

# CRIMINAL JUSTICE AND COURTS ACT 2015

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1 – Criminal Justice

#### Offences involving intent to cause distress etc

#### *Section 33: Disclosing private sexual photographs and films with intent to cause distress*

332. *Section 33* creates a new offence of disclosing private sexual photographs and films with intent to cause distress.
333. *Subsection (1)* provides that this offence is committed if the disclosure was made without the consent of an individual (“the victim”) who appears in the photograph or film, and with the intention of causing that victim distress. *Subsection (8)* makes it clear that the defendant is not to be taken to have the required intention merely because the distress naturally followed from the disclosure.
334. *Subsection (1)* is subject to *subsection (2)* which provides that the offence is not committed if the photograph or film was only disclosed to the victim.
335. *Subsections (3), (4) and (5)* set out the defences which apply to the offence. The burden of proving, under *subsection (3)*, a reasonable belief that the disclosure was necessary to prevent, detect or investigate crime is on the defendant.
336. However where the defendant provides sufficient evidence to raise an issue in respect to the matters set out in *subsections (4) and (5)* it will be for the prosecution to disprove those matters beyond all reasonable doubt in order to secure a conviction.
337. The defence in *subsection (4)* applies to those directly engaged in journalism and to their sources because the defence applies both to disclosure in the course of publication of journalistic material and to disclosure with a view to such publication. In either case the defendant needs to show that he or she reasonably believed that there was, in all the circumstances, a public interest in the publication in question. *Subsection (7)(b)* defines “publication” as disclosure to the public at large or to a section of the public.
338. The defence in *subsection (5)* applies where the defendant could show that he or she reasonably believed that the photograph or film in question had previously been disclosed for reward; for example the defendant might have a reasonable belief that the photograph or film had previously been published on a commercial basis because he or she had seen it in a magazine. The previous disclosure for reward could have been made either by the victim of the offence or by another person. In addition the defendant needs to show that he or she had no reason to believe that this previous disclosure for reward was made without the consent of the victim of the offence. For example, the defence would fail if the prosecution proved that the victim had told the defendant that they did not consent to the previous disclosure for reward.

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339. *Subsection (7)(a)* clarifies that, for the purposes of the offence, “consent” to the disclosure of the photograph or film (whether on the occasion to which the offence relates or on a previous occasion for commercial reward) could be general consent covering the disclosure of the material or specific consent to the particular disclosure in question.
340. *Subsection (9)* provides that the offence of disclosing a private sexual photograph or film with intent to cause distress is triable either way and can therefore be tried in either a magistrates’ court or the Crown Court. On conviction of indictment the maximum term of imprisonment is 2 years. The maximum term of imprisonment on summary conviction is 6 months until section 154(1) of the Criminal Justice Act 2003 comes into force, at which point it will be 12 months (*subsection (11)*). Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will remove the limit on fines that can be imposed in the magistrates’ court. However, until it comes into force, any fine imposed on summary conviction of the new offence must not exceed the statutory maximum (*subsection (12)*).

***Schedule 8: Disclosing private sexual photographs or films: providers of information society services***

341. *Schedule 8* addresses the position of providers of information society services in respect of the new offence under section 33.
342. *Paragraph 1* of the new Schedule extends liability to a service provider established in England and Wales (an “E&W service provider”) in respect of a photograph or film which is disclosed in a European Economic Area state other than the UK.
343. Sub-paragraph (2) of paragraph 1 makes clear that section 33 applies to an E&W service provider who discloses a photograph or film in the course of providing information society services in a European Economic Area state that is not the UK.
344. Sub-paragraph (3) of paragraph 1 provides for proceedings in respect of an offence under section 33 to be dealt with in any place in England and Wales as if it had been committed in that place.
345. *Paragraph 2* of the new Schedule restricts when proceedings may be instituted against a service provider established in a European Economic Area state other than the United Kingdom (a “non-UK service provider”).
346. Sub-paragraphs (2) to (4) of paragraph 2 set out the derogation conditions that must be satisfied for proceedings against a non-UK service provider to be instituted. These are where proceedings are necessary for the purposes of the pursuit of public policy, an information society service prejudices or presents a serious or grave risk of prejudice to the pursuit of public policy and is proportionate to the pursuit of public policy.
347. *Paragraph 3* of the new Schedule sets out exceptions for mere conduits.
348. Sub-paragraphs (1) to (3) of paragraph 3 set out when a service provider is not capable of being guilty of an offence under section 33. The circumstances are where the information society service provided consists of the provision of access to a communication network or the transmission in a communication network of information provided by a recipient of the service. In such circumstances the service provider is not capable of being guilty of an offence if it does not initiate the transmission, select the recipient of the transmission or select or modify the information contained in the transmission.
349. Sub-paragraph (4) of paragraph 3 sets out that if a service provider stores the information for longer than is reasonably necessary for the transmission it is capable of being guilty of an offence.
350. *Paragraph 4* of the new Schedule sets out exceptions for caching.

351. Sub-paragraph (1) of paragraph 4 sets out that paragraph 4 applies where an information society service consists of the transmission in a communication network of information provided by a recipient of the service.
352. Sub-paragraphs (2) to (4) of paragraph 4 set out the circumstances in which a service provider is not capable of being guilty of an offence under section 33 in respect of the automatic, intermediate and temporary storing of information. The circumstances are where: the storage of information is solely for the purpose of making more efficient the onward transmission of information to other recipients of the service at their request; and the service provider does not modify the information, complies with any conditions attached to having access to the information and expeditiously removes the information or disables access to it. The service provider should expeditiously remove the information where it obtains actual knowledge that the information at the initial source of the transmission has been removed from the network, access to the information has been disabled or a court or administrative authority has ordered its removal or disablement.
353. *Paragraph 5* of the new Schedule sets out an exception for hosting.
354. Sub-paragraphs (1) to (4) of paragraph 5 set out the circumstances in which a service provider is not guilty of an offence under section 33 where in the course of providing an information society service it stores information provided by a recipient of the service. These circumstances apply where the recipient of the service is not acting under the authority or control of the service provider. The service provider must have no actual knowledge when the information was provided that it consisted of or included a private sexual photograph or film, that it was provided without the consent of an individual who appears in the photograph or film, or that the disclosure of the photograph or film was with the intention of causing distress to that individual. The service provider must, on obtaining such knowledge, expeditiously remove the information or disable access to it.
355. *Paragraph 6* of the new Schedule defines “disclose”, “photograph or film”, “recipient”, “information society services”, “service provider”, and when a service provider is established in England and Wales or a European Economic Area state.

### ***Section 34: Meaning of “disclose” and “photograph or film”***

356. **Section 34** defines the terms “disclose” and “photograph or film” for the purposes of the offence in section 33.
357. By virtue of *subsections (2) and (3)* a disclosure takes place where a defendant, by any means, gives or shows the photograph or film to another person or makes it available to another person irrespective of whether the material in question had previously been disclosed to that person and whether or not the disclosure was for reward. Disclosure therefore includes electronic disclosure of a photograph or film, for example by posting it on a website or e-mailing to someone. It also includes the disclosure of a physical document, for example by giving a printed photograph to another person or displaying it in a place where other people would see it.
358. *Subsection (4)* defines “photograph or film”. *Subsection (4)(a)* makes clear that the offence applies only to material which appears to be, or to contain, a photographed or filmed image. A photographed or filmed image is a still or moving image (or part of an image) originally captured by photography or by the making of a film recording (*subsections (6) and (7)*). For example, an image, even if derived from a photograph, which has been digitally altered to look entirely like a drawing would not satisfy the test. But if a drawing had a photographed image or part of a photographed image transposed onto it, it would do so.
359. Where an image appears wholly or partly photographic, it will only fall within the terms of the offence if it is in fact derived wholly or partly from one or more photographed or filmed images (as to which see *subsection (4)(b)* and *subsections (6) and (7)*, discussed

above). The offence therefore does not apply if the disclosed material looks like a photograph but does not in fact contain any photographic element (for example because it had been generated entirely by computer).

360. By virtue of *subsection (5)* an image is still considered to be a photograph or film for the purpose of the offence if it satisfied the requirement in subsection (4)(b), even if the original photograph or film recording has been altered in any way (for instance by being digitally enhanced). However, this is subject to *subsections (4) and (5)* of section 35.
361. *Subsection (8)* makes clear that references to a photograph or film include a negative version of a still or moving image that is a photograph or film and stored data that can be converted into such a still or moving image – for instance data stored on a hard drive or disc.

### **Section 35: Meaning of “private” and “sexual”**

362. *Section 35* explains the meaning of “private” and “sexual” for the purposes of the offence created by section 33.
363. The effect of *subsection (2)* is to exclude from the ambit of the offence a photograph or film that shows something that is of a kind ordinarily seen in public. This means that a photograph or film of something sexual (such as people kissing) would not fall within the ambit of the offence if what was shown was the kind of thing that might ordinarily take place in public.
364. The effect of *subsection (3)(a)* is to provide that a disclosure of a photograph or film which shows all or part of an individual’s exposed genitals or pubic area would be considered sexual for the purposes of the offence in section 33.
365. Where a photograph or film does not show such an image it would still, by virtue of *subsection (3)(b)*, be considered sexual if a reasonable person would regard it as such because what is shown is by its nature sexual.
366. Where what is shown is not by its nature sexual, *subsection (3)(c)* provides that a photograph or film is nevertheless to be considered sexual where a reasonable person would regard the content of the photograph or film when taken as a whole as sexual. For example, a photograph of someone wearing their underwear is not necessarily sexual, but a reasonable person might consider it to be so if the content of the picture, including for example what else was (or was not) shown or the manner in which the person was posing, would lead a reasonable person to consider it as such.
367. *Subsections (4) and (5)* set out the circumstances in which a photograph or film which contains content which is private or sexual is not to be considered private and sexual for the purposes of the offence created by section 33.
368. Those provisions apply (*subsection (4)*) where a photograph or film has been altered in any way (for example by manipulating a part of the image using a computer programme) or where the photograph or film combines a photographed or filmed image with either another such image (for example where two photographs have been spliced together) or another kind of image (for example where a photograph of individuals has been superimposed on a wholly computer generated picture).
369. An image of that kind is not private and sexual if:
- no part of the photograph or film in question originated from a photographed or filmed image that was itself private and sexual;
  - the photograph or film is only private or sexual because the photographed or filmed element has been altered or combined with other material (for example, where a non-sexual photograph or film recording has been altered to make it private and sexual, or where it has been placed next to another image in a way which made the image as a whole appear to be private and sexual);

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- the victim of the offence only appeared as part of, or with, whatever made the photograph or film private and sexual because the photograph or film in question has been created in one of the ways set out in paragraph 368 above (for example, where a non-sexual photograph of a person has been merged with a sexual photograph that did not originally feature that person).