

Invasive photography

An evaluation of the implementation of the law

English summary of Brå report 2019:7

The Swedish National Council for Crime Prevention (Brå) –
centre for knowledge about crime and crime prevention measures

The Swedish National Council for Crime Prevention (Brå) works to reduce crime and improve levels of safety in society. We do this by providing factual information and disseminating knowledge on crime, law enforcement, and crime prevention work, first and foremost to the Government and law enforcement agencies.

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Summary

The Swedish National Council for Crime Prevention (Brå), on instruction from the Government, has carried out a study of how the law on photographic activity constituting invasion of privacy (referred to in this report as invasive photography) is applied in the criminal justice system. The report is based on criminal statistics, a review of 293 case files (reports filed and preliminary investigations), and 104 verdicts. We have also interviewed 40 police officers, public prosecutors, judges, and other officials in the criminal justice system.

The law on invasive photography was passed on 1 July 2013 and prohibits “unlawfully, by technical means, in secrecy, taking a picture of any person who is indoors in a residence or in a lavatory, a dressing room, or other similar space” (Penal Code Chapter 4, section 6 a). The regulation was passed to protect personal integrity in a previously unregulated area, hidden filming.

Three types of offences

The Government instructed Brå to examine which types of acts which have been reported and investigated as invasive photography. The report shows that the number of reports filed has increased annually since the law was introduced, from 181 (2014) to 445 (2017).¹ However, fewer reports have been filed than were expected by parties in the criminal justice system. It is presumed that there is a high level of non-reporting.

The review of the case files shows that most of the reports involve pictures with nude or sexual content. Exercise of power is the most common motive behind invasive photography. There are three primary types of acts which are reported:

- a. *Social power*: Approximately one-third of the cases involve hidden filming for the purpose of spreading pictures to friends and

¹ The number of reported offences in the criminal statistics has been adjusted to exclude extreme values (see the *Method and material* section in the chapter entitled *Introduction*, as well as the chapter entitled *Reporting*).

acquaintances. Both the victim and the suspect are often teenagers. A typical scenario is a boy covertly photographing a naked girl and sharing it with his friends through social media. The pictures are circulated among friends as a way of gaining status or creating cohesion in a social group. The victim usually finds about the existence of the pictures through friends.

- b. *Harassment and extortion*: Another category of reports involves hidden photography which is part of systematic harassments or ongoing abuse. Unlike acts motivated by social power, these pictures are used to interact directly with the depicted person. In the typical case, the photographs were taken while the suspect and the victim had a sexual relationship. The existence of these pictures is usually discovered after the relationship has ended, when the suspect begins to extort the victim with threats to disseminate the pictures. The acts which recur in this category are often linked to domestic abuse or sexual offences.
- c. *Voyeurism*: The third type of reported act is voyeurism. This involves suspects who take pictures in order to watch acquaintances and people who they do not know undressed without the victim's knowledge. The photographs are often taken in lavatories or in dressing rooms using hidden spy cameras. The pictures are taken for the perpetrator's private use and they seldom circulate the pictures. The reported offences are usually included in larger investigations and sometimes involve various types of sexual offences against children.

These three types of reported acts comprise three-fourths of the reviewed case files. Other reports involve incidents which do not satisfy the *actus reus* (i.e. required criminal acts) of the law. This includes, for example, reports filed regarding neighbours and colleagues at workplaces. Many have been dismissed directly, since they did not occur in a place identified under the law.

Women and young people are exposed

The report shows that invasive photography is a gender-based offence. The crime is usually committed by men/boys against women/girls. In three-fourths of the reviewed case files, a man or a boy is identified as the suspect. In two-thirds of the case files, women/girls are the victims.

A pervasive pattern is that girls and women are victims in cases which involve naked pictures. The gender breakdown and the execution of the act may reflect gendered norms on sexuality which discredit women who are photographed undressed or in sexual situations. These norms render women and girls more likely as possible targets for threats, extortions, harassments, and defamation on the basis of a naked picture.

There are, however, matters which deviate from the pattern. In approximately one-fourth of the case files, the victims are men or boys. When one or more boys are identified as the victims, they have often been photographed by an adult man or by another boy in a school environment.

In slightly more than one in ten reports, the perpetrator is identified as a girl/woman. When a girl is the suspect, the injured party is most often another girl who was, for example, photographed in a dressing room. In other words, it is uncommon for a girl/woman to be reported for having unlawfully taken photographs of a boy/man.

Many of the reviewed case files involve offences where the victim is a minor – i.e. under 18 years of age. A total of one-third of the case files involve a victim under 18 years of age and, in approximately one-half of these, the victim is under 15 years of age. An adult male is the suspect in one out of every three cases with a victim under 18 years of age.

Offences are difficult to investigate

The instruction to Brå was to evaluate and shed light on how the reports and investigations are handled in the criminal justice system up to the point of verdict. Brå was also instructed to give an account for the experiences of the police, public prosecutors, and judges in applying the legislation. Brå's overall conclusion is that invasive photography is a type of offence which is difficult to investigate under certain circumstances.

Preliminary investigations dismissed without pictures

Most of the reviewed reports led to a preliminary investigation. Of these preliminary investigations, slightly fewer than one-fourth resulted in a person-based clearance², but three-fourths of the initiated preliminary investigations were closed.

The most common reason why a preliminary investigation was closed was the lack of technical evidence. Approximately one-half of the reviewed preliminary investigations had access to the pictures referred to in the case, and many investigations were dismissed when the possibilities to obtain such evidence were deemed exhausted. Other common reasons for dismissing a preliminary investigation were that the claimants withdrew from the case, that the suspect was charged with the wrong offence, that no victim was identified, or that it was one person's word against the other.

Approximately one in five of the filed reports were dismissed immediately with no preliminary investigation whatsoever. The majority of these involved acts in locations other than those stated in the law. Acts in which

² An *offence with a person-based clearance* is an offence in which the public prosecutor has decided either to prosecute, issue a summary sanction order, or waive prosecution.

the perpetrator was unknown, or where the suspected person was not criminally responsible, were also dismissed immediately.

A question of resources

According to the police and public prosecutors who were interviewed, an underlying reason for the closure of so many preliminary investigations is the lack of resources to take measures which can result in technical evidence. The access to digital forensic investigations, coercive measures and requests for international legal assistance are a question of resources. Primary priority is given to offences with a higher penal value than invasive photography.

Suspected invasive photography may, however, be prioritised if included in a larger investigation involving offences with a higher penal value. The allocation of resources can then “spill over” into the investigation of invasive photography. On the other hand, many of the investigations which only include suspicion of invasive photography, or other offences with similar penal value, are assigned lower priority in respect of resources and measures.

These conditions obtain significance in the selection process within the legal justice system. The matters that involve youth exercising “social power” constitute almost one-third of the reviewed preliminary investigations but it is seldom deemed possible to allocate the necessary resources. There is often a need for both international legal assistance and extensive digital forensic investigations in these preliminary investigations, since many images are shared and stored via social media. There are thus limited possibilities to clear these cases even though the law has criminalised the acts.

Offences against children are tried more frequently

The review of district court verdicts shows that the variety of cases which were tried differs from the variation among the filed reports. The cases which also included suspected offences with a higher penal value were tried more often. One-half of the reviewed verdicts have a victim under 18 years of age as claimant, while the corresponding percentage of the filed reports was one-third. All verdicts involved pictures with nude or sexual content, while only two-thirds of the case files have such content.

The percentage of cases which also include child pornography or sexual offences is also significantly higher among the verdicts than among the reviewed case files and preliminary investigations. It is likely that a consequence of the investigations of offences against children and certain sexual offences are given higher priority and allocated more resources.

Technical evidence is central

Most of the reviewed prosecutions led to convictions (78 per cent). In some acquittals, technical evidence was either lacking or given very little weight, or the photographs were not deemed sufficient to a) establish the time of the offence and b) prove that the picture was taken covertly and unlawfully. In most convictions which were included in our sample, the technical evidence was ascribed central significance for proving all elements of the offence. However, there were instances where other evidence formed the basis for a conviction – such as information from witnesses proving the existence of a photograph or defendant’s confession.

Fewer locations are covered than expected

The law against invasive photography has criminalised hidden photography of a person who is indoors in a residence or a lavatory, in a dressing room, or in “another similar area”. The Government Bill which preceded the law stated that a subsequent follow-up should shed light on “whether the legislation is suitably limited in respect of the places which are subject to criminalisation” (Government Bill 2012/1369, p. 34).

The report shows that “other similar places” tends to be interpreted restrictively. Our review of filed reports, investigations and verdicts indicates that the cases involving acts committed in places other than those specifically stated in the text of the law (dressing rooms, lavatories, and indoors in a residence) were often deselected in one of the instances in the criminal justice system. An appeals court verdict from 2016, in which a doctor’s office was not deemed “another similar place”, has been influential to the restrictive application of the law.

The report also shows that acts committed at other locations (than stated in the law) can be difficult to get at by means of other related legislation. Hidden photography in public places which constitutes an invasion of integrity and which takes place at a certain distance is not covered under the law against invasive photography, the law against sexual molestation or the law against molestation. Many of the police officers and public prosecutors who were interviewed stated that the difficulty in seeking criminal accountability for such acts is a problem.

Day fines are a common sanction

The penal value for invasive photography is day fines or imprisonment for a maximum term of two years. Criminal statistics and the review of verdicts show that the most common sanction for invasive photography (as the primary offence) was day fines.

The compilation of criminal statistics shows that almost all persons convicted were men. One in four convictions was of conviction of a man under 21 years of age.

Brå's assessment

This report shows, in summary, that the law has proven useful as a supplemental classification of offence in those cases where there is a primary sexual offence or other violation of integrity against women and children. As a consequence of the law, certain covert photography motivated by a sexual interest in children, previously not classified as child pornography, has been criminalised. Previous fears of infringement of journalists' liberties and rights have, on the other hand, proven to be unsubstantiated.

The review of the reports filed, preliminary investigations, and verdicts shows, however, that cases which relate to a) social power among youths and b) acts which were committed in locations other than those stated in the law, tend to be deselected as the case passes through the criminal justice system. The fact that the law is more applicable to certain types of cases than to others is a result of a number of different circumstances such as:

1. the practical conditions which govern the investigative work;
2. a restrictive interpretation regarding the locations where invasive photography is criminalised;
3. the fact that related laws are also inapplicable.

These conditions affect the applicability of the law, the extent to which certain objectionable acts can be criminalised, and the ways in which the outcome corresponds to the legislative intent. Accordingly, it should be considered whether certain acts which are deselected would be reasonable to criminalise. If an expanded application of the law were to be recommended, Brå suggests three appropriate areas to consider:

1. *Required elements under the law.* The criminal liability can be extended through a re-evaluation of the required elements under the law against invasive photography, or through adjusting the required elements under other related laws. Such an assessment could be based on a broader overview of the application of the law against sexual molestation and the law against molestation.
2. *Resources for investigations.* Many preliminary investigations of invasive photography are contingent on the resources for digital forensic investigations and international legal assistance. These conditions apply generally to many criminal investigations today, and are not specific to invasive photography. As a consequence, a general increase in resources to regional and national digital crime centres would also be beneficial to investigations of invasive photography.

3. *Preventive work.* Awareness of what is legal and illegal concerning photography could be significantly improved, particularly among children and youths. Since the report shows that offences committed by youths via social media are often difficult to investigate, preventive work could be an important supplement. Such work should involve numerous actors, for example schools, police, and media companies.