

Should 'revenge porn' be illegal?

Max Harris explains how Britain legislated against it and compares this with the position in other common law countries



The internet is creating new norms and new practices. Because of their use on the internet, trigger warnings have become common offline, as recent commentators have [noted](#). Online social media exchanges can be more barbed and less sensitive, arguably because people can't see each other's faces. And perhaps most worryingly, there has been a rise in the malicious sharing of private sexual images online – now that the taking and distribution of images on mobile phones is so much easier.

Actress Jennifer Lawrence drew attention to the issue after nude photographs of her were leaked online in 2014, as a result of the hacking of her iCloud account. Then there was the tragedy of Tyler Clementi, the 18 year-old student at Rutgers University who committed suicide after his

sexual encounter with a man was covertly filmed by his room-mate and shared with Twitter followers.

What is known as ‘revenge porn’ is one form of malicious sharing of private sexual images. It involves the online dissemination of private sexual images, sometimes on specially designed pornographic websites, often following a relationship break-up. Holly Jacobs, whose boyfriend posted intimate images of her on a revenge porn website, [set up](#) the Cyber Civil Rights Initiative (CCRI) and the End Revenge Porn campaign in 2012. Research by CCRI has shown that 1 in 10 ex-partners threaten to post sexually intimate images online. 60% of those ex-partners end up posting those images. 90% of victims are women.

The harms caused by revenge porn are significant. Victims have reported mental health problems, feelings of alienation from male relationships, turning to alcohol to deal with stress, and weight loss. CCRI’s study showed that 93% of revenge porn victims suffer significant emotional distress as a result.

So, in the context of an under-regulated internet, how have parliaments responded? Following the tireless work of campaigners, lawyers, and advocates, the UK Parliament passed the Criminal Justice and Courts Act 2015, which came into force on 12 February 2015. This Act created a new offence of “disclosing private sexual photographs or films with intent to cause distress”, punishable by up to two years’ imprisonment. The new offence has 6 significant elements:

- *Disclosing* – defined as giving or showing or making available “by any means” to another person;
- A *private* – meaning “of a kind not ordinarily seen in public”;
- *Sexual* – essentially showing genitals, the pubic area, or anything that a reasonable person would consider sexual;
- *Photograph or film* – including negatives, altered images, and data that can be converted into a photograph or film;
- *Without the consent of an individual who appears in the photograph or film*; and
- *With the intention of causing that individual distress* – with it not being enough that distress is a natural and probable consequence of causing the disclosure.

The law provided for three defences (in addition to other defences that might apply). First, it is a defence if a person is preventing, investigating, or detecting crime. Secondly, individuals can avoid conviction if the images were disclosed as part of journalistic material that is in the public interest. Thirdly, those accused can raise a defence of the material being previously “disclosed for reward”, an awkward phrase that presumably refers to situations where material has been paid for and is in the public domain.

The passage of this legislation is a positive development. It provides explicit protection for victims of an increasingly common practice and gives detailed guidance to police and prosecutors in their

attempts to enforce the law. However, there are at least three sources of uncertainty in the law:

- The definition of “intent” is quite narrow. The usual legal approach is to conclude that intention exists where there is either evidence of specific intention, or where, from actions or events, it is clear that something is intended because an outcome is a natural and probable consequence of an act. The British law does not allow the second approach to intention to apply in revenge porn cases, thereby creating difficulties for victims in establishing the mental state of the offender.
- “Sexual” has been given a narrow or at best uncertain meaning. The law refers to photographs or films of genitals or the pubic area as being “sexual”. It supplements this by referring to what the reasonable person would consider to be sexual. We can only hope that judges and others will interpret the word sensibly. But there is a danger that the law, as written, will not cover some images with sexual content and ‘reasonable person’ tests have often been criticized as being blunt tools that result in majoritarian societal views being entrenched in legislation.
- The “journalistic material” defence is capable of being manipulated. The person publishing the material must have a reasonable belief that the material is in the public interest. But there may be cases where, say, objectionable images are published on a blog and are claimed to constitute “journalistic material” (especially if the images are accompanied by some broader argument). Freedom of speech may be considered part of the public interest. It remains to be seen whether this is merely a hypothetical danger or will become a barrier for victims.

How does the UK law compare to the rest of the world? Revenge porn laws have been passed in [many countries](#), including Japan and the Philippines. It is perhaps most helpful to look at Canada, the United States, Australia, and New Zealand – these are the jurisdictions with revenge porn laws whose legal systems are most similar to the UK’s. A number of states in the United States attempted to pass revenge porn laws, though the first of these, California, was heavily criticized for drafting a law that seemed to exclude situations where the victim had taken a ‘selfie’, a quite common occurrence in these cases. Canada’s legislature has considered the Protecting Canadians from Online Crime Act, which frames the offence in slightly different terms – as non-consensual sharing of intimate images – but has largely the same effect as the UK legislation. Some commentators have said that Canadian revenge porn cases are better dealt with through civil remedies or changes in copyright law. New Zealand is also in the process of passing the Harmful Digital Communications Bill, which allows for a maximum two-year prison term when a person intentionally posts a digital communication causing harm. The New Zealand law is drafted more broadly and lists several factors for judges to consider when weighing up the harm produced, including the nature of the victim, the extent of the circulation, and the surrounding context. Such drafting ensures that punishment is sensitive to the facts of each case, but may lead to greater uncertainty for victims (and for lawyers and judges applying the provisions). The state of Victoria in Australia has a law with a similar problem: it criminalises intentional distribution of an intimate image to a third party that is contrary to community standards. Whilst the concept of ‘community

Free Speech Debate

Thirteen languages. Ten principles. One conversation.

<http://freespeechdebate.com>

standards' is not foreign to judges, it is fuzzy and may result in inconsistencies where judges have different views about what is actually contrary to community standards. Overall, the UK revenge porn law appears strong compared to these other jurisdictions.

Some might say that in the UK existing legal remedies – such as the law of harassment, or the tort of breach of confidence – are sufficient. But a specific law ensures that victims are treated consistently, and the criminal law is preferable to tort law because it does not require the victim to bear the cost of bringing a case. PEN and Article 19 have claimed that free speech is infringed by the revenge porn law. However, the law, as drafted, allows leeway (some would say too much!) for journalistic material, and the core cases of revenge porn do not involve speech that contributes meaningfully to individual self-fulfilment, the pursuit of truth or democratic deliberation. Others might claim that when a break-up has involved trauma, retribution through revenge porn is justified. This view disregards the significant harms associated with revenge porn, described above. The Canadian Criminal Justice Association has made the further objection that new revenge porn laws add to the prison population. This is a legitimate concern, especially in the UK. But prison terms for this offence will be short, and the point is relevant to how the offence is punished – not whether to have the offence at all.

The UK revenge porn law is an important attempt to protect victims and to ensure that the law keeps up with changing social practices online. However, as Ann Olivarius [observes](#), more work needs to be done. It might be worth rethinking the term 'revenge porn', which takes the perpetrator's perspective and implies that they have some justification for their actions. Holly Jacobs has suggested "cyber rape"; another possible moniker is "malicious sharing" ("mal-sharing"). Beyond the language, too, there is a need to target websites that host these images and to change the culture that has made this practice more common.

Max Harris is an Examination Fellow at All Souls College, Oxford.

Published on: April 3, 2015