Executive summary

1.1 We welcome the Government’s decision to examine and debate this important issue. However, careful consideration is needed before adding a further layer of regulation, especially when that legislation (as currently proposed) risks distracting political and public focus away from the real harm of so-called revenge pornography. The images described as ‘revenge pornography’ are a form of harassment and abuse.

1.2 ‘Revenge pornography’ occurs where A posts intimate/sexual images of B online without their consent as a form of harassment and abuse of B. A specific offence that addresses the harm of revenge pornography has the advantage of making clear that such actions are wrong. It would place responsibility for the harm on those who seek to exact this form of ‘revenge’, while undercutting those who seek to gain from such actions (such as website providers) by restricting the supply of images on which they depend.

1.3 We raise below a number of concerns regarding the specific wording of a new ‘revenge pornography’ offence. In particular, we question:

   1.3.1 a requirement that images are uploaded for the purposes of sexual gratification (4.1);
   1.3.2 a requirement that a specific person is clearly ‘identifiable’ in an image (5.3-5.4); and
   1.3.3 a defendant being able to assume consent or having a defence of reasonable belief in consent to the images being distributed (4.6-4.7 and 5.7-5.9).

1.4 As well as a specific offence, however, what is also needed is strong political will to tackle the underlying culture that creates and legitimises sexual violence, abuse and harassment in all its forms. This requires a Government commitment not just to headline making legislative reform, but also to ensure the effective implementation of a new offence and compulsory sex and relationships education in schools.
‘Revenge pornography’ is harassment and abuse, not pornography

2.1 Legislative action against so-called ‘revenge pornography’ is justified because it is a form of harassment and abuse. ‘Revenge pornography’ is not pornographic per se – understood as sexually explicit 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. It 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 is a gross violation of an individual’s privacy.

2.2 This is recognised by Scottish Women’s Aid in their campaign to ‘Stop Revenge Porn’ in Scotland. Their message is clear: “Sharing photos or videos without your consent isn’t ok. It’s a form of abuse.”¹ In an article for the New Statesman Ellie Hutchinson, the co-ordinator the campaign, stated: “This is not a one off incident with no repercussions - it is harassment, it is humiliation, it is violence against women”.²

2.3 There is a danger that the framing of this form of harassment and abuse as ‘pornography’ shifts attention away from the motivations and actions of the perpetrator of the abuse 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?” Such comments and questions. First, they assume the pictures are taken in a non-coercive context; that the taking of pictures is consensual when we know that there is considerable pressure on young people to share intimate images of themselves.³ Second, it feeds into the suggestion that the victim (usually, but not always, women or young girls) should be ashamed of her actions or body. No one should ever be made to feel ashamed in this way. Moreover, these are exactly the feelings – humiliation, shame and/or regret – that the abuser typically wants his victim to experience when they post the pictures. In other words, the negative reaction (or fear thereof) to the images (whether by friends, family or strangers) is a key aspect of the abuse.

² Ellie Hutchinson, ‘We need to talk about Revenge Porn’ New Statesman 5 October 2013: http://www.newstatesman.com/politics/2013/10/we-need-talk-about-revenge-porn.
³ See, for example, research which found that young men ‘pester’ girls into sending images which are then commonly distributed without their consent: Maddy Coy et al, “Sex without consent, I suppose that is rape”: How young people in England understand sexual consent’, Office of the Children’s Commissioner (2013) available at: http://www.childrenscommissioner.gov.uk/force_download.php?fp=%2Fclient_assets%2Fcp%2Fpublication%2F744%2FSex_without_consent_I_suppose_that_is_rape_newprint.pdf [accessed 7 July 2014]
Revenge pornography is not motivated by sex, but by a desire to humiliate and harass

3.1 The legislative focus should be on the harassing and abusive motivation and actions of the individual posting the sexually explicit image/s or film without consent. It is already an offence, under the Protection from Harassment Act 1997, to harass another (where the defendant “pursue[s] a course of conduct— (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other”.  

3.2 There are difficulties in applying the Protection from Harassment Act in this context.  Nevertheless, a focus on the defendant’s actions as harassment and abuse is a helpful one.

3.3 Despite its label, ‘revenge pornography’ need not be sexually motivated. While the content of the images is sexually explicit, the motivation of the crime may have little to do with sex or sexual gratification. Thus while any legislative provision should be limited to images which are sexually explicit, there should be no requirement that the images are produced or disseminated for pornographic (or similar) purposes.

Specific comments on Berridge and Morris clause

After section 68 of the Sexual Offences Act 2003, insert—

“68A Revenge pornography
A person commits an offence if—
(a) he discloses a recording of another person (B) doing a private act;
(b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B including doing a private act;
(c) he and B were in a private or confidential relationship where they retained a reasonable expectation of privacy with regard to disclosure beyond that relationship; and
(d) he knows that B does not consent to his disclosing the recording with that intention.

(2) In proceedings for an offence under subsection (1), a person shall have a defence where he can show that he made the disclosures for the purpose of—
(a) lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment;
(b) the reporting of unlawful conduct;
(c) images of voluntary exposure by the individual in public or commercial settings; or
(d) disclosures made in the public interest.

4 Protection from Harassment Act 1997, s 1(1). Harassment is defined as “alarming the person or causing the person distress” (section 7(2)).
5 For example, the posting of a single image will not amount to a “course of conduct”.
Focus is on sexual gratification, instead of harassment by perpetrator (s 68A(1)(b))

4.1 To satisfy the offence, the defendant must distribute the images with the intention that he, or a third party, gains sexual gratification from doing so. This provision is problematic. As it is framed, no offence would be committed if the defendant disclosed the image simply with a view of humiliating and embarrassing the person in the images and had no interest one way or another whether anyone gains sexual gratification from looking at it. Examples such as these are unlikely to be exceptional. The motivation behind ‘revenge porn’ is typically not to distribute pornography, but to humiliate and harass the victim. It is this intention which should determine the mens rea element the offence.

Requirement that the image is of a private act (ss 68A(1)(c) and 68A(3)(c))

4.2 To come within the offence, the image must be of a ‘private act’. This requires both that the person had a reasonable expectation of privacy and that they are performing a sex act “that is not of a kind ordinarily done in public”. Thus, the section would not extend to images or videos of activities performed in a public place (even if it is an act “that is not of a kind ordinarily done in public”).

4.3 This provision is also limited to situations where the defendant and B were ‘in a private or confidential relationship’ (68A(1)(c). It will be important that this provision does not preclude covering distribution of images taken during a one-off sexual encounter where there is no consent to distribute the images.

Requirement that the person’s genitals, buttocks or breasts are exposed or covered only with underwear (s 68A(3)(c))

4.4 This requirement limits the application of the offence to images where the person’s genitals, buttocks or breasts are exposed or covered only with underwear. This may not always be the case and may unduly limit the offence. For example, the genitals, breasts or buttocks may not be exposed of a person who is performing oral sex. The genitals of the person she/he is performing

---

7 This is currently not defined and would need to be clarified in the Act’s explanatory notes.

8 The image/video of a UK teenager performing oral sex on a number of men in a bar in Magaluf, which was widely discussed in the media on 4 July 2014 following its widespread distribution across social networks, would not likely be covered. On this particular case, see Amelia Butterly, ‘Spanish police investigating Magaluf nightclub sex act’: [http://www.bbc.co.uk/newsbeat/28156870](http://www.bbc.co.uk/newsbeat/28156870) [accessed 4 July 2014]
oral sex on may be exposed however the reference to ‘the person’ (not a person) in the proposed wording of the clause suggests it is referring to the victim of the offence.

4.5 Clearly, the non-consensual distribution of such an image is likely to be distressing and potentially harmful. The requirement of the visual display of specific body parts emphasises the sexual content of the image, rather than the defendant’s behaviour.

Defendant must know (B) did not consent to distribution (s 68A(1)(d))

4.6 To commit the offence, as drafted, the defendant must know that the victim did not consent to the distribution of the image for the purposes of sexual gratification. This appears to be unduly restrictive. The requirement of specific knowledge of non-consent is a very high standard to meet. In many cases, there may not have been a direct discussion as to whether the images could be distributed (or, at least, there is unlikely to be evidence of such a discussion). What if the defendant simply assumes B’s consent? In such a circumstance, he/she may have no specific knowledge of B’s non-consent.

4.7 The danger here is that a defendant may be in a stronger position if he/she does not ask whether or not the person consents. There must be no presumption of consent for distribution simply by reason of any images being taken. The onus must be on a defendant to seek positive consent: what steps, for example, did he/she take to ascertain consent? This provision, therefore, might be amended to include a standard of recklessness; that is, that the defendant was reckless as to whether or not B consented. This is a common standard in criminal law.

Title of the offence – ‘revenge pornography’

4.8 Although term ‘revenge pornography’ is in common usage to explain the phenomenon this clause seeks to address, it unduly focuses on the sexual nature of the material, rather than on the actions of the defendant who has breached the trust of another with the aim of causing distress and harassment.

4.9 The offence might better be characterised as one of non-consensual distribution of private sexual images.

Specific comments on Marks, Grender, Brinton and Barker clause

Insert the following new Clause—

“Offence of publishing a sexually explicit or pornographic image without consent

(1) A person commits an offence if they publish a sexually explicit or pornographic image of another identifiable person (whether or not that person is engaged in a sexual or pornographic act), unless—

(a) the identifiable person consented to publication;
(b) the person who published the image reasonably believed the identifiable person would have consented; or
(c) the person who published the image has reproduced an image that has already been published by another person.

(2) For the purposes of this section it is immaterial who owns the copyright of the published image.

(3) In this section “publish” means to reproduce, share or otherwise distribute an image via the internet or other means.

(4) In this section a person is an “identifiable person” if—
(a) their face is displayed in the image;
(b) any other identifiable characteristics are displayed in the image;
(c) their name is displayed on, or otherwise connected to, the image; or
(d) the image contains any other information by which the identity or address of the person could reasonably be ascertained.”

Insert the following new Clause—
“Defence: publishing a sexual or pornographic image without consent
It is a defence for a person charged under section (Offence of publishing a sexually explicit or pornographic image without consent) to prove—
(a) that they had no reason to believe that the identifiable person did not consent to the publication of the image; or
(b) that they did not intend to publish the image.”

Insert the following new Clause—
“Penalties: publishing a sexual or pornographic image without consent
A person guilty of an offence under section (Offence of publishing a sexually explicit or pornographic image without consent) is liable—
(a) on conviction on indictment, to imprisonment for a term not exceeding 12 months or a fine (or both);
(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine (or both).”

Sexually explicit or pornographic image (s 1)
5.1 While this Clause emphasises, in its title, that it is concerned with non-consensual distribution, it nonetheless refers to sexually explicit or pornographic images without giving definitions as to what these terms might mean in this context.

5.2 ‘Sexually explicit’ is likely to be relatively clear, and is likely to cover a wider range of images than the Berridge and Morris Clause. However, as noted above, the use of the term ‘pornographic’ is problematic in this context as it requires some investigation into either how the image is received, or the intention of the producers.

Unnecessary limitation for identifiable person (s 1)
5.3 It is not clear why the offence is limited to only circumstances where the individual is identifiable. As noted above, the motivation of this offence is to harass and abuse the victim. This harm will be caused whether or not she/he is identifiable to others.

---

9 It should, for example, cover an image of a clothed woman performing oral sex.
5.4 A further disadvantage of such a provision is that it may lead to unnecessarily complicated evidential debates – for example, is an image where the face or other identifying features are pixelated one of an identifiable person?

Reproducing image that is already available (s 1(c))

5.5 The offence will not be committed if the defendant has “reproduced an image that has already been published by another person”. The offence is confined to the originator of the image; that is the person exacting the ‘revenge’. This means that someone who simply forwards an image (which falls within the offence) to someone else will not commit an offence.

5.6 While this may be a pragmatic limit on the offence, it offers no means of targeting the Internet providers or hosts who provide a forum for this form of harassment and abuse. Nor does it offer a way of tackling the reproduction of these images on mainstream pornography websites.\(^\text{10}\)

Defence of reasonable belief in consent

5.7 As drafted, this is likely to be a serious limitation on the viability of the offence. It is not obvious why it has been included. It seems that the defendant would have a defence if he can claim that he reasonably believed that victim would have consented to the distribution of the material. See also our concerns at 4.6 and 4.7 above.

5.8 This provision is likely to lead to difficult questions around what constitutes reasonable belief. This is an area in sexual offence law which is especially fraught and prone to myths and stereotypes. Will it be deemed reasonable to assume consent by dint of the image having been taken and shared? Research with young people suggests common assumptions that those who have shared images of themselves are legitimate targets of subsequent harassment.\(^\text{11}\) Are such attitudes and assumptions to be taken to justify a reasonable belief in consent to distribute?

5.9 We do not think this should be the case. No-one should be able to assume that they can upload an intimate image of someone unless they have explicit consent. The onus should be on a defendant to ensure that there is consent to distribute an image before they do so.

---


Current Law in the United States
5 Many states in the US have adopted specific legislation to tackle ‘revenge pornography’, as well as some states actively applying existing legal provisions.\textsuperscript{12} The extent to which these laws will reduce ‘revenge pornography’ will similarly depend on the commitment of the criminal justice system to pursuing cases.

Current Law and Proposals in Scotland
6 In Scotland, there have been a number of convictions to date for ‘revenge pornography’, using existing laws, though there is also discussion in Scotland regarding the need for a specific offence.\textsuperscript{13}

Beyond Reforming the Law in England & Wales
7 As the Government has noted, there are a range of different laws in England & Wales which may currently apply to the phenomenon of ‘revenge pornography’, both civil and criminal. There are specific difficulties associated with each of these legal provisions when applied to ‘revenge pornography’ (as we have noted in 3.2 in relation to the Protection of Harassment Act). Thus, we broadly welcome the introduction of a specific offence dealing with the distribution of non-consensual intimate images.

8 However, we re-iterate that reducing the prevalence of ‘revenge pornography’, and the harassment and abuse caused, requires changing the societal attitudes and behaviours which both provide the culture in which these images are commonly distributed and in which the victims (mostly women) are denigrated for their role in producing the images in the first place. Compulsory sex and relationships education would be a welcome first step\textsuperscript{14}, together with greater public debate and campaigns around issues of consent, privacy and victim-blaming.

Professor Clare McGlynn: Clare.McGlynn@durham.ac.uk
Professor Erika Rackley: Erika.Rackley@durham.ac.uk

\textsuperscript{14} End Violence Against Women’s campaign for compulsory sex and relationships education \url{http://www.endviolenceagainstwomen.org.uk/schools-safe-4-girls} [access 7 July 2014].