offence and this is an improvement on the current situation under s.33, which would not criminalise so broadly. Yet, this effective downgrading of some intimate disclosures rather reflects the ‘just-ing’ that so often occurs in domestic abuse, from its use by violent men to minimise the abuse (‘just snapping’)⁶⁹ to its use by the police to do the same (just a ‘domestic’). There is a real, and concerning, possibility that there could, in practice, be an overreliance on the base offence, in which no ulterior intent need be proved, in cases where images are disclosed to control but where the specified ulterior intent is harder to prove. Of course, given what we know about police responses to both domestic abuse⁷⁰ and intimate disclosure,⁷¹ this possibility seems a real one *whenever* the police are responding here but it seems a particularly compelling one in these cases in which they are faced with conduct which is not captured by the substantive definition of the relevant chargeable offence.

There are, then, gaps in the legal framework. There will be situations in which women who have not been covered by s.33 will still not be covered by the new offences and there is concern that, when the intention is to control, the base offence will be overused relative to the aggravated offences. There is also concern around the broader legal framework which will result. Certainly, police and prosecutors faced with a woman who has had intimate images disclosed in the context of a coercive and controlling relationship will have several options from which to select an offence. When images are disclosed as a tool of coercion, the police will be looking to s.76, alongside the (new) base offence; aggravated disclosure with intent to cause distress/alarm/humiliation offence; and, likely, the threats offence. There are also several potentially relevant communications and harassment offences. Assuming there is legislative provision made, at some point, for the Commission’s further proposals on the taking and making of intimate images, these offences will also be in the mix.

Yet, we know that the police struggle to understand the offences here and, in turn, to select the ‘correct’ offence. In relation to s.33, 78.2% of police report having an average or patchy understanding of the offence and 5.9% report having no knowledge at all.⁷² Similarly, in relation to s.76, a recent government review found ‘significant room for improvement’⁷³ and recommended further research to assess police awareness and understanding of the legislation and its application in practice.⁷⁴ It is interesting that, in ultimately not recommending a disclosure offence with an additional intent to control or coerce, the Law Commission also stated its concern not to complicate further the legal framework. Yet, in setting out an improved *but not comprehensive* new package of offences, it seems the Commission may have done just that in relation to image-based domestic abuse. In not adopting the recommendations in full and in tinkering with them as it has in the Online Safety Act, the government has, in turn, amplified the complexity and confusion. The government’s decision to overlook the Commission’s recommendation that a ‘...holistic approach to

⁶⁹ L. Kelly and N. Westmarland, ‘Naming and defining “domestic violence”: Lessons from research with violent men’ (2016) 112 *Feminist Review* 113

⁷⁰ See most recently A. Myhill et al., ‘A genuine one usually sticks out a mile’: policing coercive control in England and Wales’ (2023) 33 *Policing and Society* 398

⁷¹ <https://refuge.org.uk/news/intimate-image-abuse-despite-increased-reports-to-the-police-charging-rates-remain-low/>

⁷² E. Bond and K. Tyrell, ‘Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales’ (2021) 36 *Journal of Interpersonal Violence* 2166

⁷³ Home Office, *Review of the Controlling or Coercive Behaviour Offence* (HMSO: London, 2021)

⁷⁴ *Ibid.* at 7

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intimate abuse offences...⁷⁵ is needed and set out a sharing offence only is especially chargeable in this regard, as is its decision to discount the Commission’s insight on terminology and introduce without due consideration and consultation such definitions as ‘intimate state’.

Whilst there is clearly a need for more research into how women in these circumstances present to the police and other services (*do* they, for example, even present in relation to disclosure?), we can say with some certainty that women in controlling relationships will present with several, different – and sometimes competing – needs and that women’s needs in this regard are seldom static. When an additional level is added by online abuse and image disclosure, women’s help-seeking is further complicated. Given the difficulties in achieving a positive criminal justice outcome in the *individual* offences as currently constructed, there are surely very real possible implications of continuing to present *several* potential offences to the police in terms of the practical response women experiencing image-based domestic abuse receive from these and other criminal justice services.

Yet, the concern here is not just that the complexity of help-seeking is mirrored by an equally complex (and still, piecemeal) legal framework but is also that these ‘new’, ‘strengthened’, ‘more expansive’, *et cetera* alternative offences could serve, ultimately, as a distraction to the police and prosecutors from more appropriate offences. These offences are clearly being presented as having ‘bolstered’ the law – a ‘...crackdown...’ and a ‘...turning point...’ in the law’s response.⁷⁶ This presentation is, to a limited extent, true but, as we have seen, is, to a much greater extent, not true and these limitations are particularly relevant in relation to disclosure as a tool of coercion.

Arguably, the most obvious more appropriate offence in this regard is that at s.76 – the coercive control offence which, when enacted, signalled a significant development in the law’s response to domestic abuse. Notwithstanding its current difficulties, s.76 remains the offence best suited to capturing the context and range of conducts designed to control, restrict and reduce in domestically abusive relationships – including the disclosure of intimate images to this end. It carries a higher sentence and it would draw image-based domestic abuse much more obviously into the prevailing policy response, which, as noted, is increasingly framed around coercive control; this having, alongside the use of the term ‘gaslighting’, become much more established in the popular conversation about intimate abusive behaviours and the characteristics and consequences thereof. Elsewhere,⁷⁷ I have called for a strengthening of the narrative of s.76 better to include within its parameters those conducts which, whilst not incidents of violent physicality, nonetheless involve the reduction of life space and denigration of possibility that the offence initially sought to address – again, including the disclosure of intimate images to this end.

Given what we already know about the police’s use of s.76, it is clear that much needs to be done in order to drive an increase in this use when intimate images are disclosed in the context of abusive relationships. Surely, the effort in this regard will be significantly frustrated by presenting the police with a new and, supposedly, toughened disclosure offence? Alongside, the need to make s.76 work as an explanatory and legislative framework around which everyday experiences, including those of intimate image disclosure, can be organised seems unlikely to be realised by distracting the police

⁷⁵ Above, n. 49, para. 1.39
⁷⁶ <https://www.gov.uk/government/news/government-crackdown-on-image-based-abuse>. Last accessed 08/12/23
⁷⁷ Above, n. 2

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3 and prosecutors with the Online Safety Act and its new (but still lacking) offences. Of course, the
4 weight of the concerns here come, in large part, from the conclusion that these new offences are
5 not *actually* toughened since, whatever the merits of s.76, any distraction from it would be more
6 readily reconciled with if the distraction was to a responsive and robust alternative. Clearly, it would
7 be better for the police to craft a charge sheet with offences tailored to the particular experience
8 and needs of the victim, including s.76 and the new disclosure offences, but given existing and
9 emerging evidence, this it seems unlikely.
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12 13 **Conclusion** 14

15 There is no question that the Online Safety Act sets out some welcome improvements to the current
16 law when images are disclosed within controlling and abusive relationships. It is also clear, however,
17 that, when the proposed disclosure offence structure is enacted, there will remain gaps in the
18 legislative framework. Some of these gaps reflect the inherent tensions in legislating around
19 behaviours that are specific to the dynamics of domestic abuse but also highly specific to the
20 relationship and parties therein – the proposed definition of intimacy, for example. Other gaps
21 seem a much clearer missed opportunity. The proposed ulterior intent, for example, falls a long way
22 short of addressing the enduring concerns with the *mens rea* of the current disclosure offence and,
23 as regards image-based domestic abuse in particular, is a disappointing attempt to capture the
24 harmful conduct and consequences.
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28 More concerning is that, in setting out an improved but not comprehensive new framework, the
29 Online Safety Act could ultimately prove counterproductive as an attempt to bolster the law's
30 response to image-based domestic abuse, further complicating the legislative landscape and
31 distracting police and prosecutors from the more appropriate s.76 offence. Whilst this somewhat
32 strange consequence sits well with the story of an Act which has come to embody the turmoil and
33 deep tensions post-Brexit in the Tory government, it will not serve well women seeking a robust
34 response to image-based domestic abuse.
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