

Ofcom's treatment of cyberflashing in the Illegal Content Judgements Guidance

Commentary from Prof Clare McGlynn, Durham University

While Ofcom guidance says it is reasonable to infer that sending unsolicited genital images constitutes the criminal offence and therefore action should be taken to prevent this risk, it provides an exception for any service which claims that sending unsolicited dick pics is 'commonly accepted', such as dating sites for gay men. There is no such defence or exception in the cyberflashing criminal offence. Indeed, sending unsolicited dick pics is against the terms of service of most dating sites. It is not at all clear why Ofcom continues to provide this exemption to the law and excuse for services not to act.

State of Mind

1.93 It will be reasonable for service providers to infer the required intent or recklessness where a user sends content depicting genitalia, unless:

- a) there is evidence of consent from the user(s) receiving the photograph or film or*
- b) it is posted on a service where it is a commonly accepted part of the culture to send and receive intimate images without prior agreement.*

This is the same as the existing guidance. As a general statement, this is positive, as it says it is reasonable to assume that sending genitalia images contravenes the legislation and therefore action should be taken, unless other circumstances.

However, the suggestion that this presumption can be reversed, en masse, where the image is posted on a service where it is 'commonly accepted part of the culture' is deeply problematic. The target is dating sites, particularly those used by men seeking to have sex with men. It is commonly suggested that sending unsolicited dick pics is 'normal' and 'acceptable'.

However, this is problematic for two main reasons.

First, sending unsolicited dick pics is actually against the terms of service of most such dating sites. They prohibit it as it is non-consensual conduct of a sexual nature, as well as often constituting harassment. See [Grindr](#) for example.

Secondly, there are many who are on these sites who do not consider this 'normal' and 'acceptable', therefore challenging these assumptions and supposed norms.

This raises questions:

- Why is Ofcom giving carte blanche to sites to decide for themselves if there is a 'commonly accepted culture' on their service of sending unsolicited dick pics, meaning they don't have to take proactive action, when this is exactly the type of conduct that the law was introduced to prohibit?

- Why is Ofcom allowing a situation to continue whereby Terms of Service prohibit this conduct, but this is not enforced?

Background to this issue being raised in debates on cyberflashing offence:

When the cyberflashing offence was being debated, the then Government Minister [Chris Philp argued](#) against a consent-based law on the basis that: ‘in an online environment where the exchange of those kind of images was generally considered fine, that might criminalise those kinds of exchanges.’ (Evidence to Women and Equalities Committee).

I responded in [my evidence](#) that, in fact, many dating websites prohibit this conduct, giving the example of [Grindr whose guidelines state](#): ‘Ask for consent before sending nude photos or explicit messages, and don’t post these things publicly.’

Problems with Ofcom’s Usage Examples (page 22, after 10.1)

Ofcom repeats these assumptions that sending unsolicited dick pics can be acceptable in the examples it gives:

A photograph or video of a person’s genitals, sent over a messaging app or other communications service to all users in a ‘meeting’ or group chat where it would not be commonly expected to appear.

A photograph or video of a person’s genitals, posted to a public comments section on a service where this is not a commonly accepted part of the service’s culture.

This suggests it is acceptable to send an unsolicited genital image in a messaging app or similar if it could be said that this is ‘commonly expected’. Similarly, the second example.

It should be made clear that sending unsolicited genital images should be presumptively prohibited, and steps should be taken to prevent it. Only if there is clear consent, or lack of the requisite intent, should it then be allowed.

The focus should be on preventing the harms of cyberflashing.