

A Matter of Privacy or Abuse? Revenge Porn in the Law.

Summary: *The introduction of the “revenge porn” offence in England and Wales was hailed as a timely and appropriate response to tackling the non-consensual disclosure of intimate images. The offence was introduced to tackle a very particular breach of sexual privacy and this ethos may limit the effectiveness of the offence, something that becomes particularly evident when the English version of the offence is set against its Scottish counterpart.*

Introduction

April 2017 marked two years since the “revenge porn” offence of “disclosing private sexual photographs and films with intent to cause distress” came into force in England and Wales. With 206 prosecutions commenced in 2015-16 and a further 465 in 2016-17 only naysayers could declare the offence a failure.¹ Yet despite this early success there have been problems; complainants still do not feel comfortable reporting offences to the police and attrition rates are high – an investigation by the BBC in 2016 found 61 per cent of reported offences have resulted in no further action.² The offence has also been criticised for being overly narrow in its definition of a qualifying image, which excludes images that have been digitally created, and for the specificity of its mens rea requirement, which requires an intention to cause distress.

This article examines why it was necessary to create a specific offence to tackle revenge pornography and looks to the constitutive elements of that offence and the concluded prosecutions to ask whether it is, as enacted, fit for purpose. The Scottish offence of “disclosing, or threatening to disclose, an intimate photograph or film” will be used as a point of comparison to determine whether this offence provides the blueprint for a more effective response to this problem.

The Background to Criminalisation

The disclosure of private sexual images, often by aggrieved ex-partners, is not a new phenomenon but the internet gave new life to the practice by providing a platform for dissemination that could

¹ CPS, *Violence Against Women and Girls*, 10th Edition 2016-17 at p.16.

² ‘Revenge pornography victims as young as 11, investigation finds’ *BBC News* 27 April 2016.

result in a very public form of humiliation. Public concern about the malicious disclosure of intimate images began to grow in 2011 after a spate of international incidents drew media attention to the situation. IsAnyoneUp.com, a website that featured user generated pornographic content, began to attract public attention for hosting sexual images that had been uploaded without the consent of the individuals featured. Styling itself as a platform for revenge IsAnyoneUp encouraged intimate images to be posted with the names of those pictured and links to their social networking profiles. The site was closed after an investigation established that some of their images had been illegally obtained. But by this point "revenge porn" - the sharing of sexually explicit images without the consent of the person or persons featured in them and with the intention of humiliating those pictured - had been firmly established in the public mind as an emerging danger.³

The short-lived website Snapchat Leaked fuelled further concern when it was revealed that the site had made thousands of private and intimate Snapchat images publicly available. As Snapchat users are typically younger people,⁴ concerns about revenge porn began to coalesce with those about the proliferation of child abuse images.⁵ In December 2013 the public were introduced to the practice of 'sextortion' when an action was brought against the founder of UGotPosted, a revenge porn website that attempted to extort money in exchange for the removal of these images. Vengeful ex-partners have been sharing and threatening to share private sexual images for decades, but these revenge porn sites harnessed the reach of the world wide web to make this a particularly effective form of blackmail.

Media coverage initially pointed to the threat posed by the proliferation of dedicated revenge porn websites, but this reportage was later focussed on the internet search engines operators and social media platforms being used to disclose intimate images. Steps had already been taken by many of these companies to protect private information. In some cases this was forced upon them; a ruling by the Court of Justice of the European Union had required Google to delete links to unwanted online

³ Principally through the publicity given over to it by the *MailOnline*. See, among others, articles posted on Apr 20, 2012; May 3, 2012; May 23, 2012; Dec 3, 2012.

⁴ R. Grieve "Unpacking the characteristics of Snapchat users: A preliminary investigation and an agenda for future research" *Computers in Human Behavior* (2017) 74, pp.130-138; Pew Research Center "Social media usage: 2005-2015" <http://www.pewinternet.org/2015/10/08/socialnetworking-usage-2005-2015/> [accessed 09/04/2018].

⁵ For example, 'Revenge porn and Snapchat: how young women are being lured into sharing naked photos and videos with strangers' *Daily Telegraph.co.uk* Feb 13, 2013; 'Nude photo leak: Now the hackers are going after children on Snapchat' *Daily Telegraph* Oct 13, 2014; 'Former Culture Secretary Maria Miller issues stark warning against child sexting epidemic and calls on schools to do more to stamp it out' *MailOnline* Oct 11, 2014.

content by providing a “right to be forgotten,” a mechanism which can be used to block access to identifiable information, including private sexual images.⁶ Social media platforms including Facebook, Twitter and Instagram already had policies in place that prohibited nudity or partial nudity (consensual or not) on their services, although in most cases these were reactive and relied on user reports. Self-regulation could of course only partially regulate this behaviour and it became increasingly obvious that these responses were insufficiently robust to tackle the dissemination of intimate images.

Although national attention had been drawn to this issue by high-profile incidences overseas,⁷ revenge porn was already being tackled by the CPS in England and Wales. Between January 2012 and July 2014 149 allegations of what has latterly become known as the disclosure of private sexual images were recorded in England and Wales.⁸

Prosecutors seeking a criminal resolution could rely on a suite of offences. Sending sexual images, online or offline, amounts to an offence at s.1 of the Malicious Communications Act 1988 if the image is “indecent or grossly offensive” and it is sent with the intention of causing “distress or anxiety”. Section 127(1) Communications Act 2003 similarly criminalises those who send a message which is “grossly offensive or of an indecent, obscene or menacing character”, knowing or being aware that the message is offensive.⁹ Section 127(2) of the Act also makes it an offence to persistently make use of a public communications network to cause “annoyance, inconvenience or needless anxiety to another”. Where the disclosure (or threatened disclosure) of an image forms part of a course of conduct this may amount to harassment at s.2 of the Protection from Harassment Act 1997, or in rare incidences the offence of stalking at s.2.A of that Act. A threat to disclose an image may also amount to blackmail, but only where the offender seeks to make a gain for himself or another in money or other property.¹⁰

When images have been acquired by accessing a computer or a smart phone without authorisation s.1 of the Computer Misuse Act 1990 is engaged, regardless of whether that image is shared.

⁶ Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González (Case C-131/12) 2014.

⁷ In part after public attention was drawn to the issue by the disclosure of celebrity revenge porn featuring the singer Rihanna in 2009 and the later large-scale hack of iCloud accounts in 2011 and 2014 that exposed private sexual images of actors Scarlett Johansson, Jennifer Lawrence and Vanessa Hudgens, amongst others.

⁸ Reported in *The Guardian* Oct 13, 2014; *BBC News Online* Dec 28, 2014.

⁹ *DPP v Collins* [2005] EWCA Crim 1980.

¹⁰ Or cause a loss to another. Theft Act 1968, ss.21,34.

These offences do not directly criminalise the non-consensual sharing of a single sexual image. Section 1 MCA requires an intention to cause distress or anxiety to the recipient or to “any other person to whom he intends that it or its contents or nature should be communicated.” This requirement would exclude cases where images are shared with willing recipients without the victims’ knowledge. Section 127(1) CA, perhaps the most appropriate offence for tackling the disclosure of sexual images, provides for a maximum penalty of only 6 months imprisonment and is entirely focused on the misuse of a public electronic communications network. Intimate images may be shared in hard copy, through private networks or Bluetooth - and these methods of dissemination are not captured by the offence. The communications offences also require the material which has been sent to be either grossly offensive, indecent or obscene. Thresholds which non-explicit, but nonetheless private and sexual images, may not reach. Section 1 of the Computer Misuse Act 1990 provides a useful remedy when images are accessed without authorisation but focuses on gaining access to, not disclosing, that data.

Notwithstanding the limitations of these offences the malicious disclosure of sexual images was being effectively prosecuted. For example, in 2013 James Aldous admitted a charge of harassment after posting intimate images of his ex-partner to revenge porn sites.¹¹ In 2014 Luke King was jailed for twelve weeks for harassment when he threatened to share sexual photographs of his ex-girlfriend and posted one image on WhatsApp¹² and Thomas Samuel pleaded guilty to the offence of sending a message via a public communications network of an indecent character after posting explicit photographs of his ex-girlfriend on Facebook.¹³ In January 2015 Kevin Howlett, pleaded guilty to an offence under the Computer Misuse Act 1990 for sending nude pictures of his ex-girlfriend to contacts on her mobile phone.¹⁴

Despite this, the campaign to introduce a specific revenge porn offence in England and Wales began to gather cross-party party support as the link between the disclosure of explicit images and abuse became increasingly evident. As former Culture Secretary Maria Miller MP stated in a Commons debate in June 2014:

¹¹ Unreported, Apr 18, 2013, Colchester Magistrates' Court.

¹² Unreported, Nov 12, 2014, Southern Derbyshire Magistrates' Court.

¹³ Unreported, Oct 1, 2014, Bristol Magistrates' Court

¹⁴ Unreported, Jan 28, 2015, Peterlee Magistrates' Court. Rather than looking to the distribution of the pictures the offence was concerned with Howlett's unauthorised access of the victim's phone contacts.

“The case studies provided to hon. Members by Women’s Aid in preparation for today’s debate are, at best, alarming, demonstrating how social media and the posting of images, or indeed the threat of posting images, are being used to threaten and intimidate women.”¹⁵

With criminal sanctions being successfully deployed there were doubts about whether there was truly a lacuna in the law. On the more general question of whether suitable remedies were available to tackle online offending the House of Lords Select Committee on Communications, *Social Media and Criminal Offences* concluded in July 2014 that the introduction of specific offences was unwarranted.¹⁶ The Select Committee noted civil remedies were also available when private information was disclosed online, including misuse of private information and breach of confidence, but recognised civil actions may be long, costly and enforcing any order for the removal of images may be difficult when these were hosted overseas.¹⁷ This report stressed that online behaviour should not be subject to overly rigorous regulation, the preservation of freedom of expression was crucial and the criminal law should only intervene when online communications reached those thresholds already established in the available offences.¹⁸

In light of these conclusions it seemed unlikely a specific offence would be enacted. However, the attention drawn to the issue and the recognition that disclosure of such images could cause lasting psychological harm led to a response – albeit one it was expected would be tempered by the considerations of the Communications Committee.¹⁹ Resultantly two draft clauses were proposed. Baroness Berridge and Baroness Morris of Bolton proposing an amendment to the Sexual Offences Act 2003 making it an offence for D to disclose a recording of another person (B) doing a private act (where D and B were in a private relationship) without the consent of B and with the intention of D or a third person obtaining sexual gratification from that image. Lord Marks of Henley-on-Thames introduced a similar clause seeking to criminalise the publication of a sexually explicit

¹⁵ Hansard, Commons Debate, June 19, 2014, vol.582, col.1370.

¹⁶ House of Lords Select Committee on Communications, *Social Media and Criminal Offences* (Session 2014-15, HL 37) para.94.

The Committee did call for greater clarity from the Director of Public Prosecutions about indecent communications.

¹⁷ House of Lords Select Committee on Communications, *Social Media and Criminal Offences*, para.41-44. Chrissy Chambers action for harassment, breach of confidence and misuse of private information against a former boyfriend who had uploaded intimate videos to a pornography hosting site has now concluded with Chambers receiving substantial damages. ‘Victim of revenge porn wins landmark High Court payout’ *The Times* Jan 18, 2018.

¹⁸ House of Lords Select Committee on Communications, *Social Media and Criminal Offences*, para.5 and 94.

¹⁹ As a result of an Early Day Motion. Early Day Motion 192, June 30, 2014. The amendment was heard by the House of Lords, July 21, 2014. Hansard, HL vol.755, col.968.

or pornographic image of another identifiable person unless that person had consented to publication.²⁰ The subsequently enacted offence is something of a hybrid of these clauses.

The Offence

In October 2014, the Ministry of Justice announced that the sharing of a private sexual image was to become an offence. The hope was that this would provide victims with a clear method of legal redress allowing them to feel confident that this behaviour would be taken seriously if reported, that offenders would be held to account and the maximum sentence of 2-years imprisonment would provide an effective deterrent. The offence came into force April 13, 2015.

Despite ubiquitous reference by the media to the offence of 'revenge porn' the offence, set out in ss.33-35 of, and Schedule 8 to, the Criminal Justice and Courts Act 2015, is actually titled "disclosing private sexual photographs and films with intent to cause distress".

Section 33(1) sets out:

"It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made -

- (a) without the consent of an individual who appears in the photograph or film, and
- (b) with the intention of causing that individual distress."

The offence is not a sexual one, despite liability hinging on the disclosure of a private sexual image. Section 33 is not an offence under a provision of the Sexual Offences Act 2003, nor are those convicted of it subject to the notification requirements at Part 2 of the Act. The constituent elements of the offence suggest the protection of sexual privacy was central to the creation of the offence, although a distinct rationale for criminalisation was never clearly expressed either before the introduction of the amendment, or during the passage of the Bill.²¹

²⁰ Hansard HL, July 21, 2014, vol.755, col.968-870, 977-978.

²¹ See the discussion by A. Gillespie "'Trust me, it's only for me": "revenge porn" and the criminal law" (2015) *Criminal Law Review* 11, at p.873.

The essence of the offence is captured in its rather unwieldy title, as is typical with modern legislation, the Act then goes on to define the constituent elements of the offence in some detail and, in the process, both clarifies and obfuscates the limits of the offence.

Disclosure

Disclosure is defined at s.34(2) as giving or showing to a person or making it available to a person. Unlike the offence of harassment, which requires a course of conduct, a single act of disclosure will suffice. The disclosure must be made to a third party; showing the image²² to the individual featured in it will not, however uncomfortable or unwelcome that may be, amount to an offence.²³ Disclosure will typically take place on-line, but a disclosure by any means will fall within the offence. To date, there has only been one reported case that concerned a hard copy disclosure, when Luke Brimson distributed intimate pictures of a woman to customers at a supermarket. Brimson received a 6-month suspended sentence.²⁴

The disclosure does not have to be made for reward, or to an individual who has never seen it before.²⁵ Giving and showing are straightforward terms that have caused little difficulty in statutory interpretation and as Gillespie states, "making it available" has been held to include placing images in shared folders on websites to be accessed by others.²⁶ We can assume that this would include where a password is provided for access to such folders.²⁷

There is no requirement that the image is viewed and the Explanatory Notes to the Act suggest that displaying an image "in a place where other people would see it" would amount to a disclosure. This ensures offenders will not escape liability when images that are sent to an email address, placed in a shared folder or sent by SMS go unopened. However, this broader interpretation of disclosure makes less sense where, for example, an image is printed out for private viewing at home and is

²² The term image in the discussion below will be used to include photograph or film.

²³ Criminal Justice and Courts Act 2015 s.33(2).

²⁴ Unreported, July 30, 2015, North Somerset Magistrates' Court. Brimson also pleaded guilty to a charge of harassment.

²⁵ Criminal Justice and Courts Act 2015 s.34(3)(a)(b).

²⁶ A. Gillespie "'Trust me, it's only for me': "revenge porn" and the criminal law" (2015) *Criminal Law Review* 11, pp.866-880 citing *R v Dooley* [2006] 1 W.L.R. 775.

²⁷ In *R v Fellows and Arnold* [1997] 1 Cr. App. R. 244 the provision of a password that enabled others to view indecent images of children was held to amount to possession with a view to images being shown.

then glimpsed by a passer-by.²⁸ The Explanatory Notes do not of course form part of the Act and can only ever be suggestive of the intention behind an offence, but when read together with s.34(2) itself, may allow disclosure to be more widely construed than might have been expected. To date there have been no cases that have questioned whether a disclosure has been made under the Act.

Although “disclosure” is widely construed, a disclosure must actually be made for the offence to apply. Those who threaten to disclose may commit other offences, but their actions will not fall under s. 33 as this offence has been drafted to deal with an actual breach of sexual privacy. There are potential difficulties with this omission. For example, in October 2017 Daniel Stainton was convicted of blackmail and disclosing private sexual images after he threatened three women with the disclosure of the intimate images the women had shared with him.²⁹ The money Stainton extorted from one of his victims ensured the offence of blackmail could be made out, but to rely on blackmail to police this behaviour is to assume that perpetrators will be looking to make a gain in money or other property.³⁰ The prosecutions of Ricki Chew, who threatened disclosure to force his partner to continue their relationship and of Sarah Lewis who had forced a married man to meet with her by threatening to disclose a sexual image of him, suggests such threats may also be used to control or harass.³¹

In contrast, threats to disclose are not excluded from the more recently enacted Scottish offence of “disclosing, or threatening to disclose, an intimate photograph or film”. As s.2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 provides:

“(1) A person (“A”) commits an offence if—

(a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation,

²⁸ The mens rea of the offence would not be made out here where the image was displayed with no intent to cause distress. However, given there have been cases in which guilty pleas have been entered when intention should have been in question this does raise concern.

²⁹ Unreported, September 29, 2017 Gloucester Crown Court. For a report of the prosecution see *Daily Telegraph* Oct 3, 2017.

³⁰ Theft Act 1968 s.21.

³¹ Sarah Lewis was convicted in 2017 for disclosing a sexual image of an ex-partner and multiple counts of harassment. Some of her victims were pressured into meeting with her by threats of disclosure. Unreported, June 29, 2017 Worcester Crown Court. Ricki Chew was convicted of two counts of disclosing private sexual images and one of harassment after following through on his threat. ‘Doncaster man, 71, sentenced in ‘revenge porn’ case’ *BBC News* Dec 5, 2017.

(b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and

(c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.”

This offence was introduced after a review into the legal framework governing domestic abuse and it is then no surprise that the resultant offence was positioned as a robust response to abusive behaviour³² and carries the, more substantial, maximum penalty of 5-years’ imprisonment. The need for this to be an offence that captured threats was borne out when the first conviction under s.2 was for a threat to disclose where a disgruntled former partner threatened to upload a sexual video featuring the victim.³³ The threat offence may also provide a useful alternative charge where there are evidential difficulties in proving subsequent disclosure because the image cannot be located, but a threat to do so is provable.

Private and Sexual

Section 33(1) requires that the image disclosed must be a “private sexual” one, s.35 goes on to clarify what is meant by “private” and “sexual” for the purposes of the offence.

Considering the mischief this offence was enacted to tackle, essentially the exposure of intimate images taken during sexual relationships, it is unsurprising these terms were used. Private is then defined simply at s.35(2) as “something that is not of a kind ordinarily seen in public”.³⁴ As the Explanatory Notes explain:

“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

³² Thanks to the efforts of Scottish Women’s Aid and Professors C. McGlynn and E. Rackley who presented evidence establishing that this offence was commonly a form of, or part of a pattern of, abuse. C. McGlynn, E. Rackley and R. Houghton “Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse” (2017) *Feminist Legal Studies*, 25(1), pp. 25-46; C. McGlynn and E. Rackley “Image-Based Sexual Abuse” (2017) *Oxford Journal of Legal Studies* 37(3), pp. 534–561.

³³ *R v Robinson* Unreported, September 5, 2017 Jedburgh Sheriff Court.

³⁴ Criminal Justice and Courts Act 2015 s.35(2).

ambit of the offence if what was shown was the kind of thing that might ordinarily take place in public”

The term is then used to denote an act which it would be unusual to see in public and is sufficiently flexible to allow for changes in social mores to be taken into account - although this provides little clarity for more fetishistic practices, such as toe sucking.

By virtue of s.35(3) an image is inherently “sexual” if it “shows all or part of an individual's exposed genitals or pubic area” or could be found to be sexual if the reasonable person would consider it so because of its nature or content.³⁵ This broad definition means images of all body parts could conceivably be considered sexual but more subtly sexual images, such as those of body parts covered by underwear, *may* fall outside of the offence, dependent upon the whims of the magistrate or the jury.³⁶

For s.33 an image of a woman performing an intimate sex act (oral sex) has been accepted as a private and sexual one,³⁷ and Paul Marquis admitted the offence after sending a photograph of a woman’s breasts to another man.³⁸ The inclusion of an image of a male torso in a graduate art project was also recently prosecuted as the s.33 offence.³⁹ But it is unclear whether an image of genital groping or someone baring his or her buttocks would be deemed sexual. Flexible terminology is always useful to prevent an offence falling rapidly out-of-date, but there is a lack of clarity here. This puts significant pressure on police and prosecutors to use their discretion effectively and consistently – particularly in light of the media attention the offence continues to attract.

An attempt to make s.35(3) more precise by bring images of breasts and buttocks expressly within s35(3)(a) in order to avoid relying on the amorphous standards of the finders of fact (and to bring

³⁵ Criminal Justice and Courts Act 2015 s.35(3)(a), s.35(3) (b), s.35(3)(c).

³⁶ This could amount to the common law offence of outraging public decency. For commentary on the difficulties in bringing images of body parts covered with underwear within the offence of voyeurism see this see A. Gillespie ““Up-skirts” and “down blouses”: voyeurism and the law” (2008) *Criminal Law Review*, 5, pp.370-382.

³⁷ *R v Kennedy* June 22, 2015 Cardiff Magistrates’ Court.

³⁸ Unreported, June 9, 2015, Teesside Magistrates’ Court. Marquis received an 18-week sentence of imprisonment suspended for 12-months for disclosing a private photograph, with 18-weeks to be served consecutively for the harassment of his ex-partner.

³⁹ The trial judge expressed concern about misuse of the offence, the prosecution offered no evidence and the judge consequently entered a not guilty verdict. The trial judge’s reported criticism focused on the fact the alleged victim could not be identified from the image, this is not a requirement of the offence. *Daily Telegraph* ‘Art student charged with revenge porn after submitting photograph of topless ex-boyfriend for art degree’ April 12, 2018.

s.33 in line with the proposed Scottish offence) was tabled in 2016, but was withdrawn to ensure the offence only captured explicit images which were likely to cause distress to the victim.⁴⁰ While this reasoning makes practical sense, whether the image is sexual is a separate question to whether that disclosure was calculated to cause distress and conflating this element of the actus reus with the mens rea is not helpful.

The Scottish offence concentrates instead on whether the image is of an “intimate situation”, defined as where:

(a) the person is engaging or participating in, or present during, an act which—

(i) a reasonable person would consider to be a sexual act, and

(ii) is not of a kind ordinarily done in public, or

(b) the person’s genitals, buttocks or breasts⁴¹ are exposed or covered only with underwear.

Placing the focus on an intimate situation to trigger liability more accurately reflects the nuisance these “revenge porn” offences seek to tackle, the sharing of images featuring body parts or situations that would be widely deemed private. Interestingly this offence mirrors the language of the voyeurism offence in the Sexual Offences Act 2003⁴² and it is surprising that our legislature did not choose, for ease or at least consistency, to use this terminology in s.33.

Other jurisdictions have similarly struggled to find language that prohibits the disclosure of private sexual images without creating an offence which is impracticably broad. In Victoria, Australia intimate images include those which depict a person “engaged in a sexual activity”, or is “in a manner or context that is sexual” or depicts the genitals, the anal region or (female) breasts.⁴³ In California, USA the non-consensual pornography offence criminalises the distribution of images of intimate body parts of another identifiable person, but also particular sexual activities demarcated as intimate acts; sexual intercourse, sodomy, oral copulation and masturbation.⁴⁴ It is unsurprising that legislatures have found it difficult to balance freedom of expression with privacy, however this lack of consistency is troubling when images are typically posted on the world wide web and removal of

⁴⁰ Hansard HL, 16 November, 2016, vol.776, col. 1436- 1445.

⁴¹ In the English voyeurism case of *R v Bassett* [2008] EWCA Crim 1174 ‘breasts’ was held to mean only female breasts and not a male chest. It is likely ‘breasts’ will be interpreted in the same way here.

⁴² Section 68 (1).

⁴³ Summary Offences Act 1966 (Vic) s.40 Definition of intimate image.

⁴⁴ California Penal Code 647(j)(4).

them may hinge on co-operation from a country that does not recognise the image as a “private sexual” one.

Section 33 does not provide redress for those who have had innocent images presented as sexual by any written commentary added to those images. Where the image itself does not reach the threshold of “sexual” but is used in some sexual context other offences can be charged. For example, when Oliver Whiting posted non-explicit images from his victims' social media accounts to an American pornographic site to garner explicit comments he admitted 11 counts of the improper use of a public electronic communications network.⁴⁵

In practice, the hazy definition of a sexual image in s.35 has proven unproblematic. The mischief the offence seeks to tackle is the non-consensual disclosure of explicit images – regardless of the clumsily titled offence – and prosecutions have typically involved explicit images which have been disclosed to humiliate victims.

Photographs and Film

For the purposes of the offence photographs and films are given their ordinary meaning of “a still or moving image in any form” that “appears to consist of or include one or more photographed or filmed images, and in fact consists of or includes one or more photographed or filmed images”.⁴⁶ While this includes images that have been altered the subject of the complaint must be an image which itself is, as originally created, private and sexual. If it has only become private and sexual by way of an alteration to the image or by combining it with another image, perhaps by digitally superimposing the victims face onto a sexual image, then that cannot be the subject of a complaint.⁴⁷

An attempt was made in 2016 to repeal those sections that exclude digitally altered images. This was withdrawn after the Minister of State for the Home Office forcefully rebuffed the amendment suggesting that

⁴⁵ Contrary to Section 127(1) of the Communications Act 2003. ‘Social media porn offender Oliver Whiting sentenced’ *BBC News* Apr 4, 2017.

⁴⁶ Criminal Justice and Courts Act 2015 s.34(4).

⁴⁷ Criminal Justice and Courts Act 2015 s.35(4) and (5).

“the disclosure of such an image, though still distressing, does not have the potential to cause the same degree of harm as the disclosure of an undoctored photograph showing images of the kind referred to in Section 35(3) of the 2015 Act.”⁴⁸

Yet, as Lord Marks has recognised a digitally altered image may be indistinguishable from an original image, and its publication none the less humiliating.⁴⁹ Moreover, for those who have not - and would not - pose for a sexual image, a depiction that suggests they have done so may prove more distressing than it would for those who have posed, but did not expect it to be disclosed. This issue is dealt with differently in the regulation of child sexual abuse images, where the possession, distribution etc. of pseudo images are criminalised.⁵⁰ Obviously when seeking to protect children we must adopt a more flexible approach, but the exclusion of digitally altered images here seems excessive. This approach flows from the fact that s.33 is focused upon punishing a breach of privacy – not the sexual humiliation of victims.

The Scottish legislature took a wider view and the offence at s.2 recognises significant harm can flow from the disclosure of an image that is digitally altered and does not exclude such images, unless they are entirely computer generated.⁵¹ This is a consequence of s.2 being crafted as a response to abuse, the omission of such from s.33 will need to be addressed in the future.

Consent

For the offence to be made out, the prosecution must prove that the disclosure was without the consent of the individual who appears in the photograph or film.⁵² Section 33(7)(a) elaborates that consent to disclosure can be a “general consent to the disclosure of the material, or specific consent to a disclosure in question”.

Consent must have been given to the initial taking of the image – otherwise the appropriate offence to charge would be voyeurism. As consent has always been a thorny issue for the criminal law, and

⁴⁸ Hansard HL, Nov 16, 2016, vol. 776, col. 1443, The Minister of State, Home Office (Baroness Williams of Trafford).

⁴⁹ Hansard HL Nov 16, 2016, vol.776, col. 1445 The Minister of State, Home Office (Lord Marks of Henley-on-Thames).

⁵⁰ Protection of Children Act 1978 s.1 and Criminal Justice Act 1988 s.160.

⁵¹ Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s.3(2).

⁵² Criminal Justice and Courts Act 2015 s.33(1)(a).

no more so than in situations that involve sexual activity,⁵³ we may have expected there to be a definition of consent in the Act, yet aside from s.33(7)(a) the Act is silent on how consent is to be approached. Some clarity would have been useful, even if this were only by way of the general definition of consent at s.74 of the Sexual Offences Act 2003.

This failure to define consent may cause some difficulties for the courts in effectively directing juries, if guidance is required. If consent is disputed, then the question of whether the image has been disclosed without consent will be a matter of fact and there are general legal principles that will guide decision making; an individual must have the capacity and freedom to consent, and consent must be informed.⁵⁴

To illustrate the difficulties that could arise consider the following examples of sharing intimate images on the internet:

- a) Consent has been given by V to X to the sharing of a sexual image only on a specific 'members only' pornography website. X then posts the image to a similar website.
- b) Consent is given by V for the disclosure of an image to a website after being assured by X that this image will only be viewed by a select group of people on that website, X posts the image and V does not realise anyone can join that group. X knows this.
- c) Consent to the disclosure of an image is given by V when intoxicated and it is posted online by X. V later says she can't remember giving consent.
- d) Consent is given to a disclosure by V, but she felt pressured into agreeing to this by X who is emotionally abusive, and X has said he wouldn't love her anymore if she didn't consent.
- e) V consents to the disclosure of a private sexual image to a pornographic website, but a week later she rescinds her consent.

It is likely that scenarios (a) and (b) would turn firstly upon whether these disclosures were made with an intent to cause distress, as it is arguable in both examples that causing distress may not have been X's intention. Consenting to a specific disclosure – albeit via a medium where the image could be captured and distributed more widely – could be construed as qualified consent via

⁵³ An area which has attracted a significant amount of academic attention including J. Temkin and A. Ashworth "The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent" (2004) *Criminal Law Review* (May) pp.328-346. C. Sjolin "Ten years on: consent under the Sexual Offences Act 2003" (2015) *Journal of Criminal Law* 79(1) pp.20-35. J. Herring "Mistaken Sex" (2005) *Criminal Law Review* (July) pp.511-524.

⁵⁴ For a concise discussion of consent for non-fatal offences against the person see D. Ormerod and K. Laird *Smith and Hogan's Criminal Law* Oxford: OUP (2015) pp.717- 725.

33(7)(a) or, in the emerging language in the field of sexual offences, as “conditional consent”.⁵⁵ In (a) posting to a similar site could be held to amount to a non-consensual disclosure if V was clear that she only expected the image to be posted to that specific website. For (b) s.33(7)(a) may not assist as V had given specific consent to that disclosure, however as *Konzani*,⁵⁶ a case concerning HIV transmission, makes clear consent must be given with full knowledge of the facts. X’s deception should mean that V’s consent is not fully informed.

For (c) and (d) the question would be whether valid consent had been given. Intoxicated consent has caused significant debate in the field of sexual offending, where *Bree* established that if a complainant could consent when intoxicated if they had retained the capacity to do so.⁵⁷ If V’s cognitive functioning was so impaired that X was aware that they were not capable of giving meaningful consent, we would say X did not have an honest belief in consent. The problem is at what point can we say that V was so disinhibited that they did not understand the nature of the act they were consenting to? Wallerstein has argued that the reasoning in *Bree* is out of step with the interpretation of intoxicated consent for non-fatal offences against the person and property offences, where intoxication can negate liability even where it has not overwhelmed an individual’s capacity to give consent.⁵⁸ It will be interesting to see how the law develops here.

For (d) consent can be nullified by duress, but pressure – particularly of an emotional nature - is not typically cast as so significantly overpowering to amount to duress.⁵⁹ While here, a threat “not to love someone” is relatively low-level duress it could be part of a pattern of emotional abuse and controlling or coercive behaviour, an offence under s.76 Serious Crime Act 2015. How duress is to be construed is going to require careful consideration in the future given the recognised links between revenge pornography and domestic abuse.

The scenario at (e), where V rescinds consent, is not expressly considered in the Act. It appears that s.33(7)(a) would not assist here – although we have yet to see how this will be interpreted - but

⁵⁵ See *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R (on the application of F) v The DPP* [2013] EWHC 945 (Admin); *Justine McNally v R* [2013] EWCA Crim 1051.

⁵⁶ *R v Konzani* [2005] EWCA Crim 706.

⁵⁷ *R v Bree* [2007] EWCA Crim 256.

⁵⁸ S. Wallerstein “A Drunken Consent is Still Consent’ - Or is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following *Bree*” (2009) *Journal of Criminal Law*, Vol. 73, No. 4, pp.338-339.

⁵⁹ There is little substantive law to guide what would amount to duress capable of vitiates consent. The Sexual Offences Act 2003 provides for duress at s.75 where evidential presumptions will be raised if violence was used (or threatened) against the complainant or another or the complainant was unlawfully detained, ss.75(2)(a),(b),(c).

we do more generally accept that consent to an act can be withdrawn. The difficulty will be that the revocation of consent has come after a lawful disclosure has been made. To find liability “disclosure” would have to be construed here as a continuing act. It seems unlikely that this would be a sensible reading of disclosure when an image has been consensually posted to a publicly accessible website. Without the protective evidential and conclusive presumptions of the Sexual Offences Act 2003,⁶⁰ which establish that in certain factual situations the victim did not consent, there is a danger that rape myths⁶¹ – prejudicial views about sexual assaults that seek to excuse offenders – could impact upon decision making. A nuanced reading of the general principles of consent, which takes into account the inherently sexual nature of the offence, will be required to ensure victims are fully protected.

Distress

The mens rea of s.33 requires that the disclosure is made with an intention to cause distress to the individual featured in that image.⁶² The draft clauses did not require this intention and the need to ensure that the fault element was appropriately focused was the subject of considerable debate.⁶³ As Baroness Kennedy stated:

“it is important that this proposed new clause is drawn with real care. While I hear the discussions about the motivation to degrade and humiliate or to secure sexual gratification, it is important to draft widely without specifying the nature of the motivation. That is because it is always difficult to pin down motivation.”⁶⁴

It is unsurprising that causing distress is the focus of the mens rea, requiring an intention to bring about distress is a requirement of several offences, including those that were being used to police this area prior to the introduction of s.33.⁶⁵ Although it is not unusual for an offence to focus on an intention to rouse an emotional response no evidence that distress was caused is required here. The

⁶⁰ Sexual Offences Act 2003 ss.75-76.

⁶¹ For an assessment of the prevalence and impact of rape myths see K.J. Russell and C.J. Hand “Rape myth acceptance, victim blame attribution and Just World Beliefs: A rapid evidence assessment” (2017) *Aggression and Violent Behavior*, Volume 37, pp. 153-160.

⁶² Criminal Justice and Courts Act 2015 s.33(1)(b).

⁶³ Criminal Justice and Courts Bill 2014-15.

⁶⁴ Hansard HL, July 21, 2014, vol.755, col.973.

⁶⁵ Among others the Public Order Act 1986 s.5, the Protection from Harassment Act 1997 s.4A and the Malicious Communications Act 1988 s.1.

purpose of this fault element is to exclude those who pass on images in the belief they are amusing or otherwise intend no harm, so that it captures only those who have a malicious intent. This is clarified at s.33(8) which explains that an intention to cause distress cannot be found “merely because that was a natural and probable consequence of the disclosure”.

While it is difficult to see how an arbiter of fact would fail to find that a non-consensual disclosure of such an image was not calculated to cause distress, there are situations in which the publication of such images could be differently motivated. Both amateur and professional pornography sites trade in intimate images and sharing to these sites may be purely sexually or financially motivated. The disclosure of images purely for sexual or financial gain - as well as discloses calculated to cause reputational damage - would arguably fall outside of the precise mens rea prescribed by s.33, yet the result is none the less harmful or humiliating.

There are benefits in injecting subjectivity into this offence. It ensures that only those who are actively seeking to humiliate or cause acute embarrassment - those who are ultimately seeking revenge - are criminalised. Yet, it seems to exclude those who give no thought to whether that disclosure would cause distress or who have an entirely different intention. It is surprising the level of mens rea was not lowered to include subjective recklessness, or that this intent was not excluded entirely.

The Scottish offence requires that D either intends fear, alarm or distress to be caused to the person featured in the image, or is reckless as to the same.⁶⁶ Opening the offence up to reckless disclosures makes this offence far broader than its English and Welsh counterpart.⁶⁷ This will particularly be the case if the Scottish courts follow their traditional approach to recklessness of objectivity⁶⁸ something which could make the offence so wide that it those who innocently share images could commit the offence, an issue acknowledged at the report stage.⁶⁹ Of course, those who recklessly share images do not have to be prosecuted. Many offences are purposefully broad, and we trust that guidance to prosecutors will prevent baseless prosecutions.

⁶⁶ Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s.2(1)(b).

⁶⁷ And was rejected on that ground by the House when proposed as amendment in 2016. Hansard HL, 16 Nov, 2016, vol.776, col. 1443, The Minister of State, Home Office (Baroness Williams of Trafford).

⁶⁸ For further discussion of the prevalence of objective recklessness in Scottish law see J.S. Barton “Recklessness in Scots Criminal Law: Subjective or Objective?” (2011) 2 *Juridical Review* pp.143-161.

⁶⁹ Report by the Justice Committee, *Report on the Abusive Behaviour and Sexual Harm (Scotland) Bill*, 2nd Report (2016) Session 4, para.71.

This said, intention has not, to date, been an impediment in cases where the mens rea of s.33 might have been expected to have been in question. When David Jones posted intimate images of his ex-partner on various social media platforms the trial judge stated that he believed Jones had posted the pictures for his own gratification, whereas Jones' maintained it was an attempt to resume his relationship with the victim. Jones entered a guilty plea and was sentenced to 16-weeks imprisonment.⁷⁰ If the disclosure was a poorly thought out attempt at reconciliation then the mens rea was not made out. Christopher Green similarly pleaded guilty to the s.33 offence after sending a video of his ex-girlfriend to her friend to warn her that it was being circulated by a third party.⁷¹ Green, who had also reported the third-party disclosure to the police, claimed he had shared the video to protect the child he had with the victim. This was recognised by the sentencing judge who called his actions "foolish" and acknowledged Green had acted "out of concern", a motivation reflected in the light sentence imposed – a conditional discharge and costs of £250.⁷² Green's guilty plea precluded any finding of fact, yet the reported facts suggest this should never have been prosecuted as a 'revenge porn' offence.

Defences

Three defences to disclosure are available: where there is a reasonable belief the disclosure is for the purpose of preventing, detecting or investigating crime at s.33(3); where the disclosure is in the course of, or with a view to, the publication of journalistic material in the public interest at s.33(4)(a) and (b); and where the image is disclosed with the reasonable belief that it had previously been disclosed for reward and there was no reason to believe that the previous disclosure was made without consent at s.33(5) (a) and (b).⁷³

Section s.33(3) is phrased in a way that suggests a legal burden is placed on the defendant,⁷⁴ whereas ss.34(4) and (5) require only that the defendant introduces evidence of either circumstance

⁷⁰Unreported, August 18, 2015, Liverpool Magistrates' Court. 'Wallasey man jailed for posting 'revenge porn' images' *BBC News* August 19, 2015.

⁷¹ Unreported, July 21, 2016, Harrow Crown Court.

⁷² 'Salesman prosecuted after warning his ex about sex tape of her being spread online' *Express Online* 25 July, 2016'; 'Advertising salesman, 34, is hauled before the courts for 'sending revenge porn' after tipping off his ex that another of her boyfriends had sent him a sex tape of her.' *MailOnline* 25 July, 2016.

⁷³ Criminal Justice and Courts Act 2015 s.33(3) – 33(5).

⁷⁴ Although Gillespie doubts this is the case – see A. Gillespie "Trust me, it's only for me": "revenge porn" and the criminal law" (2015) *Criminal Law Review*, 11, p.866

“to raise an issue with respect to it.”⁷⁵ Publication is defined as “disclosure to the public at large or to a section of the public.”⁷⁶

These defences have yet to be tested. Allowing the sharing of materials in the interests of criminal investigation is a standard defence when the display or distribution of images may otherwise amount to a crime.⁷⁷ This will typically be a defence when images are shared with the police or other agents of the criminal justice system, but it could also provide a defence in circumstances such as Christopher Green’s (above). The journalistic defence is slightly more contentious. This would protect journalists who sought to reveal the hypocrisy of, for example, a politician who has railed against the taking of intimate images but was revealed to have done so himself, but it could also provide a defence in less deserving cases. While at pains not to curtail freedom of expression it remains to be seen how broadly “public interest” will be construed. The “previous disclosure” defence also seems at odds with the spirit of the offence. The Explanatory Notes give the example of a defendant founding his reasonable belief that an image “had previously been published on a commercial basis because he or she had seen it in a magazine”. However, sexual images are so widely available online that a reasonable belief that an image was of a pornographic model may raise an evidential burden that the prosecution could find difficult to disprove.

The Scottish offence mirrors s.33 by providing defences where the intimate image is disclosed for the prevention, detection, investigation or prosecution of crime or where it is in the public interest.⁷⁸ Section 2(3)(a) goes on to provide a defence where actual consent has been given to the disclosure and 2(3)(b) where “A reasonably believed that B consented to the photograph or film being disclosed”, placing the burden on the accused to raise evidence of consent, rather than requiring the prosecution to prove the image had been disclosed without consent. This consent can be, as with s.33, to a particular disclosure (or threatened disclosure), or consent given to disclosure more generally (or threatened disclosure). As with s.33, consent is not defined further and is subject to those same criticisms outlined above. Finally, a defence is provided at s.2(5) in circumstances where B was voluntarily in an intimate situation in a public place, effectively allowing images of individuals who have already sacrificed their privacy to be shared, such as streakers and exhibitionists.

⁷⁵ Criminal Justice and Courts Act 2015 s.33 (6) (a) and (b).

⁷⁶ Criminal Justice and Courts Act 2015 s.33(7).

⁷⁷ For example, see the Protection of Children Act 1978 s.1B.

⁷⁸ Abusive Behaviour and Sexual Harm (Scotland) Act 2016 ss. 2(3)(b) and 2(3)(c).

Barriers to Prosecution

Criticising s.33 is admittedly picking fault with an offence that has not yet been fully tested. These criticisms are perhaps (literally) academic when it may not be the constitutive elements of the revenge porn offence that have hindered prosecutions.

As the Act provides no mechanism for the take-down of illicit images it is likely many victims will fail to report disclosures to the police. Images are typically disclosed online and, as there is no guarantee of complainant anonymity, a prosecution may draw further attention to the disclosure. There may also be social resistance to the reporting of this sexually inflected offence, together with the likelihood that a disclosure may be part of a cycle of domestic abuse. Together, these factors present significant hurdles to victim reporting.

To avoid further exposure some victims may choose to take informal action, requesting that the host site (where the image has been published online) removes the image, while others will need support to report offences to the police. Support has been available since February 2015 through the Revenge Porn Helpline - a confidential service which provides help and support to victims throughout the UK. As a service that provides clients with pro-bono legal advice, emotional support and practical guidance it is unsurprising the Helpline had proved popular. The relationships it has built with internet service providers has aided the take-down of images which has been, in many cases, the redress victims seek. Figures produced by the service revealed that it had taken 1800 calls in its first six months of operation and been contacted 4000 times by March 2016.⁷⁹

For those cases reported to the police, a BBC freedom of information request revealed that of the 1,160 instances of revenge porn recorded between April and December 2015 no action was taken in 61 per cent of these cases.⁸⁰ Many of these reported incidents failed to proceed due to evidential difficulties or as the complainant had withdrawn their support for prosecution.⁸¹ A consequence of

⁷⁹ Government Equalities Office and the South West Grid for Learning, 'Revenge Porn Helpline Evaluation Report', accessible at <https://revengepornhelpline.org.uk/assets/files/rp-evaluation-report.pdf> [accessed 08/06/2017].

⁸⁰ 'Revenge pornography victims as young as 11, investigation finds' *BBC News*, April 27, 2016.

⁸¹ The BBC data is currently accessible here:
<https://docs.google.com/spreadsheets/d/1T6bqWcss4JKu7L9LV11VLy-z8FeYPUP42ZW->

s.33's requirement that the prosecution must prove that the disclosure was made without the consent of the individual featured is that cases may be dropped where this cannot be evidenced. As the Scottish offence does not place this burden on the prosecution, prosecutions could be commenced without co-operation from the complainant.

Social Media

Schedule 8 of the Act exempts providers of information society services from liability when they unknowingly host private sexual images. Thus, service providers will not be liable if they had "no actual knowledge" when the information was provided that the elements of s.33 were satisfied and they "expeditiously" removed it when notified.⁸² This does not exempt the operators of websites who provide platforms for hosting revenge porn imagery who can be liable for encouraging or assisting the commission of the offence. Operators of sites based outside of the UK could be found liable where jurisdictional issues are surmounted.⁸³ In practicality there will be difficulties in prosecuting foreign website providers unless it can be established that a substantial part of the offence was committed within our territory. Even where this is the case there may still be difficulties in collecting admissible evidence and getting co-operation from nations who do not recognise the non-consensual disclosure of sexual images as a crime, or where our definition of an illicit image differs from theirs.

As noted, search engines and social media platforms do regulate their content and encourage users to report suspect images, but decided cases continue to point to the regularity with which intimate images continue to be posted to social media, particularly Facebook. Such sites offer an ideal platform for humiliation as users will have a group of 'friends' who can view images and can be exploited by offenders. The first woman to be convicted of the s.33 offence, Paige Mitchell, received a 6-week sentence, suspended for 18-months after uploading four explicit images to Facebook with the aim of "humiliating and hurting" her partner following an argument.⁸⁴ Of course, images shared

SNe3Gmw/edit#gid=2041719221. The value of the information is limited as all forces did not include detailed information on outcomes.

⁸² Criminal Justice and Courts Act 2015, sch. 8.

⁸³ For discussion of jurisdictional issues and the liability of Internet Service Providers see Y. Akdeniz *International Child Pornography and the Law: National and International Responses* (2008) Aldershot: Ashgate at pp. 227-245 and A. Gillespie 'Jurisdictional issues concerning online child pornography' (2012) *International Journal of Law and IT* (2012) 20 (3), pp. 151-177.

⁸⁴ *Daily Telegraph* Sept 2, 2015. Unreported, Sept 1, 2015, Stevenage Magistrates' Court.

on social media platforms are more likely to come to light and be traced to the poster, whereas images shared to private or specialist pornography sites may not.

The ease with which sexual images can be shared online has not gone unnoticed by the courts who have attempted to call the social media giants to account. Most explicitly, Northern Ireland's High Court suggested

"... Facebook has or should have a method of recording and preserving information that is put onto their accounts so as to assist courts in preventing Facebook being used as a tool to abuse individuals. The court looks to Facebook to assist. That is to provide technical assistance in order to achieve what everyone seeks to achieve, namely that individuals can live their lives free from harassment, abuse and instances of revenge porn."⁸⁵

Online content moderators are clearly struggling with managing the volume of images uploaded. An investigation in 2017 revealed moderators had to evaluate "nearly 54,000 potential cases of revenge pornography and "sextortion" on the site in a single month."⁸⁶ This high-volume of uploads means that many images will invariably slip through the net and there will be delays in responding to user complaints. For example, when Clayton Kennedy posted an explicit image on Facebook it was only visible for thirty minutes before he removed it, long enough to humiliate his victim but an insufficient length of time for Facebook to respond to any complaints.⁸⁷

The civil law may prove useful in tackling those who host intimate images online. An action brought against Facebook for misuse of private information, negligence and breach of the Data Protection Act in Belfast's High Court, by a northern-Irish victim whose naked image was posted repeatedly on the platform, reached an out of court settlement in early 2018.⁸⁸ Ultimately, criminal liability may be difficult to establish, but hitting host sites in the pocket may incentivise them to more rigorously police the content uploaded to their platforms.

Sentencing

⁸⁵ *MM v BC, RS, Facebook Ireland Limited* [2016] NIQB 60 at para.8.

⁸⁶ The *Guardian* has investigated the difficulties in effectively policing Facebook. The reports are available online at <https://www.theguardian.com/news/series/facebook-files> [Accessed 1 November 2017].

⁸⁷ *R v Kennedy*, Unreported, June 22, 2015 Cardiff Magistrates' Court.

⁸⁸ 'Girl, 14, wins Facebook revenge porn payout' *Daily Telegraph* January 12, 2018.

For those cases that reach the courts a conviction for disclosing private sexual images carries a maximum sentence of 2-years' imprisonment on indictment and twelve months on summary conviction. Decided cases point to a flexible sentencing regime being used, and a prison sentence of 2-years has yet to be ordered. The Scottish offence carries the more significant maximum sentence on indictment of 5 years' imprisonment, both for the disclosure offence and threats to disclose.

There is currently no sentencing guidance available for either offence and no guidance has been provided by the courts. The Sentencing Council for England and Wales has published its draft guidelines for sentencing in cases of intimidatory offences and domestic abuse and this includes the s.33 offence.⁸⁹ Offences in the high culpability range are delineated by the Council as those where the disclosure (or disclosures) were intended to maximise distress - such where images have been sent to a victim's family who are very religious, or to a victim's young sibling; offences which involve significant planning or sophistication, such as setting up a fake internet profiles or website in the victim's name; images circulated widely, publicly and where a significant number of images have been disclosed.

Cases of lower culpability are identified as those where there has been little or no planning, and culpability is reduced by a learning disability or mental disorder. The Council's assessment of harm predictably draws on the language of the offence and looks to the distress caused to the victim, their vulnerability and the practical impact upon them. They suggest a starting point for the most serious offences of 1 year's custody with a category range of 26 weeks to 1 year 6 months.

The strong response promised by the government to revenge porn offenders predictably created an expectation of lengthy custodial sentences, and some newspapers reported that the sentences handed down thus far show that offenders are "getting off".⁹⁰

To date, the sentences ordered have not been excessively punitive, although courts have generally found that the custody threshold has been crossed. There has been an appropriate focus on both offender rehabilitation and the protection of victims, with the courts issuing restraining orders in several cases. The first person to be sentenced for the s.33 offence, Jason Asagba, who took intimate pictures of his girlfriend while she slept and shared them widely, including texting them directly to

⁸⁹ The Sentencing Council, *Intimidatory Offences and Domestic Abuse Guidelines, Consultation*, Mar 30, 2017.

⁹⁰ 'THE Sun SAYS Revenge let-off' *The Sun* Feb 10, 2017; 'Porn bully is 'let off again' *Daily Mirror*, 9 Feb 9, 2017; 'If a man guilty of revenge porn' gets off with a caution...' *The Independent* May 12, 2016; 'Victims outraged as revenge porn pervert let off' *Daily Mail* May 10, 2016.

members of her family, received a 6-month jail sentence, suspended for 18-months with a restraining order imposed.⁹¹ Heroy Bygraves received a sentence of 14-months in February 2017 for sending images of his girlfriend to 150 people including her family and friends. His lengthy sentence reflected the number of images disclosed and the harm caused by his disclosure to close family members. His sentence was aggravated by his not guilty plea, the blame he directed at his victim and his lack of remorse.⁹²

When prosecuted under the more general communication offences there had been predictable inconsistencies in sentencing. Thomas Samuel, convicted under s.127 of the Communications Act 2003 for posting explicit images on Facebook received the maximum sentence allowable of 6-months' imprisonment, suspended for 2-years,⁹³ whereas James Aldous was sentenced to an 18-week suspended prison sentence for a single count of harassment,⁹⁴ which had consisted of the disclosure of 20 pictures of his ex-partner shared to 4 different websites. Kevin Howlett, who shared intimate images of his ex-partner with contacts by SMS and pleaded guilty to an offence under the Computer Misuse Act received a 12-month supervision order.⁹⁵ Bringing these acts under the umbrella of the s.33 offence should lead to greater consistency in sentencing.

Conclusion

Section 33 has not proved the magic bullet the Government had hoped. It has provided a more targeted response than those offences that had previously been relied upon by prosecutors, but there are outstanding problems. The offence may have been drafted to protect sexual privacy, but it has become increasingly clear that the disclosure of these images typically forms part of a pattern of harassment or abuse. The success of the Revenge Porn Helpline suggests that a more holistic approach is required to ensure victims come forward and support prosecutions. Introducing complainant anonymity and ensuring that practical assistance is available to remove images would give victims greater confidence that cases could be resolved without further humiliation.

⁹¹ Unreported, May 16, 2015, Reading Magistrates' Court

⁹² Unreported, Jan 16, 2017, Canterbury Crown Court.

⁹³ Unreported, Oct 1, 2014, Bristol Magistrates' Court

⁹⁴ Unreported, Apr 18, 2013, Colchester Magistrates' Court.

⁹⁵ Unreported, Jan 28, 2015, Peterlee Magistrates' Court

A failure to articulate clearly a rationale for criminalisation has resulted in a narrowly constructed offence, which may fail to protect those who are victimised by the disclosure of sexual images. There now needs to be a reconsideration of whether those amendments suggested in 2016 – that the definition of a private sexual image includes buttocks, breasts and digitally created images – should be introduced. These are simple amendments that would bring the offence in line with its Scottish counterpart and provide redress for those who are victimised in this way. The mens rea of s.33 raises more difficult questions. An “intention to cause distress” captures the motivation of those offenders who seek to humiliate and harass their victim, but provides a loophole where disclosures are purely financially or sexually motivated. Amending s.33 in line with s.2 would do little to address this.

It is too early to comment on how successful the Scottish offence will be, but it shows more promise in fostering victim confidence. By positioning itself as an offence of abuse it opens up services and support services that, while not denied to victims in England and Wales, are perhaps more obviously signposted when the offence is couched as one of personal abuse. The inclusion of threats to disclose within s.2 also provides a valuable alternative charge to the disclosure offence and consideration should be given to introducing a commensurate offence in England and Wales.