

CRIMINAL LAW UPDATE



March 2024: Cyber-flashing

Hetty Summerhayes examines the introduction of the offences of cyber-flashing and sharing or threatening to share intimate photographs or film.

Introduction

On 31st January 2024, two new offences came into force via the Online Safety Act 2023 (“OSA”) and the Sexual Offences Act 2003 (“SOA”): cyber-flashing and the sharing or threatening to share intimate photographs or film. The driving force behind the implementation of these offences is the Government’s pledge to make “the UK the safest place in the world to be online”.¹

This newsletter outlines the changes in more detail.

Section 187 OSA: “Cyber-flashing”

Section 187 OSA inserts into section 66A of SOA:

“(1) A person (A) who intentionally sends or gives a photograph or film of any person’s genitals to another person (B) commits an offence if—

(a) A intends that B will see the genitals and be caused alarm, distress or humiliation, or

(b) A sends or gives such a photograph or film for the purpose of obtaining sexual gratification and is reckless as to whether B will be caused alarm, distress or humiliation.

(2) References to sending or giving such a photograph or film to another person include, in particular—

¹ Online Safety Bill: Supporting Documents <<https://www.gov.uk/government/publications/online-safety-bill-supporting-documents#what-the-online-safety-bill-does>> accessed 5 February 2024

- (a) sending it to another person by any means, electronically or otherwise,
 - (b) showing it to another person, and
 - (c) placing it for a particular person to find.
- (3) “Photograph” includes the negative as well as the positive version.
- (4) “Film” means a moving image.
- (5) References to a photograph or film also include—
- (a) an image, whether made or altered by computer graphics or in any other way, which appears to be a photograph or film,
 - (b) a copy of a photograph, film or image within paragraph (a), and
 - (c) data stored by any means which is capable of conversion into a photograph, film or image within paragraph (a).
- (6) A person who commits an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates’ court or a fine (or both);
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years.”

The whole section should be read in full [here](#).

Background

In July 2021, following a consultation paper,² the Law Commission published a report recommending the new offence of cyber-flashing.³ It is set out in this report that cyber-flashing has increased, and the legislative framework was inadequate to deal sufficiently with this offence. The British Transport Police identified important data with regard to this offence, “in 2019 there were 66 reports of cyber-flashing, compared to 34 reports in 2018, and just 3 reports in 2016.”⁴

The list below covers the previous legislative provisions prior to the new offence of cyber-flashing:

- a) The common law offence of outraging public decency.⁵
- b) Section 66 of the SOA.

² Law Commission, *Harmful Online Communications A Consultation Paper* (2020) No 248, para 6.116

³ Law Commission, *Modernising Communications Offences - A final report* (20 July 2021) No 399

⁴ R Speare-Cole, ‘Spike in unsolicited sexual photos sent over AirDrop on trains, data reveals’ *Standard* (19 February 2020)

⁵ Criminal Justice Act 2003, s.320

- c) Section 1 of the Malicious Communications Act 1988.
- d) Section 127 of the Communications Act 2003.
- e) Section 2 of the Protection from Harassment Act 1997 (“PHA”).
- f) Common assault.

Dealing with each of these provisions in turn:

The common law offence of outraging public decency can only take place in the company of two or more individuals who are present, even if they do not see it, as per the case of *R v Hamilton*.⁶ Whereas cyber-flashing encompasses “a number of different behaviours, from the sending of self-produced sexual images or videos to the...transfer of pornographic media via digital means”⁷ and this can take place between individuals.

Section 66 of the SOA deals with the offence of “exposure.” In the case of *R v Alderton*,⁸ the defendant exposed his genitals on facetime to the victim and he was convicted of six counts of exposure under s.66 SOA.⁹ Although s.66 deals with cases where the nature of the offence takes place online, it has not yet applied where the exposure happens from an image or video which has not been taken in real time.

Section 1 of the Malicious Communications Act 1988 sets out that it is an offence to send offensive communications with the intent of causing distress or anxiety which in some cases has been difficult to establish.

Arguably, section 127 of the Communications Act 2003 could have dealt with situations where the cyber-flashing offence is seen to be reckless in nature, for example, if an individual was to constantly cyber-flash an individual. There would also be protection under section 2 of the Protection from Harassment Act 1997.

⁶ [2007] EWCA Crim 2062

⁷ Bo Wang, ‘A Critical Analysis of the Law Commission’s proposed cyber-flashing offence’ [2023] J. Crim. L. 87(1), 39-52 [1]

⁸ [2014] EWCA Crim 2204

⁹ Law Commission (n 2) 6.115

In the event that none of the above would suffice then cyber-flashing could be charged as a common assault.¹⁰ However, it was the Law Commission's conclusion that a new offence was necessary.

Cyber-flashing In Practice

On Monday 12 February 2024 in Southend Magistrates' Court the first person, in England and Wales, was convicted of the offence of "cyber-flashing." The defendant sent "unsolicited photos of his erect penis to a 15-year-old girl."¹¹

Cyber-flashing is a sexual offence.¹² However, unlike a number of other sexual offences, there is a distinct difference. Namely, that it is a "motive-based... [as opposed to] ...consent-based" offence.¹³ By that fact, omitting an element which some other sexual offences have, i.e. consent. The offence of cyber-flashing has been implemented to address, the harm caused, the prevalence of the offence and the alleged gap which exists in the current laws. A further driver is the "exceptionally high levels of online harassment of girls in English schools...including cyber-flashing."¹⁴

Cyber-flashing is arguably a symptom of the technological advances within society and needs to be addressed. The Law Commission highlighted that if the offence was "based purely on non-consent [it] would bring within its scope too many different behaviours that were non-culpable, or at least not at a level sufficient to justify criminalisation" for example, a "genuine (even if misguided) attempt at humour by "the immature juvenile."¹⁵ There are rising cases of cyber-flashing, research has shown that 76% of girls under 18 have received an unsolicited penis image¹⁶ and this is supported by Ofsted's findings that the "majority of girls...said that being sent sexual images...was common."¹⁷ Many defendants find themselves subject to criminal

¹⁰ Bo Wang (n 7) [9]

¹¹ PA Media, 'First person in England and Wales convicted of cyber-flashing' *The Guardian* (London, Monday 12 February 2024)

¹² Sexual Offences Act 2003, s.66A

¹³ Clare McGlynn, 'Cyberflashing: consent, reform and the criminal law' [2022] *J. Crim. L.*, 86(5), 336-352 [1]

¹⁴ *Ibid*

¹⁵ Law Commission (n 3) 6.81 and 6.35

¹⁶ Clare McGlynn (n 13) [2]

¹⁷ Ofsted, 'Review of Sexual abuse in schools and colleges' (2021)

<https://www.gov.uk/government/publications/review-of-sexual-abuse-in-schools-and-colleges/review-of-sexual-abuse-in-schools-and-colleges> accessed 15 February 2024

proceedings after partaking in something which at the time they found to be humorous, this does not “insulate them from prosecution.”¹⁸

Evidently, the concern regarding young individuals is not unfounded. There needs to be a system whereby effective education is implemented on this issue. The creation of this offence acknowledges the harm caused and indicates legislative progress.

Until 31 January 2024 the legislative provisions in place to prosecute cyber-flashing offences were considered unsatisfactory as they did not “keep pace with the ways in which sexual harassment and abuse are perpetrated...through new and evolving technology.”¹⁹ The implementation of this new offence aims to address cyber-flashing, by requiring evidence of a consequential harm, i.e. alarm, distress or humiliation.

Section 188 OSA: sharing or threatening to share an intimate photograph or film

Section 188 of OSA inserts into section 66B of the SOA:

- (1) An offence is committed when a person (A) intentionally:
 - (a) 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 (s.66B(1) SOA).
- (2) An offence is committed when a person (A) intentionally:
 - (a) Shares a photograph or film which shows, or appears to show, another person (B) in an intimate state,
 - (b) A does so with the intention of causing B alarm, distress, or humiliation, and
 - (c) B does not consent to the sharing of the photograph or film (s.66B(2) SOA).
- (3) An offence is committed when a person (A) intentionally:
 - (a) Shares a photograph or film which shows, or appears to show, another person (B) in an intimate state,
 - (b) A does so for the purpose of A or another person obtaining sexual gratification,
 - (c) B does not consent to the sharing of the photograph or film, and
 - (d) A does not reasonably believe that B consents (s.66B(3) SOA).
- (4) An offence is committed when a person (A) intentionally:

¹⁸ Clare McGlynn (n 13) [9]

¹⁹ Bo Wang (n 7) [2]

- (a) Shares a photograph or film which shows, or appears to show, another person (B) in an intimate state,
- (b) A does so –
 - i. With the intention that B or another person who knows B will fear that the threat will be carried out, or
 - ii. Being reckless as to whether B or another person who knows B will fear that the threat will be carried out. (S.66B(4) SOA)

The whole section should be read in full [here](#).

Background

In March of 2023, Stephen Bear (a reality TV personality) was convicted of sharing a sex video of Georgia Harrison without consent and was given a 21 month prison sentence.²⁰ The campaigning of individuals, such as Georgia Harrison and Zara McDermott, have contributed to the implementation of the new offence under s.188.²¹

Prior to the 31 January 2024, allegations of this nature could be prosecuted under s.1 of the PHA or s.33 of the Criminal Justice and Courts Act 2015 (“CJCA”). However, there were limitations with both legislative provisions. Namely, s.1 of the PHA, required a “course of conduct...that [could] not be satisfied by a single posting of an image”²² and s.33 CJCA did not identify this offence as a sexual offence, resulting in a failure to recognise the harm caused to victims. Also, despite “more than 20,000 complaints...[being]...made to the police of image-based abuse [since 2015] ...very few result[ed] in a criminal charge.”²³

²⁰ Rachel Hall, ‘Stephen Bear jailed for 21 months for sharing sex video without consent’ *The Guardian* (London, Friday 3 March 2023)

²¹ GOV.UK ‘Cyber-flashing, epilepsy-trolling and fake news to put online abusers behind bars from today’ < <https://www.gov.uk/government/news/cyberflashing-epilepsy-trolling-and-fake-news-to-put-online-abusers-behind-bars-from-today>> accessed 16 February 2024

²² Emma Short, Leanne Hanney, Majella Morrin, Melanie Pitchford, James Barnes, ‘A single incident of “revenge porn”? The prevalence of image based sexual abuse in a course of conduct amounting to stalking and consideration of the harms caused’ [2021] Ent. L.R. 32(2), 33-36 [5]

²³ Peter Coe, ‘TikTok, disinformation and AI controversy and recognising "image-based abuse”’ [2023] Comms. L. 28(3), 95-97

An example of the approach to this offence, prior to 31 January 2024, is highlighted in the case of *FGX v Gaunt*²⁴ which followed from the criminal proceedings in September 2020. In this case, the defendant, who was in a relationship with the victim had filmed her whilst in the bathroom/whilst she slept and uploaded the images to a pornographic website. The “defendant was convicted of voyeurism and other sexual offences [and] ... received a two year suspended sentence and was ordered to sign the Sex Offenders Register for 10 years.”²⁵ The victim subsequently received damages, in the sum of £97,041.61 after issuing a civil claim. This case clearly identifies the harm which can be caused by an offence such as this, the victim was “diagnosed with PTSD, had become a recluse, had become hesitant to form relationships and...continued to take antidepressant medication.”²⁶

Sharing or threatening to share intimate photograph or film in practice

The new offence inserted by s.188 OSA focuses on abusers disclosing or threatening to “disclose private sexual photographs or films of their victims”²⁷ which goes beyond the previous legislative provisions for this offence. Importantly, it is now a criminal offence to “share intimate images or film without consent regardless of whether or not the perpetrator intended to cause the victim any harm.”²⁸

Not only does this new offence acknowledge the extent of the expanding nature of this type of offending, in 2016 “there were over 3000 active “revenge porn” websites sharing images globally without the victim’s consent”²⁹ and between 2019 and 2022 “a total of 13,860 intimate image offences across 24 police forces were recorded”³⁰ but it identifies the necessity to insert this offence into the SOA as the “impacts of the defendant’s abuse [are] akin to the impacts of sexual abuse.”³¹

²⁴ [2023] EWCA 419 (KB)

²⁵ Matthew Gill and Bea Ildem, ‘High Court awards £97,041 in damages to claimant in landmark decision on “image based abuse” [2023] Ent. L.R. 34(4), 127-130 [1]

²⁶ Ibid [2]

²⁷ CPS, ‘Illegal sexual behaviour online including sharing and threatening to share intimate images and cyber-flashing targeted in new CPS guidance’ < <https://www.cps.gov.uk/cps/news/illegal-sexual-behaviour-online-including-sharing-and-threatening-share-intimate-images#:~:text=For%20the%20first%20time%20it,reveng%20porn%20from%20now%20on.%3E>> accessed 18 February 2024

²⁸ Ibid

²⁹ W. S. DeKeseredy and M. D. Schwartz, "Thinking sociologically about image-based sexual abuse: the contribution of male peer support theory" (2016) 2(4) Sexualisation, Media, & Society 1–8.

³⁰ Refuge, ‘Refuge publishes data showing charging rates remain woefully low on intimate image abuse’ < <https://refuge.org.uk/news/refuge-publishes-data-showing-charging-rates-remain-woefully-low-on-intimate-image-abuse/>> accessed 19 February 2024

³¹ Matthew Gill and Bea Ildem, ‘High Court awards £97,041 in damages to claimant in landmark decision on “image based abuse” [2023] Ent. L.R. 34(4), 127-130 [4]

The new offence inserted by s.188 moves away from the term “revenge porn” in order to appropriately refer to the crime and provides for circumstances where there is no consequential harm despite consent not being given.

Conclusion

The new offences are significant. They reflect the advancing nature of the law required to appropriately deal with the offending which is prevalent in the modern digital world. It is important to note that s.187 deals with the motive of the sender whereas s.188 addresses the consent of the receiver.

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