

Howard League for Penal Reform's response to the Law Commission's consultation on intimate image abuse

May 2021

Summary

1. The Howard League welcomes the opportunity to respond to the Law Commission's consultation on intimate image abuse. The Howard League believes that intimate image abuse can cause great harm and it is important that steps are taken to prevent future victims from this kind of abuse.
2. The Howard League acknowledges that in respect of adults, this is a complex and emerging area which needs to be considered in the wider context of public education to prevent intimate image abuse in the first place. Criminalisation can indicate society's opprobrium but public education and peer pressure is probably more effective at reducing harm.
3. This response focuses on children and young adults who may be accused of the proposed new offences, drawing on the Howard League's expertise in working with this group.
4. The proposed offences should exclude children. As research on contextual safeguarding has shown, the social environments which children spend their time in normalise victim-blaming, sexual exploitation, and peer abuse. Education should be the focus of attention rather than criminalising individual young people.
5. The police are developing sophisticated responses to children who share images and that should not be jeopardised.
6. Children do not yet have fully developed consequential thinking skills and may not understand or foresee the damage caused by sharing an intimate image.
7. Children should not be criminalised for behaviour which they do not realise is unlawful and wrong. Instead, there needs to be a wider culture change so that children grow up with healthy expectations about sex, relationships and consent.
8. The proposed offences do not take into account the developing psychosexual maturity of children, who may not have the same perceptions of normal sexual behaviour as a fully-grown adult.
9. The response to children who have perpetuated intimate image abuse must be child-centred and welfare-based, especially if the abuse normalises sexual violence: research suggests that a high proportion of children who are convicted of sexually harmful behaviour have themselves experienced abuse.
10. Similar considerations apply to young adults, who are still maturing into their mid-twenties and require a different approach.

1. About the Howard League for Penal Reform and summary of response

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
- 1.3 The Howard League's legal team works directly with children and young adults in prison. We have drawn on our legal work in responding to this consultation.
- 1.4 The Howard League agrees that intimate image abuse is a significant social problem which must be addressed. However, the proposed offences run the risk of criminalising young people who are surrounded by harmful expectations about sex and who do not fully understand the consequences of their actions. They should not apply to children and should not apply in the same way to young adults: instead, intimate image abuse among young people should be tackled through education about healthy sexual relationships and a cultural shift away from victim-blaming attitudes.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. In respect of adults, this complex and emerging issue needs to be considered in the context of public education

- 2.1 In respect of adults, intimate image abuse is a complex and emerging issue which can cause great harm. The Howard League agrees that steps should be taken to protect future victims from this form of abuse.
- 2.2 The Howard League recognises that criminalising intimate image abuse could express society's opprobrium and send a moral message that it is unacceptable. However, public education and peer pressure are likely to be more effective in protecting potential victims. The Commission should bear this in mind as the consultation process progresses.

3. Focus of his submission: children and young adults who may be accused of the new offences

- 3.1 This response draws on the Howard League's expertise on young people in the criminal justice system. The Howard League runs a free, confidential legal advice line for children and young adults under the age of 21 in custody. Though only two per cent of children in custody have been convicted of sexual offences (a reduction of three per cent in the

last five years), Howard League lawyers have worked with a number of young people who have perpetuated sexual harm (Youth Justice Board, 2021).¹

- 3.2 In its policy and campaigning work, the Howard League frequently highlights and addresses the issues faced by children who are in trouble with the law. Since 2010, the Howard League has been working closely with police forces across the country to reduce the unnecessary criminalisation of children (Howard League, 2020).² In 2016, the Howard League published a research paper which explored young people's understanding of the law around sexting. None of the children who participated in the study knew that forwarding an intimate image of a 17-year-old was a criminal offence (Bevan, 2016).³
- 3.3 This response deals with the principles that arise in respect of children and young adults who may be affected by the proposed framework of offences rather than responding to the detailed questions. We have had sight of the response of the Youth Practitioners' Association and concur with the points made in that submission.

Children

4. Children should be excluded from the proposed new offences to minimise harm and prioritise prevention through education

- 4.1 Children should be excluded from the proposed offences. The process of prosecution and criminalisation can be harmful and counterproductive for children without any proven effect of increasing safety for victims. Instead, intimate image abuse by children should be understood in relation to the social environments which children inhabit and tackled through education and culture change.
- 4.2 Criminalising children for harmful sexual behaviour can often be counterproductive (Janes, 2016).⁴ In particular, becoming involved with the legal system as a result of displaying harmful sexual behaviour can have a negative impact on children and young people. Being labelled as an "offender" can limit children's opportunities in the future, inhibit their capacity for change and increase their risk of delinquency in adulthood. If a young person is being prosecuted for their behaviour, they may be asked not to talk about any incidents of harmful sexual behaviour until after the criminal trial. This means that they may not be able to receive therapeutic treatment until after the trial has finished. Being put on the sex offenders register can disadvantage young people, affecting a young person's chances of securing jobs, places in education and housing, and have an effect on future relationships.⁵
- 4.3 Coercive sexting is part of a broader context of sexualised pressure on young people. A qualitative research study commissioned by the National Society for the Prevention of Cruelty to Children (NSPCC) found that most of the participants 'felt in some ways oppressed by perceived sexual pressure – to perform, judge and be judged – by peers'. The researchers concluded that this pressure 'should be discussed in order to

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956621/youth-justice-statistics-2019-2020.pdf

² <https://howardleague.org/wp-content/uploads/2020/12/Child-Arrests-2019-FINAL-online.pdf>

³ <https://howardleague.org/wp-content/uploads/2016/06/Investigating-young-people%E2%80%99s-awareness-and-understanding-of-the-criminal-justice-system.pdf>

⁴ <https://uobrep.openrepository.com/handle/10547/622404>

⁵ Janes, L. (2016) Is criminalising children's sexual behaviour counterproductive? *Child and family law quarterly*, 28 (3): 239-260

undermine the culture of silence that further harms youth, especially girls' (Ringrose et al, 2012: 8).⁶

- 4.4 A growing number of schools and local authorities have adopted a 'contextual' approach to safeguarding, drawing on the work of a team of researchers and social workers based at the University of Bedfordshire (Firmin, 2020).⁷ The contextual safeguarding model was developed in response to research findings about peer abuse among young people. This research showed that even very serious sexual harm could not be effectively tackled through criminalisation alone and that victim-blaming attitudes were worryingly common, even among adult professionals. In a 2017 article on safeguarding responses to peer abuse, Carlene Firmin (the principal researcher behind contextual safeguarding) noted that:

Despite harmful gendered norms/behaviours within schools being associated with abusive incidents in eight cases, files contained only one example of an attempt to change school cultures following an abusive incident ... Convicting and/or relocating young people did not create safety in contexts associated to the abusive incidents. In six cases, bystanders, who were peers of the complainants or suspects, experienced ongoing harm in their local area. In six cases, harm also continued in schools: for example, students continued to experience physical abuse and sexual harassment in schools featured in two rape cases and one murder case. Rather than create safe environments, and challenge the harmful norms that dominated the contexts in question, complainants were moved and these fields were left unsafe for those young people who remained within them (Firmin, 2017: 51–52).⁸

- 4.5 Similarly, the harmful norms which enable intimate image abuse must be challenged to create safe environments for children who are at risk of victimisation. This will require a combination of education and culture change, which must address the culture of silence about sexualised pressure among young people and promote healthy expectations about sex and consent. The inclusion of healthy intimate relationships and sexual pressure in the new Relationships and Sex Education curriculum is a welcome step in this direction (Department for Education, 2019).⁹

5. The new offences should not jeopardise the pragmatic and effective response to children who share intimate images which is currently being taken by police

- 5.1 If the new offences are to be applied to children, there is a danger that this will undermine the pragmatic response to sexting and intimate image sharing which has been developed by the National Police Chiefs' Council (NPCC).
- 5.2 The NPCC Lead for Children and Young People, Olivia Pinkney, recommends a child-centred and proportionate approach to intimate image sharing. Pinkney notes that if a school informs the police about an incident of this kind, the Home Office Counting Rules require police to record it as a crime. It may then be revealed in future Disclosure and Barring Service checks, which take an inconsistent approach to proportionality of disclosure – with potentially severe implications for a child as they grow up (Pinkney, 2015).¹⁰ The new offences could undermine this pragmatic approach, placing schools

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https://eprints.lse.ac.uk/44216/1/__Libfile_repository_Content_Livingstone%2C%20S_A%20qualitative%20study%20of%20children%2C%20young%20people%20and%20%27sexting%27%20%28LSE%20RO%29.pdf

⁷ Firmin, C. (2020). *Contextual Safeguarding and Child Protection: Rewriting the Rules*. London: Routledge.

⁸ <https://onlinelibrary.wiley.com/doi/pdfdirect/10.1002/car.2449>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908013/Relationships_Education_Relationships_and_Sex_Education_RSE_and_Health_Education.pdf

¹⁰ <https://www.npcc.police.uk/ThePoliceChiefsBlog/SextingyoungpeopleandthepoliceWorkingtowardsacommo.aspx>

and police in a position where they feel obliged to report and record incidents where a criminal justice approach is not appropriate.

6. Children may not understand the consequences of taking and sharing intimate images

6.1 As Paragraph 1.5 of the Sentencing Council's Overarching Guideline on Sentencing Children and Young People reminds sentencers, children 'may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes' (Sentencing Council, 2017).¹¹ Children are still developing their consequential thinking skills and cannot be expected to assess the consequences of taking and sharing intimate images in the same way as fully-grown adults.

6.2 Scientific evidence shows that children struggle to make mature and informed judgements in situations where their emotions are running high (McCue, 2018; Johnson et al, 2010).¹² Peer pressure also limits children's ability to reflect on the consequences of their actions beforehand: psychological studies show that adolescent decision-making is driven by the fear of being socially excluded and that this can lead to highly risky behaviour (Blakemore, 2018).¹³

6.3 As the research commissioned by the NSPCC underlines, intimate image sharing among children takes place in the context of widespread sexualised pressure from peers and in wider society (Ringrose et al, 2012).¹⁴ This affects the perpetrators as well as the victims. It is unlikely that children in these situations are able to understand and assess the harm which they may cause in the same way as fully-grown adults.

7. Children should not be criminalised for behaviour which they do not realise is unlawful and wrong

7.1 If the proposed new offences are to apply to children, they must be restricted to instances where it can be proven that the child knew that the behaviour was wrong, and it must be accompanied by public legal education to ensure children know it is against the law. Children do not necessarily realise that intimate image sharing is unlawful and may not even understand that it is wrong, especially when they see it happening regularly. It is a societal failing if children learn that their behaviour is harmful through prosecution, rather than through education about sex and consent.

7.2 The research on sexting published by the Howard League suggests that children do not know that it is currently illegal to share images of children over the age of 16. One participant in the study suggested that intimate image sharing among teenagers was too commonplace to be effectively prosecuted (Bevan, 2016).¹⁵ In practice, prosecution is likely to be inconsistent and to depend on the responses of professionals and police (Pinkney, 2015).¹⁶

¹¹ <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/>

¹² <https://theconversation.com/a-parents-guide-to-why-teens-make-bad-decisions-88246>;

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/>

¹³ Blakemore, S. (2018). *Inventing Ourselves: The Secret Life of the Teenage Brain*. London: Penguin.

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https://eprints.lse.ac.uk/44216/1/_Libfile_repository_Content_Livingstone%2C%20S_A%20qualitative%20study%20of%20children%2C%20young%20people%20and%20%27sexting%27%20%28LSE%20RO%29.pdf

¹⁵ <https://howardleague.org/wp-content/uploads/2016/06/Investigating-young-people%E2%80%99s-awareness-and-understanding-of-the-criminal-justice-system.pdf>

¹⁶ <https://www.nppc.police.uk/ThePoliceChiefsBlog/SextingyoungpeopleandthepoliceWorkingtowardsacommo.aspx>

- 7.3 Harmful expectations about sex will not be tackled through an unnecessary, poorly-understood and inconsistent criminal justice response. There is no reason to think that criminalising children will reduce levels of intimate image abuse.
- 8. The proposed offences do not take into account the developing psychosexual maturity of children**
- 8.1 Children may not have the same understanding of normal and appropriate sexual behaviour as adults: the response to children’s behaviour must take into account their developing psychosexual maturity. An overly punitive response to intimate image sharing could make it harder for children to discuss and understand the limits of sexual experimentation.
- 9. The response to children who perpetrate intimate image abuse should be child-centred and welfare-based**
- 9.1 The proposed offences include a range of categories of intimate image, from images of ‘toileting’ to recordings of sexual violence. Some of these images may be understood by children as examples of immature humour. However, others are likely to indicate serious welfare needs in respect of all involved.
- 9.2 Research on children with histories of harmful sexual behaviour shows that an extremely high proportion have themselves experienced sexual abuse. A study of 700 boys who had perpetrated sexual harm in the UK found that half had histories of documented or strongly suspected sexual abuse. An even greater proportion – two thirds – had experienced some form of childhood abuse or trauma (Hackett et al, 2013).¹⁷
- 9.3 Where children share images or recordings of sexual violence, this should prompt a child-centred and welfare-based response which recognises that children may be both victims and perpetrators of abuse.

Young adults

- 10. Young adults are still developing**
- 10.1 Many of the same considerations also apply to young adults. Considerations about maturity, peer pressure and social context also apply to young adults. The proposed offences should not be applied in the same way to young adults under the age of 25, given the ongoing development and distinct needs of this group.
- 10.2 The Howard League is a founding member of the Transition 2 Adulthood (T2A) Alliance, a broad coalition of leading charities working to evidence and promote the need for a distinct and effective approach to young adults in the transition to adulthood, throughout the criminal justice process. The work of the Howard League and T2A has highlighted the overwhelming scientific evidence that young adults are still developing into their mid-twenties: for example, young adults are still developing their decision-making and impulse control skills and remain very susceptible to peer pressure. This has clear implications for offending behaviour (Howard League, 2020).¹⁸ The lesser culpability of young adults is recognised in the case law and in the Sentencing Council guidance on age and/or lack of maturity (Emanuel et al, 2021).¹⁹

¹⁷ <https://dro.dur.ac.uk/11288/1/11288.pdf>

¹⁸ <https://t2a.org.uk/wp-content/uploads/2020/12/JudgingMaturity2020.pdf>

¹⁹ https://howardleague.org/wp-content/uploads/2021/03/CLR_Sentencing_young_adults.pdf

10.3 In light of young adults' ongoing development, their intent and culpability in sharing images should not be assessed in the same way as that of fully grown adults. The maturity of young adult perpetrators should be considered and factored into any criminal justice response.

11. Conclusion

11.1 The Howard League recognises the significant harm and distress caused by intimate image abuse and agrees that steps must be taken to protect potential victims. However, the proposed offences should not be applied to children or applied in the same way to young adults: instead, harmful expectations about sex and consent must be uprooted through education and culture change.

**Howard League for Penal Reform
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