



Knowledge Exchange Seminar Series (KESS)

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Criminalising Revenge Pornography in Northern Ireland: Laws and Lessons from England & Wales and other Common Law Jurisdictions.

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What is revenge pornography?

- Revenge pornography refers to consensual or non-consensual creation of private sexual images; and non-consensual distribution of private sexual images as an act of ‘revenge’ or sexual gratification often by a partner, an ex-partner, an acquaintance or a total stranger.
- Revenge pornography is ultimately a form of “image-based” sexual abuse. (Clare McGlynn and Erika Rackley, *Oxford Journal of Legal Studies*, (2017).



Revenge pornography and the Internet.

- Revenge pornography is exacerbated by Internet ubiquity, and the proliferation of powerful and sophisticated mobile digital devices for surreptitious or consensual capturing of intimate photos and films, which are instantly and easily upload-able unto the World Wide Web.
- Revenge pornography on Internet platform is a form of cyber-bullying.



Harm caused by revenge pornography.

- Psychological harm and mental health problems:
- Anxiety.
- Depression.
- Suicidal thoughts.
- Associated problems amongst female victims.
(Samantha Bates, “Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors,” *Feminist Criminology*, Volume 12, Issue 1 (January 2017).



Scope of the offences: section 51(1).

- Section 51(1) (a) (b) – it is an offence to disclose a private sexual photograph or film of an individual who appears in the photograph or film without their consent, and with the intention of causing that individual distress.

Scope of the offences: section 51(2).

- Section 51(2) – It is not an offence if the disclosure of private sexual photograph or film is made solely to the individual who appears in the photo or film. The clear implications are that only disclosures of private sexual photos or films made to third parties, with intent to cause distress would constitute an offence under section 51(1) (a) (b) of the Act.

Scope of defences: section 51(3).

- Section 51(3) - It is a defence for a person charged with an offence to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime. Ostensibly, this provision would facilitate professional handling and disclosure of private sexual photographs and films by law enforcement agents for the purposes of preventing, detecting or investigating crime.

Scope of defences: section 51(4) (a) (b).

- Under section 51(4) (a) (b) - It is a defence for a person charged with an offence to prove that the disclosure was made in the course of, or with a view to the publication of journalistic material; and that he or she reasonably believed that in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.



Scope of the defences: section 51(5) (a) (b).

- Under section 51(5) (a) (b) of the Act, it is a defence for a person charged with an offence to show that he or she reasonably believed that the private sexual photographs or films had previously been disclosed for a reward by the individual liable for an offence under section 51(1) (a) (b) or another person; and that he or she had no reason to believe that the previous disclosure for a reward was made without the consent of the individual who appeared in the private sexual photographs or films.

Burden of proof under sections 51(6)

- Under section 51(6) of the Act, it suffices that journalists who seek defence under section 51(4) (a) (b); and buyers who seek defence under section 51(5) (a) (b); are able to adduce sufficient evidence in support of their defence. It is incumbent on the prosecution to rebut the evidence and prove “beyond reasonable doubt” to the contrary.

Sentencing – section 51(9) (a) (b).

- Section 51(9) (a) (b) - a person guilty of an offence is liable on conviction to imprisonment for a term not exceeding 2 years or a fine or both. On summary conviction, a person found guilty of an offence is liable to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (or both).



Weaknesses of key provs: sections 51(1) (b) & (8) .

- Section 51(1) (b) expressly requires that the person charged with an offence must have “the intention of causing that individual distress.” Also, section 51(8) requires that “...a person charged with an offence... is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.”

Weaknesses of key provisions: section 51(2)

- Section 51(2) - It is not an offence if the disclosure of private sexual photograph or film is made solely to the individual who appears in the photo or film. The clear implications are that only disclosures of private sexual photos or films made to third parties, with intent to cause distress would constitute an offence under section 51(1) (a) (b) of the Act.

Weaknesses of key provisions – section 51(3).

- The defence afforded law enforcements under section 51(3) to disclose private sexual photographs or films for the purposes of preventing, detecting or investigating crime, could exacerbate the distress suffered by the victims from the original unauthorised disclosure, unless it is done sensitively and with due regards to the privacy and dignity of the victims.

Weaknesses of key provisions: section 51(4).

- The defence afforded journalists under section 51(4) (a) (b) to disclose private sexual photographs or films on grounds of reasonable beliefs that the disclosure is in the public interest, begs the question as to whether it could ever be in the public interest to disclose private sexual photographs or films in news reporting?

Civil remedies for revenge pornography.

- Invariably, revenge pornography victims are vulnerable to emotional and mental problems, which may not be sufficiently assuaged or compensated by the successful criminal prosecutions of the perpetrators. Also, recourse to urgent civil reliefs such as an injunction may be imperative, to prevent the publication of a potentially damaging private sexual photographs or films.



Civil remedies for revenge pornography.

- **Civil Injunction:** An injunctive order could be granted to prevent the disclosure of potentially damaging private sexual photographs or films; or to preserve crucial evidence that could be used for future civil or criminal prosecutions. For example, in [J.P.H. v. XYZ Persons Unknown \[2015\] EWHC \(QB\); MM v. BC, RS and Facebook Ireland Limited, \[2016\] NIQB.](#)
- **Misuse of personal or private information:** [J20 v. Facebook Ireland Limited, \[2016\] NIQB 98.](#)

Civil remedies for revenge pornography.

- **Breach of confidence:** Victims of revenge pornography could sue for breach of confidential information. In [*Wilson v. Ferguson, \[2015\] WASC 15.*](#)
- **Remedies under the Harassment Act 1997:** Victims of revenge pornography could also seek compensation under section 3(1) of the Harassment Act 1997. Under section 3(2) of the Act, victims could be awarded damages for anxiety caused by the harassment and any financial loss resulting from the harassment.

Civil remedies for revenge pornography.

- **Remedies under data protection legislation:**
Private sexual photographs or films would constitute processing of personally identifiable information under sections 10 and or 13 and 14 of the Data Protection Act 1998. ([Max Mosley v. Google Inc., \[2015\] EWHC 59.](#))

Civil remedies for revenge pornography.

- **Remedies under copyright legislation:** Photographs are artistic works under section 4(2) (b) the CDPA 1988; whilst films are protected under section 5B of the CDPA 1988 as amended. Additionally, provided that the originality condition was satisfied under section 1(1) (a), films could qualify as dramatic works under 3(1) of the CDPA 1988 as amended. ([Norowzian v. Arks Limited and Guinness Brewing Worldwide Limited \(No.2\) \[1999\] EWCA Civ. 3014](#)).
- However, revenge pornography victims could only sue for damages if they were the authors of the private sexual photographs or films under section 9 of the CDPA 1988 as amended.

Civil remedies for revenge pornography.

- **Technical Solutions and Liability of Internet Service Providers/Social Media Platform Operators:** Internet Service Providers (ISPs) and social media platform operators are legally obliged to expeditiously remove private sexual photographs or films upon notification. Their immunity from liability for user-generated contents under Articles 12, 13 and 14 of Directive 2000/31/EC on Electronic Commerce, is dependent on whether or not they actively contributed to the promotion of the offensive contents, and whether or not offensive contents are expeditiously removed upon notification. ([Max Mosley v. Google Inc., \[2015\] EWHC 59](#)); ([Delfi AS v. Estonia, ECtHR 64669/09 2015](#)). In addition, Internet Service Providers could deploy filtering software to block the upload and disclosure of private sexual photographs and films. For example, Facebook is currently trialling a filtering technology in Australia that would require volunteer subscribers to submit explicit images for tagging, with the aim of establishing a massive database against which any future revenge pornographic materials could be automatically matched and blocked.



CONCLUSIONS

- The criminalisation of revenge pornography in Northern Ireland is timely and justified. However, the key provisions are inherently weak, due to exceptions granted to law enforcements, journalists and third parties who have lawfully purchased copies, not knowing that the original disclosures were made without authorisation. Also, the requirement that there must be an intention to cause the victims distress, notwithstanding that distress is caused naturally by the unauthorised disclosure; arguably undermine the effectiveness of the legislation. The paper highlights alternative complementary civil remedies in injunctions, data protection law, copyright law, breach of confidence, Harassment Act and the tort of misuse of private or personal information that could come in handy for victims of revenge pornography.





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