

“Revenge porn” – A new crime in need of a new law?

So ubiquitous has become the phrase ‘revenge porn’ that the Oxford English Dictionary’s next update will probably include it. This concept covers both the posting of previously private indecent images by a [disgruntled ex-partner](#) or by a [malicious hacker](#). The combination of the camera phone and the internet provided the fertile ground for this rather nasty set of weeds to grow. The internet has not created revenge porn, but it has made it easier to do. Jennifer Lawrence, a victim of the hacking variety, has [said what doubtless all victims believe](#): there should be a law against it.

Thirteen American states have passed specific laws, three others already have strong privacy laws which cover this area and thirteen other states have introduced legislation to outlaw revenge porn¹ (although some of the laws do not cover images taken by the subject). Chris Grayling, the current Justice Secretary, said in July that he is [‘very open’ to changing the law](#) to tackle the issue and now [Maria Miller](#) is getting in on the act. [Women’s Aid](#) supports criminalisation. There was an attempt to insert a clause by amendment into the Criminal Justice and Courts Bill to create a criminal offence. There seems to be a groundswell in favour of legislation, but do we need another criminal offence? Should this be dealt with by civil remedies instead?

The CPS has just updated its [guidance](#) on social media prosecutions, noting that the Malicious Communications Act 1988, s.1 and the Communications Act 2003, s.127 can potentially be used to tackle revenge porn. Of course neither section was drafted with this specific mischief in mind. The MCA 1988 offence involves the sending to another of an electronic communication which is indecent or grossly offensive, with an intention to cause distress or anxiety *to the recipient*. This may cover the sending of images back to the ex-partner to try and embarrass or cause distress, but the point of revenge porn is usually wider dissemination of the images. As it is the ex-partner rather than the recipients of the images to whom the sender intended to cause distress, the MCA 1988 offence is unlikely to be very useful. The CA 2003 s.127(1) offence involves sending or causing to be sent through a public electronic communications network a message or other matter which is grossly offensive or of an indecent, obscene or menacing character. The sender must have intended or been aware that the message was grossly offensive, indecent or menacing.² There is a further offence in s.127(2) – to which the CPS do not refer – which criminalises causing annoyance, inconvenience or needless anxiety to another by persistently making use of a communications network. Threats to reveal indecent images could fall under this offence.

¹ See the National Conference of State Legislatures [website](#).

² The mental element does not appear in the Act but was added by the House of Lords in *DPP v Collins* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5.

Twitter has been expressly confirmed (by the then Lord Chief Justice, Lord Judge, whilst sitting in the High Court) as falling within the definition of a 'public electronic communications network' as it can only operate through the internet which is a public network provided for the public and paid for by the public.³ This covers sending images by text, or email (sent via the internet rather than a private network) or Twitter etc, but does simply uploading an image to the internet contravene s.127? The courts might conclude that the act of uploading involves 'sending' the material. In so doing the courts would be following similar reasoning to that in the case law dealing with what constitutes 'making' an image: a person 'makes' an image by downloading it⁴, knowingly clicking on the email attachment containing it⁵ or simply by visiting a website where the person knows that that kind of image is likely to appear as a 'pop-up'⁶. If sending were to be interpreted to include uploading, this would be significant because, from a cursory internet search, there has been a proliferation in websites specialising in revenge porn. Even if these websites require putative viewers to join, or even pay a fee, they still use the internet and so, as long as uploading is found to be sending, would probably be caught by s.127. Similarly, posting an indecent image of an ex-partner to one's own Facebook site could be caught in this way.

However, not all revenge porn is shared online. It might be shared device to device by Bluetooth or some other private network. It may simply be shown to friends by a device or hard copy being passed around. It may even involve the printing off of images and their posting up near the ex-partner's home or work. In these situations the Protection from Harassment Act 1997 may be engaged either through s.2 (harassment) or by s.2A (stalking), but both offences involve a course of conduct, so single incidents are not caught. Also, some of this kind of sharing is less about revenge and more about personal titillation: sharing publicly what were private images just for the purpose of sharing rather than with any particular desire to cause a reaction in the ex-partner. Although the harassment or stalking offences may be technically breached, the activity is not directed at the subject of the images and so the application of these offences is rather tenuous. If the complainant needs to be protected from future harassment, even if the current conduct does not amount to harassment, the court can make a restraining order⁷, even where a defendant is acquitted.

Indecent images of those aged under 18 cannot lawfully be shared, even if they were lawfully taken. It is unlawful to make or possess an indecent image

³ *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 (the successful appeal of the disgruntled passenger at Robin Hood Airport who tweeted 'Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!').

⁴ *Bowden* [2001] QB 88.

⁵ *Smith* [2002] EWCA Crim 683, [2003] 1 Cr App R 13.

⁶ *Harrison* [2007] EWCA Crim 2976, [2008] 1 Cr App R 29.

⁷ under ss.5 or 5A of the Protection from Harassment Act 1997.

of a person aged under 18. If the images were taken when the young person was 16 or over and the couple were at the time married, civil partners or living together in an enduring family relationship then it is lawful for the images to have been taken and/or received *by the parties*, but if indecent images are taken and/or kept outside of these categories (e.g. when the young person was under 16, or in a relationship which never involved cohabitation) or by someone other than the parties, then an offence will be committed.⁸ See this previous [post](#) for a discussion of the difficulties caused by the differing age limits for taking part in sexual activity and for being photographed doing it.

Where a person is effectively blackmailed into sexual activity by someone who has indecent images of them it is strongly arguable that that person is not giving consent as defined by s.74 of the Sexual Offences Act 2003, that is consent given where the person has the freedom and capacity to choose. In such a situation an offence under ss.1 to 4 of the SOA 2003 is likely to have been committed by the coercing party.⁹

All these offences tackle aspects of revenge porn, but none of them simply criminalise X sharing with Z an indecent image involving Y which Y reasonably believed would not be shared and which Y has not consented to being shared. If there is a problem in society, and it seems that there is, then there is a strong argument that having an offence which clearly and directly criminalises the activity is preferable to using offences which were drafted to deal with other ills. The law becomes clear and it does so by the action of the elected legislature rather than the judiciary attempting to fill in the gaps left by legislative inactivity.

But is another criminal offence really what is needed? There are voices urging caution. Article 19 (the organisation which aims to protect freedom of expression) through the evidence of its Press Officer, Gabrielle Guillemin, to the Lords' Communications Committee questioned whether criminal law should get involved in the fallout from failed relationships and suggested that civil remedies might be more appropriate.¹⁰ It is, however, hard to see how civil remedies are likely to be more appropriate. It is already open to complainants to either seek help from the Information Commissioner or go to court for an injunction for non-disclosure, such as that obtained by the singer [Tulisa](#) recently, or under ss.3 or 3A of the Protection from Harassment Act 1997. They rely on the complainant's ability to bring and pay for proceedings. The current availability of these civil remedies appears to have done nothing to stem the tide of such material. Although there are legitimate arguments that criminal law is not always an effective deterrent, it is more effective than the threat of civil proceedings. It is also possible to ask Google to remove

⁸ s.1 Protection of Children Act 1978 and ss.160 and 160A Criminal Justice Act 1988.

⁹ See, for example, *Bingham* [2013] EWCA Crim 823, [2013] 2 Cr App R 29.

¹⁰ See the [proceedings of the Communications Committee](#).

links to offending material¹¹, but that does not get rid of the material itself. Consent is one of the most important concepts in the Sexual Offences Act 2003 and the violation of that is at the heart of the problem with revenge porn. This violation of sexual privacy by sharing of private images would most properly be dealt with as an extension of the Sexual Offences Act.

As a final thought, perhaps the Oxford English Dictionary should steer clear of incorporating 'revenge porn' as the term is really a nasty little mash up. Those like, Jennifer Lawrence, who are the victims of a hacker are not the subject of revenge as such. The term 'porn' also has its problems as for many it connotes something which is taken and supplied consensually. The very essence of this kind of image sharing is the absence of consent by the subject. It also down plays the effect this kind of activity has on the subject of the images. 'Non-consensual image sharing' would be a more accurate term but has the ring of poor legislation. Perhaps 'sexual violation by image sharing'? Your comments please...

¹¹ *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD) (C-131/12)* [2014] 3 W.L.R. 659.