

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

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Disclosure of an intimate photograph or film (revenge porn)

1. Summary of key points

1.1 Image-based sexual abuse constitutes a fundamental breach of women's human rights to privacy, dignity and sexual expression

We support the introduction of a new offence criminalising the disclosure of 'intimate photographs or films' as such actions constitute a fundamental breach of privacy and dignity, a serious form of harassment and abuse and, therefore, result in significant harm. The prevalence of image-based sexual abuse is a form of cultural harm contributing to the normalization of non-consensual sexual activity and creating a climate in which women's sexual expression is not respected.

1.2 Law must be reformed to tackle new ways of perpetrating old harms of harassment and abuse

The phenomenon of image-based sexual abuse simply represents a new way of perpetrating the old harms of harassment and abuse of women: but the law needs to be reformed to keep up with technological changes, and to send a clear message that these forms of conduct are unlawful and criminal.

1.3 Removal of requirement to show intention to cause fear, alarm or distress

This (in section 2(1)(b)) unnecessarily limits the law (even allowing for reckless intention) and focuses attention on the motives of the perpetrator rather than the harm of the victims.

1.4 Expansion of the law to cover all forms of image-based sexual abuse

The law must cover the non-consensual distribution of intimate images whatever the motives of perpetrators. Further, in worrying too much about images of streakers and naked ramblers, the proposals appear to exclude the distribution of 'upskirting' images.

2. Why a new criminal law is justified

2.1 Clarification of the current law leading to increased reporting and prosecutions

While there are existing offences which cover some aspects of image-based sexual abuse, a new criminal offence has the considerable benefit of making it clear to

victims, perpetrators and the police that these activities are harmful and criminal. This is likely to lead to increased reports and prosecutions (as has happened in England & Wales since the implementation of its new law).¹

2.2 Strong public message recognizing that harms of image-based sexual abuse

A new offence that *criminalises* image-based sexual abuse will send a powerful message that this conduct is unacceptable in our society and wrong. It will also place responsibility for the harm on those who post the images, while undercutting those who seek to gain from such actions (such as website providers) by restricting the supply of images on which they depend.

2.3 Recognition of breach of fundamental rights to privacy, dignity and sexual expression

Legislative action against image-based sexual abuse, including so-called ‘revenge pornography’, is justified because it is a fundamental breach of privacy and dignity, a serious form of harassment and abuse and, therefore, results in significant harm.

2.3.1 Harassment and abuse:

Image-based sexual abuse is a form of bullying, humiliation and control. The posting, or threat of posting, of sexually explicit photographs or videos online, without the consent of those depicted, is used to threaten, control, abuse, bully and humiliate those in the images or film. It often forms part of a pattern of coercive control and domestic abuse.

For the women affected, and it is mostly women, the impact can be devastating. For some, their entire livelihood is in danger through threats to their working and professional lives. Others rightly fear for their personal safety, especially where their address and other forms of identification are included alongside the disclosed images. There can also be adverse impacts on family life and many suffer mental health problems because of the trauma arising from the abuse and stigma following the images being distributed. These intimate images routinely go viral, being widely distributed across social media, and often ending up on dedicated ‘revenge porn’ or on mainstream pornography sites.

2.3.2 Human rights enhancing – privacy, dignity and sexual expression:

Legislative action can be justified on the basis that it is human-rights enhancing.²

¹ Only 6 people were cautioned or charged over an 18 month period 2012-2014, compared with 13 charged in the most recent six-month period
<http://www.theguardian.com/technology/2015/jul/15/revenge-porn-cases-increase-police-figures-reveal>

² As the UK Parliament’s Joint Committee on Human Rights stated in relation to extreme pornography: ‘We welcome, as a human rights enhancing measure, the provision in the Bill to extend the current offence of possession of extreme pornography to include possession of pornographic images depicting rape and other non-consensual sexual penetration. We consider that the cultural harm of extreme pornography, as set out in the evidence provided to us by the Government and others, provides a strong justification for legislative action, and for the proportionate restriction of

Image-based sexual abuse is a gross violation of an individual's right to privacy. We should all be free to take and share private sexual images without fear that they will be distributed without consent. In the area of intimate relations, the distribution of intimate images without consent is a threat to an individual's sexual expression, leading women to self-censor their sexual activity. It has long been recognized that there is a fundamental right to privacy, and sexual expression, protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

3. Change the terminology – image-based sexual abuse, not 'revenge pornography'

3.1 Although the term 'revenge pornography' is in common usage to describe and explain the phenomenon of non-consensually shared sexual images, there are a number of difficulties with this term. First, it focuses on a relatively narrow range of image-based sexual abuse – typically consensually taken photos then distributed by a vengeful ex-partner without consent. Secondly, it unduly focuses on the sexual nature of the material, rather than on the actions of the defendant who has breached the trust and privacy of another. 'Revenge pornography' is not pornographic per se (which generally means material primarily produced for purposes of sexual arousal). While the image may have been produced in a sexual context, the public disclosure of the image without the consent of the person/s depicted is not typically done for pornographic purposes.

To frame this form of harassment and abuse as 'pornography', shifts attention away from the motivations and actions of the perpetrator and onto the content of the image and actions of the victim. This, in turn, facilitates victim-blaming attitudes and questions along the lines of "why did she pose for the pictures in the first place?"

3.2 This is problematic for the following reasons:

3.2.1 it assumes any images or videos were taken in a non-coercive context; yet we know that there is considerable pressure on young women in particular to share intimate images of themselves; and

3.2.3 it suggests that the victim (usually women or young girls) should be ashamed of her actions or body, which are often exactly the feelings – humiliation, shame and/or regret – that the abuser wants his victim to experience when they post the pictures.

4. Recommendations and proposed amendments

4.1 Remove focus on perpetrator's motives and revise requirement to prove 'intention to cause fear, alarm or distress'

The proposal provides that the defendant must be shown to have an intention to cause fear, alarm or distress, or to be reckless as to causing such effects. We recommend revision of this provision to require straightforward intention to distribute without consent, for the following main reasons:

individual rights to private life (Article 8 ECHR) and freely to receive and impart information (Article 10 ECHR)'. 14th Joint Report, May 2014.

4.1.1 Limits the law:

Requiring an intention to cause fear, alarm or distress unnecessarily limits the scope of the law, despite the inclusion of recklessness. This is an additional hurdle that police and prosecutors will have to cross to bring a successful prosecution. It should be sufficient that the prosecution show an intention to distribute materials without the consent of the victim.

4.1.2 There are many reasons why perpetrators distribute private sexual images without consent:

- financial gain: some will distribute the images for financial gain to dedicated pornography websites;
- ‘amusement’/group bonding: some will distribute images for ‘a laugh’ and some will share images as part of a group activity, possibly without the victim being aware of the images have been taken and/or distributed; and
- sexual gratification: some will distribute and share images for the purposes of sexual gratification.

4.1.3 Even though some of these motives may be covered by the recklessness provision, we nonetheless recommend that the law should not focus on the motives of perpetrators, but on the harms to the victims, mostly women.

4.1.4 As drafted, the law suggests that causing fear and distress is the predominant motive of perpetrators, as well as implying that being distressed is the appropriate responses of victims. Many victims do indeed suffer fear, alarm and distress. Others will be simply furious. Others are harmed by the breach of privacy and trust. Victims’ human rights are breached, whether or not the perpetrator intended to cause distress, or the victim actually suffered distress.

4.2 Extend the scope of the law to cover all forms of image-based sexual abuse

4.2.1 It is imperative that the new law covers the broad range of activities that constitute image-based sexual abuse and is not blinded by a focus on the paradigmatic example of the vengeful ex-boyfriend (‘revenge porn’). As already noted, there is a range of motivations behind the actions of perpetrators. In addition, there is a wide variety of ways in which abuse and harassment via the non-consensual distribution of images is perpetrated.

4.2.2 Distribution of ‘upskirting’ images should be covered

For example, the proposal as currently drafted does not appear to cover the distribution of upskirt images (images taken without the consent of the victim).³ While

³ For examples of upskirting activity in Scotland, see: <http://www.dailyrecord.co.uk/news/scottish-news/perverts-aisles-scottish-women-secretly-5710673> and http://www.eveningtimes.co.uk/news/13845532.Twisted_perv_who_film_up_teenage_girl_s_skirt_hunted_by_police/?ref=rss

the criminal law in Scotland was recently amended so that the act of taking upskirt images was criminalised⁴, the *distribution* of such images appears not to be covered by this new proposal.

Upskirt images would be 'intimate' as the 'the person's genitals, buttocks or breasts are exposed or covered only with underwear' (section 3(1)(b)). However, the proposed defence in section 2(5)(b), that is if the intimate situation took place where members of the public had access and were present, means that upskirting images, which are generally taken in public, eg on public transport, would not be covered.

In their concern not to include images of streakers or naked ramblers, the drafters have inadvertently excluded a category of images which should be included. This must be rectified and can easily be so. For example, the comparable Illinois legislation excludes images of 'voluntary exposure in public or commercial settings'.

4.3 Civil law remedy should be considered

A number of civil remedies have been successfully used in cases of revenge porn in England & Wales.⁵ However, bringing such actions can be difficult, expensive and time-consuming.

A specific civil remedy would provide victims with an additional avenue for redress, while recognizing the varied ways in which they experience the harm and how they might want redress. We recommend that this is included together with the introduction of a criminal offence, along the lines of the Protection from Harassment Act 1997. The provision should be framed broadly to include all forms of image-based sexual abuse whatever the motivation of the distributor (subject to specified exceptions⁶).

4.4 Anonymity for victims must be guaranteed

Steps must be taken to ensure automatic anonymity for those reporting offences under this new provision. Without this protection, many victims will be extremely reluctant to come forward to report crimes. This will entail ensuring this offence is treated similarly to other sexual offences.

Currently, in England & Wales, there is no anonymity for victims of image-based sexual abuse, discouraging victims from reporting and sometimes prompting withdrawal of their complaint.⁷

5. Recommendations: provisions to be maintained

5.1 Threats to disclose without consent

The current proposal properly recognizes that threats to disclose intimate images are

⁴ Sexual Offences (Scotland) Act 2009, sec 9 (4A), (4B) amended in 2010.

⁵ For example: *ABK v KDT & FGH* [2013].

⁶ For example, those relating journalism, or for the purposes of preventing or detecting crime.

⁷ <http://www.independent.co.uk/news/uk/crime/revenge-porn-victims-need-anonymity-guaranteed-campaigners-say-10488526.html>

part of a common pattern of coercive and abusive conduct. This proposal is a welcome and progressive extension of the law compared to England & Wales.

5.2 Exclusion of written text and materials justified

We agree that this law should only cover intimate images (photos and videos) and not be extended to written materials. The harm comes from the widespread dissemination of private, sexual *images* as it is the images that go viral on social media, and on the internet more generally, and that end up on dedicated porn websites.

While sharing of intimate written messages is a breach of privacy and undoubtedly will cause harm to the victims, it is images that become pornographic material, that remain discoverable whenever a victim's name is typed into Google. It is the disclosure of these intimate images that normalises sex as a means of control and humiliation and that lead women to self-censor and to retreat offline.⁸

5.3 Photoshopped images should continue to be covered

We recommend that the law does cover photoshopped images, including those that are made 'intimate' by virtue of the alteration. The harm to a victim's dignity, and the harm which comes from images going viral, is the same whether or not the image is an 'original' or altered. For example, the law should include an image which has a pornographic body imposed on the head of the victim.

It appears from section 3(2), defining 'film' and 'photograph', that images 'whether or not the image has been altered in anyway' are covered. This differs from English law which does not cover images that are only private and sexual by virtue of the alteration (section 35(5)).

5.4 Broad definition of 'intimate situation'

The current definition of 'intimate situation' avoids many of the problems of laws adopted in other jurisdictions by:

- 5.4.1 Not limiting the law to only those images where the specific person is identifiable;
- 5.4.2 Not limiting the law to only images which can be classed as obscene or pornographic (requiring a higher threshold and focusing on the content of the image rather than its harm);
- 5.4.3 Including images of victims engaging in sexual conduct where their sexual organs are not displayed, thereby covering, for example, an image of a woman performing oral sex; and
- 5.4.4 including images of body parts covered with underwear (ensuring that upskirting and voyeuristic images could be included).

⁸ See further our comment in Holyrood.com: <https://www.holyrood.com/articles/comment/more-just-revenge-porn-tackling-misuse-private-sexual-images>

5.5 Recklessness intent and secondary distributors (when images ‘go viral’)

We welcome the current proposal that a person commits an offence if they are reckless as to whether the victim will be caused fear, alarm or distress (sec 2(1)(b)). This will enable the prosecution of ‘secondary distributors’, those who are not responsible for the first dissemination without consent, but who see/receive an image and then forward it, often via social media. It is the widespread secondary distribution of images that does most to generate the harms faced by victims. This provision represents a welcome extension of the law when compared to that applicable in England & Wales.

6. Cautious welcome: further guidance required

6.1 Defence of reasonable belief in consent

We give a very cautious welcome to the inclusion of a defence of ‘reasonable belief’ in consent to disclosure which we assume is primarily included to offset the liability of some secondary distributors (section 2(3)(b)). We could envisage, for example, the defence being pleaded by a young teenager who failed to understand the broader context or implications of his sharing an image that he has come across. In other words, it might be ‘reasonable’ for a 14 year old to assume consent where an image is widely available online.

However, if this defence were to be widely used, for example by adults claiming that the mere fact that images are easily available online, they ‘reasonably’ assumed consent, the utility of the new law would be seriously eroded. Experience has demonstrated the troubling use of ‘reasonable belief’ in sexual offence cases, with problematic, victim-blaming assumptions often being taken as ‘reasonable’. It is for this reason that we urge caution in the use of this defence and recommend that clarity is offered to prosecutors and police about the limits of this provision.

7. New law not enough: education and implementation

A new law is a powerful measure to recognise the harm of these activities and constitutes a strong public statement that such conduct is against the norms of society. Nonetheless, of itself, it is unlikely to change the culture in which this phenomenon is growing. We need to create a society which better respects sexual autonomy and privacy and in which distribution of private sexual images, or the taking of intimate images of a woman in public without her consent, is considered abhorrent.

Public education and information campaigns will be vital to ensure that the public knows about this new law and begins to challenge the growth of image-based sexual abuse.

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