

Consultation on Draft Sexual Offences (Jersey) Law
States of Jersey, February 2018
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Key Recommendations

1. **Voyeurism** (Article 36): strengthen to include motives beyond sexual gratification
2. **Abuse of Trust** (Articles 18-20): strengthen to cover all exploitative sexual activity with 16-17 year olds
3. **Sexual History Evidence** (Article 43): strengthen law to encourage reporting of sexual offences
4. **Image-based sexual abuse** ('revenge porn'): include in Sexual Offences Law

1. Voyeurism (Art 36): motive requirement too restrictive

Sexual gratification motive not cover all acts of voyeurism: As currently drafted, the offence of voyeurism requires the perpetrator to act for the purposes of obtaining sexual gratification. This unduly limits the scope of the offence and fails to consider sufficiently the impact of offending on victims. Acts of voyeurism are undertaken for a variety of motives including financial gain, to cause distress or alarm, to gain notoriety or bonding among a group and for a 'laugh', as well as for sexual gratification. In each of these cases, the harm caused to the victim is serious and warrants criminal sanction.¹

Motives for sexual offending: Research into sexual offending generally has found that motives include humiliation, grievances, and punishment, as well as entertainment and recreation. Sexual offending is driven by the desire for power and control and therefore limiting offences to motives of sexual gratification fails to appreciate the harms and realities of sexual violence.²

Amend law to focus on harm to victims, not motives of perpetrators: The law should be amended, therefore, to focus more on the harm to victims than on the motives of perpetrators. The intentional taking of a sexual or explicit photo/video of someone in private or under their clothing, without consent, is harmful and deserving of criminal sanction without having to establish specific motives. Alternatively, and as a minimum, the law should be extended to cover motives to 'humiliate, alarm or distress' as for the offence of exposure (Article 35).

Law to clearly cover distribution of images: The law should also clearly cover the non-consensual *distribution* of images taken and created under Article 36.

2. Abuse of Trust (Articles 18-20): strengthen to cover all exploitative sexual activity

Strengthen law to cover all exploitative sexual activity: It is welcome that the provisions on abuse of trust are to be strengthened to include sports coaches. This is a [current gap](#) in English law. However, a better approach is to amend the law such that all exploitative and harmful relationships, including coaching, are covered. This would ensure that the whole range of circumstances where young people are sexually exploited is covered. For example, the proposed law may not cover sexual activity between a doctor and young person.

Future-proof the law: It is preferable to 'future-proof' the law to cover as yet anticipated circumstances, without having to wait until more young women and men are victimized and the law has to be changed before they are protected by the criminal law. It should be noted current law is in need of amendment because the original 'list' based approach has proven too restrictive and manifestly failed to protect victims.

Canadian law provides a suitable model to be followed: Section 153(1) of the Canadian Criminal Code provides that:

Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who:

- (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
- (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

In considering whether there has been exploitation, the following factors are considered (section 153(2)):

- a) the age of the young person;
- b) the age difference between the person and the young person;
- c) the evolution of the relationship; and
- d) the degree of control or influence by the person over the young person.

It has been rightly argued that this provision enables prosecutors and judges to examine the circumstances of the relationship, rather than whether it fits within an already set list.³

3. Sexual History Evidence (Article 43): strengthen law to encourage reporting

Strengthen law to encourage reporting of sexual offences: It is [recognised](#) that sexual offences are under-reported in Jersey.⁴ Research has clearly established in England & Wales that fear of disclosure and cross-examination on sexual history evidence at trial is one reason complainants may not report, or choose not to support a prosecution.⁵ This will particularly be the case where the rules and approach of the court remains unclear, as will continue to be the case in Jersey as the recommendations are limited to third party defendants and do not set out the criteria to be applied by judges.

Strengthen law to include all forms of sexual history evidence including with defendants: The proposed law (Article 43) will only apply to sexual history sexual history evidence with third parties, therefore missing an opportunity to clarify and update the law in relation to all forms of sexual history evidence. Further, the proposed law states that sexual history evidence may be admitted with the leave of the court, but fails to set out in statute the conditions and situations under which this is permitted. This provides considerable discretion, and therefore uncertainty, for victims.

Not permit sexual history evidence with third parties to support belief in consent: Further, in relying on the current case law in making decisions, judges will look to *AG v Correia* [2015] where it was stated that sexual history evidence with third parties could be admitted to support a claim of belief in consent.⁶ This means that a defendant may be able to use evidence of sexual history between a complainant and a third party to support his belief in consent. It is not clear why a defendant should be able to rely on sexual activity *with someone else* to support a belief that the complainant consented to him/her. This approach seriously undermines the sexual autonomy of individuals and fails to recognize that consent is [to a person, not a situation](#).⁷

4. Image-Based Sexual Abuse ('revenge porn') is a Sexual Offence

The non-consensual creation and/or sharing of private, sexual images, often referred to as 'revenge porn' (but better understood as [image-based sexual abuse](#)) is a form of [sexual offending](#) and should be included in the Sexual Offences Law.⁸ The proposed Sexual Offences Law does include forms of voyeurism, but does not cover all forms of non-consensual creation and distribution of private, sexual images, nor the creation of sexual photoshopped images/videos.⁹

Framing the law as sexual offence extends protections to all victims: Including this type of offending within the Sexual Offences Law is important because how laws are framed has serious ramifications in terms of understanding the nature of the offending (its serious harms), and informing educative and preventative

responses (focus on issues of sexual consent, sexual double standards). It also means that other protections from sexual offending, such as prevention programmes and reporting/notification requirements cover this form of abuse.

Victims experience image-based sexual abuse as a form of sexual assault: Women who have their private sexual images distributed without their consent have spoken about how they experience this abuse as a form of sexual offence. For example: Jennifer Lawrence (start of *Hunger Games*) referred to the extensive distribution of her naked images following a hack of the iCloud as a [“sex crime”](#) and Chrissy Chambers (a YouTube star) who had images of a sexual assault distributed without her consent, has argued for the person who distributed the images to be held [“accountable for sexual assault”](#).¹⁰

The images are sexual and the harm comes from the fact that it is *sexual* images that are shared without consent; the images go viral because they are *sexual*. Non-sexual images would simply not have the same potency to cause harm and abuse; nor would thousands of others distribute the images unless they were sexualised. Further, the images often end up on pornography websites, some specifically focussing on ‘revenge porn’.

Sexualised nature of abuse: The harassment and abuse which women suffer when their private, sexual images are shared without consent comes from the sexualised nature of the abuse and the sexual double standard when women are castigated for exercising sexual agency. Women suffer harassment and abuse because they have ‘allowed’ images to be taken, or they have taken images themselves. The online abuse that accompanies the distribution of private sexual images includes sexual threats (rape threats), as well as abusive comments about the victim’s appearance, body, sexuality and sexual agency.

Harms are to sexual freedom and autonomy: Sharing private sexual images without consent is a form of exploitation of an individual’s sexual identity and infringes their sexual autonomy. All of us should be free to create or share private sexual images without fear of them being distributed without our consent. The distress caused by the distribution of their private sexual images and the way women are told to self-censor to avoid becoming victims of ‘revenge porn’, restricts the individual’s willingness or ability to exercise their rights to sexual autonomy and expression.

Automatic Anonymity for Complainants of image-based sexual abuse: It is vital that all complainants of image-based sexual abuse are granted [automatic anonymity](#), in the same way as for other sexual offences. This is essential in order to encourage victims to come forward, report to the police and support prosecutions.

Expertise of Professor Clare McGlynn, Durham Law School, Durham University

[Professor McGlynn](#) is a specialist in sexual offences law in England & Wales, with particular expertise on [sexual history evidence](#) in rape trials, legal regulation of pornography and [image-based sexual abuse](#) (‘revenge porn’). She has given expert evidence before English and Scottish Parliamentary committees on reform proposals, as well as working closely with politicians, policy-makers and voluntary organisations to introduce new laws criminalising image-based sexual abuse and rape pornography in England & Wales, and Scotland. She has given presentations across Europe and Australia on lessons learnt from the UK experience, as well as being a regular media and public commentator on these issues.

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¹ See further McGlynn, Rackley and Houghton, '[Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse](#)' (2017) 25 *Feminist Legal Studies* 25-46.

² One study found that 'the most common type of rapist is one who is motivated by power and control'. Another identified motives as: revenge and punishment, sexual access of unwilling/unavailable women, recreation and adventure. Rapists attributed their offending most frequently to grievance, impulsivity or sexual need, with one third not being able to give any explanation of the motivation. A study from the UN study found that 'sexual entitlement' was an important motivation, namely the belief that men have the right to sex, regardless of consent. It was also found that prominent motivations included entertainment, as well as anger and punishment.² Therefore, while sexual gratification can be part of a motive for a sexual offence, it is only a small part. Even where the motivation is sexual, it is closely associated with negative views of women which disregard consent, believe in entitlement to sex and conduct acts of sexual assault as a means of collective punishment of women. See further: Robertiello and Terry 2007, p 511: <https://www.infona.pl/resource/bwmeta1.element.elsevier-648dd3ad-39cf-3f2d-85df-c24864ae6001>; Scully, D. & Marolla, J. (1985) 'Riding the bull at the Gilley's': Convicted rapists describe the rewards of rape' in Kennedy Bergen, Edleson, & Renzetti (eds) (2005) *Violence Against Women: Classic Papers*; Mann, R. E., & Hollin, C. R. (2007) Sexual offenders' explanations for their offending *Journal of Sexual Aggression* 13(1), 3-9; <http://www.partners4prevention.org/resource/why-do-some-men-use-violence-against-women-and-how-can-we-prevent-it-quantitative-findings>.

³ Suzanne Ost and Alisdair Gillespie, 'The "Higher" Age of Consent and the concept of sexual exploitation', in *Consent: Domestic and Comparative Perspectives* (edited by Reed et al), Routledge 2017.

⁴ <https://jerseyeveningpost.com/news/2018/02/08/sexual-offences-are-still-being-under-reported/>

⁵ See discussion in Clare McGlynn, '[Rape Trials and Sexual History Evidence: reforming the law on third party evidence](#)' (2017) 81 *Journal of Criminal Law* 367-392.

⁶ *AG v Correia* [2015] JRC061A, para 39.

⁷ For a detailed discussion, see Clare McGlynn, '[Rape Trials and Sexual History Evidence: reforming the law on third party evidence](#)' (2017) 81 *Journal of Criminal Law* 367-392 and Research Briefing available at: <https://claremcglynn.com/rape-law-and-justice/sexual-history-evidence-and-law-reform/>

⁸ Research Briefing by McGlynn and Rackley available at:

<https://claremcglynn.files.wordpress.com/2015/10/imagebasedsexualabuse-mcglynnrackley-briefing.pdf>

⁹ See further Clare McGlynn and Erika Rackley, '[Image-Based Sexual Abuse](#)' (2017) 37 *Oxford Journal of legal Studies* 534-561; McGlynn, Rackley and Houghton, '[Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse](#)' (2017) 25 *Feminist legal studies* 25-46.

¹⁰ <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover>; <http://nymag.com/thecut/2016/06/hillary-asked-how-shell-help-stop-revenge-porn.html>