

# Cyberflashing – the next infinity stone in the glove of the Sexual Offences Act

Living in the world of digital love letters and mainstream online dating has helped people across the world share a love story, yet – as with anything else – the question of misusing such apps creates a major risk, and a grey area for the law, when aspects of consent arise.

The transmission of information across two private parties has never been easier, and perhaps now more than ever, we have felt more inclined to rely on the cyber world to stay connected. A pervasive problem, experienced disproportionately by women, has proven to be cyberflashing – the unsolicited sending of obscene images isn't yet illegal in the UK, despite the harm and offence it causes.

The Law Commission has finally warned of the vitality of legislation which criminalises the act of cyberflashing. In the UK, despite the Sexual Offences Act criminalising 'the exposure of genitals', it has not been clear whether that covers images or video recordings. A report by the Law Commission recommends reforms to the communications offences to target serious harms arising from online abuse, while more effectively protecting the right to freedom of expression.

The report goes on to recommend to Parliament a reform in the "communications offences" found in section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. Currently, these offences "do not provide consistent protection from harm".<sup>1</sup>

## What is the current legislation under those acts?

The current Section 1 of the MCA 1988 covers "an offence of sending letters with intent. To cause distress or anxiety", which includes "letter, electronic communication or article of any description which conveys:

1. A message which is indecent or grossly offensive
2. A threat
3. Information which is false and known or believed to be false by the sender"<sup>2</sup>

(The complete Act is available and can be found under the link at the end of this article.)

The issue at hand is the digital nature of 'flashing' and the definition of "communication" making it easy for people to get away with the image.

Section 127 of the CA 2003, although inching closer to the notion of cyberflashing, makes it an offence to send a message that is "grossly offensive or of an indecent, obscene or menacing character over a public electronic communications network"<sup>3</sup>.

(The complete Act is available and can be found under the link at the end of this article.)

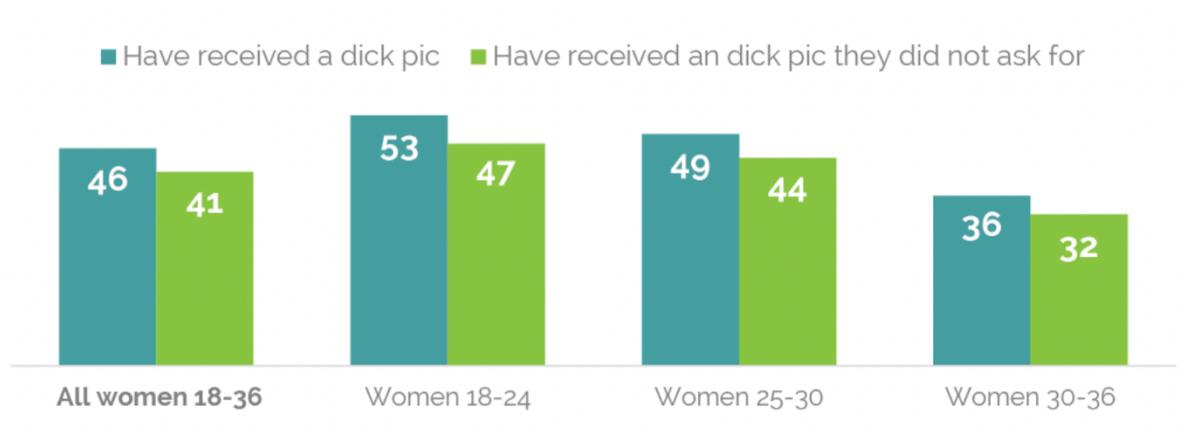
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<sup>1</sup> Law Commission, [2021] Reforms to protect victims of online abuse and safeguard freedom of expression announced <<https://www.lawcom.gov.uk/reforms-to-protect-victims-of-online-abuse-and-safeguard-freedom-of-expression-announced/>> accessed 10 November 2021

<sup>2</sup> Malicious Communications Act 1988 cl 27(s.1)  
<https://www.legislation.gov.uk/ukpga/1988/27/section/1> - accessed 10th November 2021

<sup>3</sup> Communications Act 2003 cl c.21(Part 2, Chapter 1, s. 127)  
<https://www.legislation.gov.uk/ukpga/2003/21/section/127> - Accessed 10th November 2021

It would be quite reasonable to say that the criminal law in England and Wales is currently failing victim-survivors of cyberflashing and data analytics by YouGov show that four in 10 millennial women (41%) have been sent an unsolicited photo of a man's genitals without consent. This figure increases to 48% when we look at the range of those aged 18 to 24 having received an unsolicited sexual photo in the last year alone.



Graph by YouGov Report<sup>4</sup>

Of course, looking exclusively at women raises a concern of bias so addressing the gender bind here is necessary. Contrastingly, there are no reported cases to the Police of cyberflashing from a woman to a man, thus the YouGov report does not look at the reverse, and women are factually more frequently the victims of a sexual assault crime.

## Having looked at this information, what are some of the ways to move towards including cyberflashing as a crime?

As surprising as this may come to some, cyberflashing is already a criminal offence in certain jurisdictions – Scotland, Texas and Singapore, to name a few.

While the Law Commission is investigating potential reforms to include cyberflashing as a sexual offence, it appears that this is not the only way to criminalise the act. With law reform now on the agenda for Parliament, it is important to look at potential ways in which this updated legislation can be passed.

For one, “flashing” on the street is already a criminal offence so it would be assumed that this would extend to “cyberflashing” – as much as the similarities between the two forms of abuse are present, there is a slight hurdle in the wording of this section. The offence of “sexual exposure” in the Sexual Offences Act 2003 appears unlikely to apply to cyberflashing as it requires that the person “intentionally exposes his genitals” and “he intends that someone will see them and be caused alarm or distress” – the question standing is whether exposure of the offender’s genitals online comes within this provision. We have seen case law of successful prosecution when the

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<sup>4</sup> Matthew Smith, ‘Four in ten female millennials have been sent an unsolicited penis photo’ (YouGov, 16th February) <<https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic>> accessed 12 November 2021  
[https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/ufuhb7m5fe/DickPics\\_men\\_2.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ufuhb7m5fe/DickPics_men_2.pdf)

exposure happens in real time on platforms such as Zoom, FaceTime or Skype but the delayed reaction of sender-recipient presents a current struggle for the law.

A recent academic journal published by Clare McGlynn and Kelly Johnson titled ‘Criminalising cyberflashing: options for law reform’<sup>5</sup> looks at ways in which the English and Welsh legal system can move forward by implementing a policy similar to one of the three jurisdictions, despite them having different approaches.

Reportedly, Singapore constituted a specific criminal offence to prosecute cyberflashing with a maximum sentence of one year after they saw an emerging crime trend in online sexual harassment where a person intentionally distributes to another an image of their own or another’s genitals, intending that the victim sees the image for the offender’s sexual gratification or to cause the victim distress or alarm. The Singapore Penal Code importantly uses the label “sexual exposure” which extends the range of images covered and removes the burden of evidence in order to recognise the nature of the harm which can prove to be difficult when reporting the crime to the police.

Texas took a different approach by criminalising cyberflashing as sexual harassment as the pre-existing legislation already addresses “the physical act of indecent exposure, but is silent to the increasingly prevalent occurrence of individuals sending sexually explicit images to an individual without their consent”<sup>6</sup>. The reform enacted by Texas in this situation was to simply include a criminal offence of “unlawful transmission of sexually explicit visual material”<sup>7</sup> with a maximum penalty of a \$500 fine. Again, the law reform ensures that an explicit view of the genitals is not necessary as the covered genitals of a male person that are in “discernibly turgid state” is sufficient to satisfy the offence.

Scotland’s approach is slightly more relaxed in comparison to Texan law, trying to include cyberflashing as an offence of coercing a person to look at a sexual image. Their Sexual Offences Act already includes the offence of “coercing a person into looking at a sexual image”<sup>8</sup> – this law expands the breadth and nature of sexual offending and ensures that the law covers as many eventualities as possible and is now implemented to also prosecute cyberflashing. The offence has a maximum term of imprisonment of 10 years and it was introduced into the Act after a Scottish Law Commission consultation.

There are many lessons to be learned from this, all of which lead to the necessity for reform. It seems the path on which the English Legal System is headed is similar to the tracks of Scotland which leaves people hopeful that such offences will finally be addressed by the law. Now, it is important to note that the proposal of those changes and the eventual implementation of this new listed offence will not cause the crime itself to never take place. As is often the case with crimes in the nature of sexual harassment, there is a major underreporting of the crime because it often takes long for a victim to address the problem or seek justice via involvement of the court. Nevertheless,

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<sup>5</sup> Clare McGlynn and Kelly Johnson, ‘Criminalising cyberflashing: options for law reform’ [2021] 85(3) Journal of Criminal Law  
<[https://uk.westlaw.com/Document/I2F705C70B9C911EBB9A997457E3491E0/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=803bd1fbc8634d2cb8bf4918085f5aa2&contextData=\(sc.Search\)&comp=wlu](https://uk.westlaw.com/Document/I2F705C70B9C911EBB9A997457E3491E0/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=803bd1fbc8634d2cb8bf4918085f5aa2&contextData=(sc.Search)&comp=wlu)> accessed 10 November 2021

<sup>6</sup> Troy Closson, ‘A new Texas law criminalizes sending unwanted nudes Lawyers say it might be difficult to enforce’ (The Texas Tribune, 14th August) <<https://www.texastribune.org/2019/08/14/Texas-new-law-sending-unwanted-nudes-dating-apps-texts/>> accessed 10 November 2021

<sup>7</sup> Section 21.19 of Texas Penal Code. <<https://statutes.capitol.texas.gov/docs/pe/htm/pe.21.htm>> accessed 12 November 2021

<sup>8</sup> Sexual Offences (Scotland) Act 2009 (asp 9) s6  
<https://www.legislation.gov.uk/asp/2009/9/section/6> accessed 12 November 2021

the introduction of such reform gives hope that causing distress, irrespective of its platform, deserves relevant punishment.

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