

Legal Reform to Combat Sexual and Gender-Based Violence

PART II

Online Sexual Violence

CENTRE FOR POLICY ALTERNATIVES

NOVEMBER 2020



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Acknowledgments

This report was researched and written by Khyati Wikramanayake. Comments on earlier drafts were provided by Dr Paikiasothy Saravanamuttu, Bhavani Foneska, Kushmila Ranasinghe and Charya Samarakoon. The report was edited by Pasan Jayasinghe and formatted by Ayudhya Gajanayake. CPA is grateful for the assistance of Paba Deshapriya and Uda Deshapriya, who shared information and their insights.

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Introduction

This paper examines online sexual violence. It first looks broadly at what online sexual violence is, how it differs from traditional forms of sexual violence and what forms it takes. It then outlines the need for criminal provisions relating to three offences: voyeurism, the non-consensual distribution of intimate images or videos, and sextortion, and provides recommendations for legislation criminalising each of these acts. The report finally proposes recommendations for a framework necessary to successfully implement these laws and to allow for effectively investigating, prosecuting and preventing these offences. This report is not an exhaustive study done on the extent of the prevalence of online sexual violence, but rather, is intended to be an examination of possible options for reform.

This report is Part II of a series of papers providing recommendations for law reform to combat sexual violence. Part I examines existing laws that need reform, and why law reform in this area has been slow. Parts III and IV examine the need to introduce specific laws for the criminalisation of female genital mutilation and vitriolage respectively.

Online sexual violence

Online sexual violence, or gender-based cyber violence, is defined by the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (hereafter sometimes the Special Rapporteur) as *'any act of gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of ICT, such as mobile phones and smartphones, the Internet, social media platforms or email, against a woman because she is a woman, or affects women disproportionately'*.¹ This new but fast emerging concept affects a large number of women globally, and in Sri Lanka too, where incidents of online sexual violence are on the rise.²

¹ UN Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, Human Rights Council, Thirty-eighth session, 18th June-6th July, 2018, Paragraph 23. Available at:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session38/Documents/A_HRC_38_47_EN.docx

² Chandrika Gadiewasam, 'Access to Justice for women in Sri Lanka: A true WIN-WIN story', *DailyFT*, 30th March 2019, available at: <http://www.ft.lk/other-sectors/Access-to-justice-for-women-in-Sri-Lanka-A-true-WIN-WIN-story/57-675605>

Locally, a large percentage of the population uses the internet, and digital literacy rates (i.e. the percentage of Sri Lankans who could use a computer, laptop, tablet or smartphone on their own) and computer literacy rates (i.e. the percentage of Sri Lankans who could use a computer on their own) have been growing rapidly. The former is higher and outpaces the latter, reflecting the preference for smartphones and tablets. The digital literacy rate in 2016, when it first began to be measured, was approximately 33.8%³, and grew to 46.0% in 2019.⁴ In contrast, the computer literacy rate was approximately 27.6% in 2016, and grew to 30.8% in 2019 (it was just 25.1% in 2014 and 16.1% in 2006/7).⁵

The internet is a vital resource and it is important that women are able to use it to improve their skills and improve their lives and economic and social outcomes.⁶ The internet can be a potent tool in improving the lives of women and empowering them, and it must not instead become a tool by which they are targeted, and by which they have their safety, dignity or privacy violated.

Sri Lanka's antiquated criminal law requires reform in order to bring it in conformity with the principles of equality, bodily autonomy and non-discrimination between genders, and there is as pressing a need for law reforms to meet developments and advances in technology which have a growing impact on people's lives.

The Sri Lankan Penal Code came into force at a time when the technology we see today would have been unimaginable. The last substantive amendments to sexual offences in the Penal Code came in 1998⁷ and 1995⁸ (with a few further minor amendments in 2006)⁹, a time when the internet was vastly different and smartphones did not exist. People face various types of

³ Department of Census and Statistics Sri Lanka, 'Computer Literacy Statistics – 2016 (Annual)', 2016, available at: <http://www.statistics.gov.lk/ComputerLiteracy/StaticInformation/Bulletins/2016-Annual>

⁴ Department of Census and Statistics Sri Lanka, 'Computer Literacy Statistics – 2019 (Annual)', 2019, available at: <http://www.statistics.gov.lk/ComputerLiteracy/StaticInformation/Bulletins/2019-Annual>

Digital literacy among males is 49.7% and among women 42.6%. Further, digital literacy among the age groups 15-19 years, 20-24 years and 25-29 years are 77.8%, 78.6% and 73.4% respectively.

⁵ Department of Census and Statistics Sri Lanka, Computer Literacy Statistics – 2014 (Annual)' 2014, available at: <http://www.statistics.gov.lk/ComputerLiteracy/StaticInformation/Bulletins/2014-Annual>

⁶ Incidentally the rates of digitally literate men are about 7% higher (49.7%) than the rates of digitally literate women (42.6%); Ibid, Computer Literacy Statistics – 2019 (Annual)

⁷ Available at: <https://www.lawnet.gov.lk/penal-code-amendment-6/>

⁸ Available at: <https://www.lawnet.gov.lk/penal-code-amendment-5/>

⁹ Available at: <https://www.lawnet.gov.lk/penal-code-amendment-8/>

sexual harassment online,¹⁰ and it is likely that as times and technology evolves, new and different methods of perpetrating this form of violence will emerge.

Differentiating online and traditional forms of sexual violence

Many of the offences committed online are similar to traditional forms of the same offences, only perpetrated through a different medium. For instance, an act of theft remains theft, whether it is committed physically (such as by a pickpocket), or across an online platform (such as a phishing scheme). However, there are significant differences between offences committed via these online mediums that are especially relevant to sexual violence.

The first of these differences is that perpetrators of crime have far easier access to victims online than in the real world, for the reasons that they are not limited by geographical (physical) restrictions.¹¹ When committed through the internet, sexual harassment can transcend national boundaries, a problem which may even lead to problems of jurisdiction arising when prosecuting such crimes.

Secondly, the perpetrator of an offence can reach far more third-parties when operating on the internet, thus exacerbating the harm caused in offences in which the victim's privacy is violated.¹² In just a moment, an image can be shared with thousands online, and once spread can be extremely difficult to retract or trace.

Finally, perpetrators are often cloaked in anonymity, and can take on different identities online.¹³ The detection of an anonymous perpetrator is far more difficult on the internet, and may require vast technical skills and resources. Of particular note is the phenomenon referred

¹⁰ Sachini Perera and Raisa Wickrematunge, 'Opinions, B*tch: Technology Based Violence Against Women in Sri Lanka', *Groundviews*, June 2019, available at <https://groundviews.org/2019/06/27/opinions-btch-technology-based-violence-against-women-in-sri-lanka/> and <https://drive.google.com/file/d/16ohQ7P2K08qz-kgiQUfSr0JCGvxDLHNR/view>

¹¹ Nicola Henry and Anastasia Powell, 'Embodied Harms: gender, shame and technology facilitated sexual violence in cyberspace', *Violence Against Women*, Vol 21, no. 6, March 2015, page 11, available at: https://www.researchgate.net/profile/Anastasia_Powell/publication/274399083_Embodied_Harms/links/5601f11508aeb30ba735582f.pdf

¹² Ibid.

¹³ Ibid.

to as 'catfishing', where a person uses social media to assume a false identity, often for the purpose of defrauding or scamming another.¹⁴

What the above differences demonstrate is that particular laws are needed to combat sexual violence perpetrated online; not just laws which criminalise these acts, but also procedural provisions necessary to investigate, prosecute and prevent these offences. While the laws that exist to punish perpetrators of traditional forms of sexual violence may sometimes extend to punishing those who commit similar acts online, this will often be dependent on the interpretation which the Courts may give them. The system is thus in need of modernisation and revamping.

Further, due to inadequacies in the law at present as discussed below, there are instances where even traditional forms of certain acts of sexual violence do not fall within the scope of the law.¹⁵ It is thus important to ensure that the law is updated to ensure justice is served regardless of the means used to commit the offence.

Forms of online sexual violence

The Special Rapporteur on Violence Against Women, its Causes and Consequences has in her report on online violence against women and girls from a human rights perspective detailed several forms of online violence that woman and girls face globally.¹⁶ She lists sextortion, doxing, trolling, online mobbing and harassment, online sexual harassment, online stalking, and revenge porn as some of the forms of online violence that women and girls face.¹⁷ In addition to these offences, voyeurism is another form of sexual violence perpetrated over online or cyber forums.

Many of these offences are in essence offences that violate and offend the privacy of the victim. While Sri Lanka has laws for the prosecution of acts such as the creation or possession of child pornography, there are no specific laws to address many of these other forms of sexual

¹⁴ eSafety Commissioner, Australia, 'Catfishing', available at: <https://www.esafety.gov.au/young-people/catfishing>

¹⁵ See section of voyeurism.

¹⁶ Ibid, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, Human Rights Council, Thirty-eighth session.

¹⁷ Ibid, paragraphs 35-41.

violence perpetrated online. Most significantly, there is no Constitutional recognition of the right to privacy in Sri Lanka¹⁸, a right which is of utmost importance in protecting the autonomy and dignity of victims of sexual violence.

In 2015, the Law Commission of Sri Lanka proposed several offences relating to the capturing or distributing of private or sexual images, which would have covered some aspects of voyeurism and the non-consensual distribution of intimate images¹⁹. Despite the shortfalls in those recommendations, they show that the need for laws on this subject has been recognised in Sri Lanka already. The Law Commission's recommendations were never passed into law, and it is hoped that this report compels comprehensive legislation to be passed urgently.

¹⁸ 'Right to Privacy in Sri Lanka', Discussion Paper, Centre for Policy Alternatives', September 2020, available at <https://www.cpalanka.org/wp-content/uploads/2020/09/Discussion-Paper-Right-to-Privacy-updated-draft-4-1.pdf>

¹⁹See Proposed offences under circumstances violating privacy, available at http://lawcom.gov.lk/web/images/stories/reports/2015/Proposed_Bill_Sections_1_2_3_4_and_5_Social_Media.pdf and explanatory note available at http://lawcom.gov.lk/web/images/stories/reports/2015/Explanatory_Comments_to_the_Proposed_Bill.pdf

A. Online voyeurism

What is voyeurism?

Voyeurism has been defined as the activity of getting pleasure from secretly watching other people in sexual situations or, more generally, from watching other people's private lives.²⁰ While there was once a time where voyeurs were 'peeping toms' who would physically watch those who were engaging in private acts in the confines of their home or other private spaces, technology has given rise to a new form of voyeurism where recording devices are used to capture private videos or images of the victims without their knowledge or consent. This varies from taking pictures up women's skirts (commonly known as up-skirting) or down their blouses,²¹ or video equipment being placed in locations in which victims engage in private acts.

Can it be punished under existing law?

Sri Lanka does not have specific provisions in its criminal law to deal with voyeurism, whether the offence is committed online or in the 'real-world'. Thus, law reform is needed in this case in order to deal with all forms of voyeurism and not just that which is carried out with the use of technology.

In the case of a 'peeping tom' who enters the premises of another to watch them physically, they may be convicted for trespass,²² house-trespass²³ or lurking house trespass.²⁴ However, there may be instances in which peeping toms watch a person in places other than their homes or a property in the victims' occupation, such as in toilets or changing rooms, and in that case, they would not be trespassing on the victim's property. In any event, trespass is an offence against property and not a sexual offence, and thus is not the ideal law under which to punish a perpetrator. Prosecuting the act as a sexual offence captures the fact there has

²⁰ See: Cambridge Dictionary, available at <https://dictionary.cambridge.org/dictionary/english/voyeurism>

²¹ Valerie Bell, Craig Hemmens, & Benjamin Steiner, 'Up Skirts and Down Blouses: A Statutory Analysis of Legislative Responses to Video Voyeurism', *Criminal Justice Studies*, Vol. 19, No. 3, September 2006, pp. 301–314, at 302, available at https://www.researchgate.net/publication/240534560_Up_Skirts_and_Down_Blouses_A_Statutory_Analysis_of_Legislative_Responses_to_Video_Voyeurism

²² Section 427, Penal Code.

²³ Section 428, Penal Code.

²⁴ Section 429, Penal Code.

been a violation of a person's bodily autonomy and dignity, which has a far more serious impact on the victim.

There are limited provisions of law under which a person who takes intimate images of another can be convicted. If the victim is below 18 years of age, then a person who takes or assists in taking of any indecent photograph, has it in their possession or publishes it, may be convicted for the offence of 'obscene publication and exhibition relating to children'.²⁵ This provision was introduced via amendment to the Penal Code in 1995 and carries with it a minimum sentence of two years. In such case, the consent of the victim is irrelevant.

Regardless of the age of the victim and whether the act is done in real life or online, it may also be possible to convict a voyeur for sexual harassment, though this would require a wide interpretation of the law. A person is said to commit sexual harassment (1) if by assault or use of criminal force, they sexually harass another or; (2) if by the use of words or actions they cause sexual annoyance or harassment to another.²⁶ The latter could be used to prosecute a voyeur, provided that 'sexual annoyance and harassment' are interpreted to encompass such an act. The maximum sentence for sexual harassment is five years.

International legislative responses to voyeurism

Several countries have the specific offence of voyeurism in their criminal law, though they approach the issue in varying manners. Some have a single offence that will cover both offline and online forms of voyeurism, while others have separate laws to deal with each offence.

The provisions on voyeurism in Scotland, contained in the Sexual Offences (Scotland) Act 2009 are comprehensive, and reads as follows:²⁷

Section 9

(1) A person ("A") commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

(2) The first thing is that A—

(a) without another person ("B") consenting, and

²⁵ Section 286A(c), Penal Code.

²⁶ Section 345, Penal Code. as amended in 1995.

²⁷ Section 9, available at <https://www.legislation.gov.uk/asp/2009/9/section/9>

*(b) without any reasonable belief that B consents,
for a purpose mentioned in subsection (6) observes B doing a private act.*

(3) The second thing is that A—

*(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,
operates equipment with the intention of enabling A or another person (“C”), for a
purpose mentioned in subsection (7), to observe B doing a private act.*

(4) The third thing is that A—

*(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,
records B doing a private act with the intention that A or another person (“C”), for a
purpose mentioned in subsection (7), will look at an image of B doing the act.*

(4A) The fourth thing is that A—

*(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,
operates equipment beneath B's clothing with the intention of enabling A or
another person (“C”), for a purpose mentioned in subsection (7), to observe B's
genitals or buttocks (whether exposed or covered with underwear) or the
underwear covering B's genitals or buttocks, in circumstances where the genitals,
buttocks or underwear would not otherwise be visible.*

(4B) The fifth thing is that A—

*(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,
records an image beneath B's clothing of B's genitals or buttocks (whether
exposed or covered with underwear) or the underwear covering B's genitals or
buttocks, in circumstances where the genitals, buttocks or underwear would not
otherwise be visible, with the intention that A or another person (“C”), for a
purpose mentioned in subsection (7), will look at the image.*

(5) The sixth thing is that A—

*(a) installs equipment, or
(b) constructs or adapts a structure or part of a structure, with the intention of
enabling A or another person to do an act referred to in subsection (2), (3), (4),
(4A) or (4B).*

(6) The purposes referred to in subsection (2) are—

*(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.*

(7) The purposes referred to in subsections (3), (4), (4A) and (4B) are—

- (a) obtaining sexual gratification (whether for A or C),*
- (b) humiliating, distressing or alarming B.*

The Scottish law covers a wide range of scenarios, from acts of voyeurism committed offline to those committed online. There are basically three types of voyeurism that fall within the ambit of this section:

- Watching/recording/operating equipment to watch a person engaged in a private act.
- Recording/operating equipment to see a person's private body.
- Installing equipment or altering a structure to do either of the above.

Under this law, it is not required that someone received sexual gratification from the act—it is an offence even when done for the purpose of humiliating, distressing or alarming the victim. This is a desirable element of the section as it will not be essential to prove that the perpetrator or another person received some sexual gratification, an element which could prove challenging for a prosecution to prove. In any event, the distress, humiliation or alarm caused could be equally harmful to the victim as a circumstance in which sexual gratification has been derived from the act.

The Indian legislature introduced the offence of voyeurism through the Criminal Law (Amendment) Act of 2013; an amendment also known as the Anti-Rape Act which was enacted following the outrage surrounding the Nirbhaya incident, or the brutal gang rape and murder in Delhi in 2012.²⁸ The amendment makes changes to several laws including the Penal Code of India including introducing the offence of voyeurism. The section reads as follows:

354C. Voyeurism.— Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but

²⁸ Rituparna Bhattacharyya, 'Criminal Law (Amendment) Act, 2013: Will it ensure women's safety in public spaces?', *Space and Culture, India* 2013, 1:1, pp. 13-27, p 14, available at: https://www.researchgate.net/publication/260144553_Criminal_Law_Amendment_Act_2013_Will_it_ensure_women's_safety_in_public_spaces

which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.— For the purpose of this section, “private act” includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2. — Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

While this provision covers both peeping toms as well as voyeurism perpetrated online or via recording devices, the reference to the victim engaging in a private act and “*circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person*” mean that the offence is limited to when a person is observed in a place that she expects privacy. Thus, actions such as up-skirting may not fall within the ambit of the act, as it could take place in a public place. It is therefore key that a criminal provision covering voyeurism in Sri Lanka has a wider scope in terms of location.

The Indian law makes reference to the “*victim's genitals, posterior or breasts [which] are exposed or covered only in underwear*” and in certain instances of the act, the Scottish law makes reference to “*beneath [the victims] clothing of [the victims] genitals or buttocks (whether exposed or covered with underwear) or the underwear covering [the victims] genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible*”. Both these provisions contain an exhaustive list of what has to be observed or recorded in order for the offence of voyeurism to have taken place.

However, the inclusion of an exhaustive list in this manner has its shortfalls. What amounts to being ‘personal’ is subjective, and there may be women who ordinarily opt to cover certain parts of their bodies who would feel equally violated if those parts of their bodies are observed or secretly photographed or filmed. For instance, a Muslim woman who covers her legs when in public may feel violated or humiliated if images of her legs are circulated. A person who circulated such images knowing them to cause humiliation or shame on that particular woman should not be immune from prosecution. Further, there may be instances

of images or recordings being taken of body parts not ordinarily considered 'private' (such as feet or arms) but nonetheless cause distress, humiliation or alarm to the victim due to the manner in which these images are used, for instance, if they are circulated among persons with fetishes²⁹.

Recommendations for an offence on voyeurism in Sri Lanka

A criminal offence on voyeurism should be introduced which:

- Does not specify the gender of the victim nor the perpetrator. It should be acknowledged that anyone can be the victim or perpetrator of sexual offences.
- Is sufficiently wide to cover situations where the perpetrator:
 - i. physically watches a person when engaged in a private act or in a situation where they have a reasonable expectation of privacy.
 - ii. uses any equipment to record or capture images of a person when engaged in a private act or in a situation where they have a reasonable expectation of privacy, either for their own watching/viewing, or for some other person to watch/view, or both.
 - iii. uses any equipment to record or capture images of any body part of a person which that person may reasonably consider to be private, whether in public or private, either for their own watching/viewing, or for some other person to watch/view, or both.
 - iv. makes adjustment to any structure, vehicle or building, or installs any equipment to watch, record, or capture images of a victim when engaged in a private act or in a situation where they have a reasonable expectation of privacy, either for their own watching/viewing, or for some other person to watch/view, or both.

²⁹ 'Man secretly filming women's feet in Swiss town and posting videos on porn sites', *Independent*, 16th September 2016, available at <https://www.independent.co.uk/news/world/europe/man-secretly-filming-women-s-feet-switzerland-chur-posting-them-porn-sites-a7311401.html>

- v. makes adjustment to any structure, vehicle or building to record or capture images of any body part of a person which that person may reasonably consider to be private, whether in public or private, either for their own watching/viewing, or for some other person to watch/view, or both.
- Does not make it essential to show that the perpetrator or another person received any sexual gratification in order for them to be guilty of the offence. It should be sufficient to show that the act was done to humiliate, distress or alarm the victim or had the effect of doing so.
 - Does not contain an exhaustive list of body parts which need to be captured in order for the offence to have been committed. Instead, a non-exhaustive description such as “genitals, posterior or breasts which are exposed or covered only in underwear or any other body part of a person which that person may reasonably consider to be private, or which it is known that the particular person keeps private” can be included.
 - Could include a minimum sentence similar to the several other sexual offences for which the Sri Lankan Penal Code already imposes minimum sentences.³⁰ However, the minimum sentence should be reasonably lenient as there may be situations in which the offence does not warrant a harsh sentence.
 - Could include aggravated circumstances in which the perpetrator is given a longer sentence. These include if the victim is a minor, if images/videos taken by the perpetrator have been circulated or published; if the perpetrator has made a profit from the images or videos; or if the perpetrator is a repeat offender.
 - Provides for compensation to be paid to the victim.³¹

³⁰ Example – Rape – section 363 & 364, Penal Code.; Incest – section 364A; Grave Sexual Abuse – section 365B

³¹ As is the case with several sexual offences in the Penal Code already such as Sexual Harassment (section 445); Rape (sections 363 & 364); incest (section 364A); unnatural offences (section 365); and grave sexual abuse (section 365B).

B. Non-consensual distribution of intimate images or videos

What is the non-consensual distribution of intimate images or videos?

The non-consensual distribution of intimate images or videos is a form of image-based sexual abuse, popularly known as non-consensual pornography or ‘revenge porn’.³² It is defined by the Special Rapporteur on Violence Against Women, its Causes and Consequences as “*the non-consensual online dissemination of intimate images, obtained with or without consent, with the purpose of shaming, stigmatising or harming the victim*”.³³

Before the age of the internet as we know it today, the non-consensual distribution of intimate images or videos usually took a very different form, and would not usually reach a large audience. However, today, with just the click of a button, intimate images or videos can be shared with the whole world, and once they are published on the internet, it is virtually impossible to completely stop their distribution. This happens so often that it is now a popular genre of pornography, and videos distributed non-consensually, and those made to seem like they are recorded non-consensually, are both found on many pornographic websites.³⁴ In fact, it is reported that videos of women in homemade pornographic videos are the most watched categories among Sri Lankans who consume pornography.³⁵

This development in technology that increases the speed, reach and non-detectability of recordings made this way exacerbates the distress victims face. This distress may include humiliation, but also harassment of the victim following the release of their intimate images

³² Some scholars however refrain from using the term ‘revenge porn’ because the distribution may be done for reasons other than revenge, and because the term revenge has victim blaming connotations as it suggests the victim did something that had the effect of provoking the offender. See: United Nations Office on Drugs and Crime, EJ4, ‘Module 12: Interpersonal Cybercrime’, *University Module Series: Cybercrime*, available at: <https://www.unodc.org/e4j/en/cybercrime/module-12/key-issues/gender-based-interpersonal-cybercrime.html>

³³ Ibid *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, Human Rights Council, Thirty-eighth session, paragraph 41.

³⁴ Marthe Goudsmit, ‘Revenge Pornography: A conceptual analysis – undressing a crime of disclosure’, Leiden University, 2017. Available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/47472/20170127%20MG%20Revenge%20pornography%20a%20conceptual%20analysis_Redacted.pdf?sequence=4

³⁵ ‘800 Odd Criminals: Watching Porn in Sri Lanka’, Bakamoono.lk, April 2017, available at: http://www.bakamoono.lk/admin/wp-content/uploads/2017/04/800-Odd-Criminals-Watching-Porn-in-Sri-Lanka-bakamoono.lk_.pdf

and videos, as in some instances where the pictures are published along with the victim's contact information, or where the victim is publicly known.

Can it be punished under existing law?

Several provisions are presently in place under which a person who publishes or threatens to publish the intimate images of another can be punished.

Upon a wide interpretation given to the definition of sexual harassment in section 345 of the Penal Code, the non-consensual sharing of intimate images or videos may fall within the ambit of this offence as it could amount to actions which cause sexual annoyance or harassment.

If the victim is below eighteen years of age, then even the act of persuading, inducing or coercing them to send intimate images or videos of themselves, as well as the possession of such pictures or images will fall within the ambit of section 286A of the Penal Code, obscene publication and exhibition relating to children, which carries a minimum sentence of two years' imprisonment.

The sharing of revenge porn can also be punished under the Obscene Publications Ordinance, No. 22 of 1983 which, among other things, makes it an offence to have in possession obscene images for the purpose of distribution or public exhibition. However, this is a draconian law which ought to be repealed as it can be potentially abused to punish anyone who produces or has in their possession (for the purpose of trade, distribution or public exhibition) pictures, videos and writings which may be considered by some as obscene. Thus, even a person who consensually captures these images (even of themselves) with the intention of sharing them can fall within the ambit of this law. What one considers art may be prosecuted as obscene under this law, and it is thus a potential tool for censorship.

International legislative responses to the non-consensual distribution of intimate images or videos

The Indian Penal Code provision on voyeurism, which came in through the Criminal Law (Amendment) Act of 2013, extends to punishing those who, without consent, disseminate intimate images or videos, even if those images and videos had been obtained with consent. This is through Explanation 2 to section 354C of the Penal Code, which states that:

Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

Though the act of non-consensual distribution of intimate images or videos is made punishable as an explanation to the offence of voyeurism, the two are largely different offences. In the case of the non-consensual distribution of intimate images or videos it is the distribution that is relevant, regardless of whether the victim consented to the taking of the image or recording. This is different to voyeurism, which is centred around the expectation of privacy that a person may have, and the violation of that expectation. However, despite it only being included as an explanation to another offence, the inclusion of this offence in the Indian Penal Code is nonetheless laudable.

Sections 2 and 3 of the Abusive Behaviour and Sexual Harm (Scotland) Act of 2016 provides that:³⁶

2. Disclosing, or threatening to disclose, an intimate photograph or film

(1) A person ("A") commits an offence if—

(a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,

(b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and

(c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.

(2) For the purposes of this section, a photograph or film is disclosed if it, or any data or other thing which is capable of being converted into it, is given, shown or made available to a person other than B.

(3) In proceedings for an offence under subsection (1), A has a defence if any of the following facts is established—

(a) B consented to the photograph or film being disclosed,

(b) A reasonably believed that B consented to the photograph or film being disclosed,

³⁶ Available at: <https://www.legislation.gov.uk/asp/2016/22/part/1/crossheading/disclosure-of-an-intimate-photograph-or-film/enacted>

(c) A reasonably believed that disclosure of the photograph or film was necessary for the purposes of the prevention, detection, investigation or prosecution of crime, or

(d) A reasonably believed that disclosure of the photograph or film was in the public interest.

(4) For the purposes of subsection (3), consent to the photograph or film being disclosed may be—

(a) consent which is specific to the particular disclosure or (as the case may be) the particular threatened disclosure, or

(b) consent to disclosure generally where that consent covers the particular disclosure or (as the case may be) the particular threatened disclosure.

(5) In proceedings for an offence under subsection (1), A has a defence if the following matter is established—

(a) B was in the intimate situation shown in the photograph or film,

(b) B was not in the intimate situation as a result of a deliberate act of another person to which B did not agree, and

(c) when B was in the intimate situation—

(i) B was in a place to which members of the public had access (whether or not on payment of a fee), and

(ii) members of the public were present.

(6) For the purposes of subsection (3), a fact is established, and for the purposes of subsection (5), the matter is established, if—

(a) sufficient evidence is adduced to raise an issue as to whether that is the case, and

(b) the prosecution does not prove beyond reasonable doubt that it is not the case.

(7) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

3. Interpretation of section 2

(1) For the purposes of section 2, a person is in an “intimate situation” if—

(a) the person is engaging or participating in, or present during, an act which—

(i) a reasonable person would consider to be a sexual act, and

(ii) is not of a kind ordinarily done in public, or

(b) the person's genitals, buttocks or breasts are exposed or covered only with underwear.

(2) In section 2—

“film” means a moving image in any form, whether or not the image has been altered in any way, that was originally captured by making a recording, on any medium, from which a moving image may be produced, and includes a copy of the image,

“photograph” means a still image in any form, whether or not the image has been altered in any way, that was originally captured by photography, and includes a copy of the image.

It is uncertain if the Indian law would cover instances in which a doctored or ‘photoshopped’ image is circulated, when the intimate body parts in the picture are not actually those of the victim. The Scottish law however makes provision for such situations as well.

Another way in which legislative responses to non-consensual pornography vary across the world is in terms of the *mens rea*, or the intention or knowledge with which the act must have been perpetrated in order for it to constitute an offence. The Indian law does not set out what intention the perpetrator should have committed the offence with. However, the Scottish law requires that it was done with the intention to cause fear, alarm or distress; or if the preparator was reckless as to whether it would cause the victim fear, alarm or distress.

Section 91Q of the Crimes Act of New South Wales, Australia also deals with the offence of distributing intimate images without consent:

91Q Distribute intimate image without consent

(1) A person who intentionally distributes an intimate image of another person—

(a) without the consent of the person, and

(b) knowing the person did not consent to the distribution or being reckless as to whether the person consented to the distribution, is guilty of an offence.

In this case a person who intentionally distributes an intimate image without consent and “knowing the person did not consent to the distribution or being reckless as to whether the person consented to the distribution” commits an offence. This section may extend beyond the acts of the original distributor of the intimate image. Even a person who receives the non-

consensual image and thereafter and distributes it, being reckless as to whether the person in the image consented to its distribution, may fall within the ambit of this section. It may, however, be difficult to prove the recklessness of a person other than the original distributor of the image.

Recommendations for an offence on non-consensual distribution of intimate images or videos in Sri Lanka

A criminal offence on the non-consensual distribution of intimate images or videos should be introduced providing that:

- The image or video in question can be obtained by the perpetrator with or without the victim's consent. Non-consent of the victim is not essential in how the perpetrator came into possession of or created the image.
- It is not essential to state the purpose for which the image was distributed, as long as it was done knowing that the victim did not consent, or while having no reasonable ground to believe that the victim consented.
- While the image should appear to be of the victim for the offence to have taken place, it is not essential that it is in fact an image of the victim. It can be an image edited or captioned to appear to be the victim, if it is done knowing that it would cause humiliation, distress or alarm to the victim.
- A person who further distributed the image or video after having received it from a perpetrator rather than a victim is also covered, if that person had the knowledge or reasonable grounds to believe that the image or video had been distributed without the consent of the victim.
- It does not encroach on consensual sexual expression. Consenting adults should be permitted by law to share sexually explicit images and videos with each other, provided that they are not captured or circulated without consent, or with the use of deceit and/or coercion.

C. Sextortion

What is sextortion?

Sextortion is described by the Special Rapporteur as *“the use of ICT to blackmail a victim [where] the perpetrator threatens to release intimate pictures of the victim in order to extort additional explicit photos, videos, sexual acts or sex from the victim.”* This differs from an alternate meaning sometimes given to the term ‘sextortion’, as a form of bribery or corruption in which a person abuses a position of authority to seek sexual favours from a victim in exchange for them being provided with certain benefits (such as a government official sextorting a victim in exchange for a job) or the avoidance of certain consequences (such as a Police officer sextorting a victim in return for being let off arrest).³⁷

Sextortion is often closely interlinked with the non-consensual distribution of intimate images, however, the two differ in essence. One is an act based on violating the privacy of a victim, and the lack of consent to the image or video being distributed. The other is an act based on extortion, where an intimate image or video (obtained consensually or non-consensually) is used to threaten a violation of privacy in order to induce some benefit.

Often, a victim is convinced by a perpetrator (who may include their partner) to send them ‘nudes’ (naked or semi naked pictures or videos of themselves) or record themselves engaging in sexual acts, and afterwards, is threatened with those intimate images or videos being released to another person, persons or completely publicly, in exchange for some benefit, such as inducing further sexual acts, monetary or material gain, asserting authority over the victim, or for status. Perpetrators essentially use the threat of non-consensual distribution of intimate images to extort favours from the victim. This is especially so in Sri Lanka, where social media platforms such as WhatsApp which enable taking, sharing and

³⁷ Sara Carnegie, ‘Sextortion – A crime of corruption and sexual exploitation’, *International Bar Association*, 2019, pg 8, available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=E5E451C2-A883-4518-B0ED-5AAAEBBCDD5AA>

distributing images or videos easily are very popular,³⁸ and particularly affects young women.³⁹

Sextortion is also interlinked to voyeurism when images or recordings obtained through voyeurism are used to extort some favour from the victim.⁴⁰ In this case, too, it may be sexual acts, monetary rewards or other favours that are sought from the victim in exchange for the non-release of such images or videos.

There are, however, instances in which the image or video circulated or published are not even actual images or videos of the victim. They may be doctored or ‘photoshopped’ to appear to be the victim,⁴¹ or when a face is not visible they may be published with the name of the victim, thus creating the impression that it is of them.⁴² In such instances, there may be equal trauma suffered by the victim as if it was their own image that was circulated or threatened to be circulated, as the persons receiving such content believe or would believe that it was them, and they may face further consequences such as loss of reputation and harassment.

Can it be punished under existing law?

In the event that a victim is asked to provide any ‘property or valuable security or anything signed or sealed’ in exchange for preventing such image or video being published, such action would amount to extortion under the Penal Code.⁴³ However, this is unlikely to cover

³⁸ United Nations Committee on the Right of the Child, ‘Combined fifth and sixth periodic reports of States parties due in 2015 – Sri Lanka’, CRC/C/LKA/5-6, para 67. Available at: <https://www.mfa.gov.lk/wp-content/uploads/2018/03/CRC-4.pdf>

³⁹ ‘Investigating Sri Lanka’s ‘nude’ culture’, *Grassrooted.net*, January 2017, available at: <http://www.grassrooted.net/2017/01/27/investigating-sri-lankas-nude-culture/>

⁴⁰ ‘Complaints to CID in 2017 - Social media intimidation after break-up most common’, *Daily News*, 23rd September 2019, available at:

<https://www.dailynews.lk/2019/09/23/local/197651/social-media-intimidation-after-break-most-common>

Also see: ‘Voyeur demanded sex bribes to hide victims’ nude photos’, *Daily News*, 29th September 2015, available at:

<http://www.dailynews.lk/2015/09/29/security/voyeur-demanded-sex-bribes-hide-victims-nude-photos?page=16>

⁴¹ McGlynn, C., Rackley, E. & Houghton, R. Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse. *Fem Leg Stud* 25, 25–46 (2017), page 33, available at: <https://link.springer.com/content/pdf/10.1007/s10691-017-9343-2.pdf>

⁴² “These Videos Put my Life at Risk” – a Sri Lankan Journalist Targeted with Porn Shaming”, 16th May 2016.

<https://endsexualexploitation.org/articles/revengeporn-targeted-google/>

⁴³ Section 372, Penal Code., and punishable under Section 374, Penal Code. The first illustration to Section 372 states that “A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.”

situations in which the victim is blackmailed into staying in a relationship with, or performing sexual acts with the offender.

If a woman is intimidated with the threat of releasing their nude photographs and thus coerced into intercourse with a man, it may amount to rape as per Section 363(b) of the Penal Code; *“with her consent, when her consent has been obtained by use of force or intimidation”*. However, the law only recognises a woman as a victim of rape, and thus this protection does not extend to other genders.⁴⁴ If it is a sexual act which does not amount to rape (i.e. is not penile penetration of the vagina), it may be grave sexual abuse under Section 365B(b) of the Penal Code. This is an offence that does not limit the categories of potential victims based on gender, but carries a lesser sentence.

Sri Lankan law does not recognise the right to privacy, either as a Constitutionally guaranteed right or as an Act which attracts penal consequences if violated.⁴⁵ The sharing of non-consensual pornography, however, is a violation of the victim’s privacy in essence as it publicises an intimate part of the victim’s life which was intended to be kept private. The lack of recognition of this important protection is a lacuna in the country’s laws.

International legislative responses to sextortion

There are few international legal provisions that address sextortion specifically. The Scottish law on the non-consensual distribution of intimate images or videos would extend to criminalising an act of sextortion as well, as it is sufficient that the offender threatens to disclose an image or video for the offence to have been committed. However, the act that is criminalised would be, in fact, the act of threatening to disclose the image, and not the act of extorting something in return, which is a separate offence.

⁴⁴ See part I of this series; Legal Reform to Combat Sexual and Gender-Based Violence - PART I - Reforming Existing Laws and Policies, Centre for Policy Alternatives, November 2020

⁴⁵ Ibid, ‘Right to Privacy in Sri Lanka’, Discussion Paper, Centre for Policy Alternatives’.

Recommendations for an offence on sextortion in Sri Lanka

A criminal offence on sextortion must be introduced, which is separate to that of non-consensual distribution of intimate images or videos, and which:

- Is wide enough to cover the perpetrator using the threat of releasing sexually compromising information, images or videos, in order to: extort sexual images or videos from the victim; make the victim do an act or refrain from doing an act; or extort some other material or monetary benefit from the victim.
- Which can be brought in through the introduction of a new section in the Penal Code, or through the amendment of the existing provision on extortion making it wide enough to cover instances of sextortion.
- Specifies that acts which the victim is threatened into doing can range from intercourse and other sexual acts; to staying in a relationship with the perpetrator; or not reporting the perpetrator for some criminal act committed by the perpetrator.

Wider reforms necessary for effective laws on online sexual violence

In addition to the legislative reforms recommended above, CPA recommends the following constitutional, legislative and policy reforms necessary to successfully implement and allow for effectively investigating, prosecuting and preventing them. This should be read in conjunction with part 1 of this series⁴⁶, in which CPA has recommended a fuller set of reforms to address gaps in the criminal justice system.

1. Constitutionally recognise the Right to Privacy

This right should be included in the Fundamental Rights chapter of the Constitution, and should include both the right of a person not to have their privacy transgressed by the State, as well as the recognition of the duty of the State to take proactive steps to ensure that the privacy of its citizens is not violated by any other citizen and to take appropriate remedial steps where it is.

2. Amend the Criminal Procedure Code to protect a victim's privacy during investigation and trial

The Criminal Procedure Code must be amended to allow for evidence of such sexually explicit images or videos to be led in-camera, and for the same not to be stored in the court record except where necessary (and even then, with proper privacy guaranteed). It is important that the victim's privacy is protected during the course of investigations and trial. When a sexually explicit image or video is produced in evidence, the law should provide for the said image or video not to be stored on the court record, as the same may be accessible, lawfully or unlawfully, by court officials, lawyers and the media.

3. Strengthen the existing victim and witness protection scheme

The inadequacies in the current victim and witness protection scheme, particularly as relating to the National Authority for the Protection of Victims of Crime and Witnesses, must be addressed and the victim and witness protection scheme as a whole must be properly

⁴⁶ Legal Reform to Combat Sexual and Gender-Based Violence - PART I - Reforming Existing Laws and Policies, Centre for Policy Alternatives, November 2020

enforced (see Part I of this series of papers a fuller discussion on victim and witness protection). In the case of the three offences proposed in this paper, the privacy of the victim is especially important given the Sri Lankan social context and the myriad consequences for victims. A weak victim and witness protection scheme makes victims of online sexual violence hesitant to come forward, and enables impunity for perpetrators.

4. Draft criminal laws using technologically neutral language and review and update them regularly

Criminal laws must be drafted using technologically neutral language, so as to be capable of encompassing novel scenarios that may arise as technology evolves. The State should also adopt a policy to review and update criminal laws at regular intervals to assess the operation of existing criminal provisions (particularly newly-introduced ones). This will enable meeting legal needs as raised by evolving technological advances which may not be predicted now, and prevent laws from becoming antiquated.

5. Establish a specialised online sexual violence unit within the Sri Lankan Police Cybercrime unit

The unit must be:

- trained in the skills needed to carry out investigations relating to online sexual violence offences (either under the existing legal framework or as amended in future).
- given sensitivity training, with an understanding of the psychological impact sexual violence can have on a victim.
- provided with the capacity to investigate offences regardless of specific geographical location.
- easily accessible, using properly trained staff, and should maintain in-person, telephone and online access points, where victims can lodge complaints easily, trilingually and without fear of their privacy being violated.

6. Provide counselling services for persons who have been victims of online sexual violence

The expansion of counselling and mental health services through public healthcare or through State-facilitated must accommodate persons who have been victims of online sexual violence

through the adequate training of existing and new counselling professionals and interfacing with non-government counselling services where necessary (for instance, private or NGO counselling providers). Persons who have been victimised must also be able to easily access counselling services if and when they engage the Police and the judicial system.

7. Introduce comprehensive sex education which covers online risks and dangers and protecting privacy online

Introduce comprehensive sex education to the school curriculum which includes a specialised focus on sexual expression online, and the associated risks, dangers and steps required protect privacy online. This could go a long way in allowing younger citizens, particularly girls, to identify and address unhealthy and criminal behaviours such as being pressured or coerced into sharing intimate images and videos by their partners or other persons; and how to navigate their sexuality safely in the digital world (see Part I of this series of papers for a wider discussion on comprehensive sex education).