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**CRIMINALISING “REVENGE PORN”: DID THE
HARMFUL DIGITAL COMMUNICATIONS ACT
GET IT RIGHT?**

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Abstract

This essay examines the problem of revenge pornography (“revenge porn”) in New Zealand. It argues that the Harmful Digital Communications Act 2015 provides an insufficient remedy due to its broad wording, and that the intention and harm requirements of the offence are problematic. This essay advocates for the introduction of a specific revenge porn offence to be inserted into the New Zealand Crimes Act 1961. It begins by exploring revenge porn’s impact on victims, and discusses the current legal remedies available here and in comparative jurisdictions. It then proposes a new offence that would focus on the elements of the revenge porn act itself, rather than requiring that the perpetrator intends to cause harm and that the victim actually suffers harm. This essay argues that the introduction of such an offence would provide an effective deterrent for initial and subsequent disclosers of revenge porn alike, and clarify the scope of revenge porn in New Zealand for victims, perpetrators, and the courts. Further, such an offence would place a reasonable limit on freedom of expression and send a clear social message as to revenge porn’s criminal nature.

Revenge porn – criminal law – Harmful Digital Communications Act

The text of this essay (excluding the cover page, table of contents, keywords, abstract, footnotes and bibliography) consists of exactly 7928 words.

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I INTRODUCTION

Revenge pornography (“revenge porn”) is a form of involuntary pornography involving the non-consensual publication of intimate images or videos of another person.¹ Typically, this occurs at the end of a sexual relationship, where one party publishes images or videos online. With the Internet now a pervasive and often inescapable part of everyday life, revenge porn has become a serious problem for legislators and society alike.

Until 2015, there was no criminal offence adequately equipped to control acts of revenge porn in New Zealand. While there were civil remedies available, these remedies were grossly under-utilised and sometimes unavailable.² The need for a criminal offence was clear, and the Harmful Digital Communications Act came into force in July 2015. It contains an offence provision criminalising the posting of digital communications with the intention to cause distress, which carries a penalty of up to two years in prison.³ The Minister of Justice argued that the new offence addresses the gap in New Zealand criminal law created by the rise of Internet crime, contending that it brought the country’s criminal justice system in line with other jurisdictions.⁴

This essay evaluates the current legislative and civil options for revenge porn victims in New Zealand and in comparative jurisdictions, and undertakes an analysis of whether these measures adequately redress the legal and social harms suffered. It concludes that the New Zealand legislature’s response to the problem of revenge porn, in the form of the Harmful Digital Communications Act, has been insufficient. While revenge porn victims now have a criminal remedy available alongside the option of a civil suit, the new offence is too broadly drafted to adequately address this issue. Its focus on the harm to the victim, rather than the elements of the communication itself, render it an ineffective deterrent to revenge porn perpetrators. New Zealand needs to specifically criminalise revenge porn by amending the Crimes Act to include an offence of disclosing intimate images or films

¹ Cynthia Barmore "Criminalization in Context: Involuntariness, Obscenity, and the First Amendment" (2015) 67 *Stan L Rev* 447 at 449.

² See s 56 of the Privacy Act 1993, which until 2015 made information created or distributed during “domestic affairs” exempt from privacy claims.

³ Harmful Digital Communications Act 2015, s 22.

⁴ (24 March 2015) 704 *NZPD* 2537.

without consent. A specific offence would have a strong deterrent effect,⁵ and would send a clear message to the New Zealand public and the international community that sexual privacy violations are inherently and criminally wrong.

II THE REVENGE PORN PROBLEM

Revenge porn is an unusual act, and its complexity derives as much from social attitudes as from the nature of the act itself. This can complicate control and prosecution, and makes revenge porn ill-suited to a broad-stroke criminal provision. A specific offence clearly defining the parameters of revenge porn would enable the courts and society alike to understand when a perpetrator will be culpable, despite the myriad of contexts that could arise in a revenge porn case.

A The Unique Nature of Revenge Porn

For the purposes of this essay and its definition, revenge porn content is produced consensually, as opposed to a “peeping Tom” offence where both the production and the dissemination of the images occur without consent. For revenge porn, the issue of consent comes into play at the point of publication. A common argument against illegalising revenge porn is that if an individual consented to the creation of an image or film, their consent is deemed to continue in regards to the publication of that subject matter. Consent in sexual contexts can be incorrectly viewed as having a transferable nature; the other party seems to acquire an implied right to the material that is not seen in non-sexual contexts.⁶ However, it has been established in the courts that “one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy”.⁷ The nature of an act should have no bearing on the level of privacy it is accorded. It is important to address and dismantle this false distinction through the creation of an explicit offence.

⁵ Danielle Keats Citron and Mary Anne Franks “Criminalizing Revenge Porn” (2014) 49 Wake Forest L Rev 345 at 361.

⁶ At 348.

⁷ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [98].

This view perhaps derives from the fact that revenge porn is rooted in sexism and victim-blaming, to the point that it has been described as a form of “gender-based violence”.⁸ Victims can be ignored or ridiculed when they attempt to report it.⁹ Further, the majority of perpetrators are men.¹⁰ Thus female victims face two compounding problems: they are far more likely to have images of them disclosed without their consent, and the tendency to minimise the crime’s seriousness provides legal impunity to its perpetrators.¹¹ Many revenge porn websites contain almost exclusively images of women, and capitalise on women’s place in society to blackmail and harass them.¹²

Today, the vast majority of revenge porn is publicised using the Internet, and often on websites solely dedicated to the publication of these images. While physical dissemination of images or films can still occur, online dissemination is much faster and easier, and can be a lot more harmful to victims. The “permanence of the Internet”¹³ and the rapidity of virtual dissemination create a breeding ground for sexually explicit images that can be almost impossible to control, particularly if a law only criminalises the initial disclosure of revenge porn and not subsequent on-sharing.

These issues exacerbate the confusion surrounding revenge porn, and highlight the need for a clear but sufficiently wide definition that effectively criminalises this act in all its forms.

⁸ Nicola Henry and Anastasia Powell “Beyond the ‘sext’: Technology-facilitated sexual violence and harassment against adult women” (2015) 48 *Australian and New Zealand Journal of Criminology* 104 at 105.

⁹ See Annmarie Chiarini “I was a victim of revenge porn. I don’t want anyone else to face this” *The Guardian* (online ed, United Kingdom, 19 November 2013).

¹⁰ See, inter alia, Cyber Civil Rights Initiative “Revenge Porn by the Numbers” (3 January, 2014) End Revenge Porn <<http://www.endrevengeporn.org>>.

¹¹ Michael Salter “Responding to revenge porn: Gender, justice and online legal impunity” (paper presented at: ‘Whose justice? Conflicted approaches to crime and conflict’, University of Western Sydney, 27 September 2013); see also *Police v Usmanov* [2011] NSWLC 40 where it was argued that the defendant’s conduct was “not serious”.

¹² (19 June 2014) 582 GBPD HC 1369.

¹³ Annmarie Chiarini, above n 9.

B A Working Definition

The Collins English dictionary defines revenge porn as:¹⁴

a pornographic image or film which is published, posted (e.g. on the Internet), or otherwise circulated without the consent of one or more of the participants, usually with malicious and vindictive intent, such as following a break-up.

This definition shows that revenge porn is not always posted or disclosed with revenge in mind, although that is usually the case. It renders the manner of creation irrelevant, whether the depicted person is consenting to it or not. This would encompass intrusion into seclusion situations where the victim is unaware that the content is being created. While this is a valid inclusion, the definition casts a wide net. It includes activity that is already covered by other criminal offences, such as the offence of intimate visual filming.¹⁵ A somewhat narrower definition is desirable for the purposes of this essay, as while it aims to identify and remedy a gap in the law, it is important to avoid overlap with other crimes.

This essay defines revenge porn as the intentional disclosure of intimate images or videos of an individual, where the perpetrator knows or should have known that the depicted individual did not consent to the disclosure, and the perpetrator knows or should have known that those images or videos were produced under an expectation of privacy.

This definition aims to address some of the issues highlighted above, and is designed to encapsulate a variety of situations. These include situations where the victim has shared intimate images with more than one or a group of people. Further, “disclosure” would include the sharing of images with anyone outside of the reasonable expectation of privacy, whether that was showing an individual or to a wider group. The manner of creation of the image is also rendered irrelevant.

This essay’s definition also captures situations where the victim has produced the images or videos themselves, but may not have shown anyone. In such a scenario the image or video would still be subject to an expectation of privacy. Thus hacking situations, such as the recent non-consensual sharing of intimate photos that affected hundreds of celebrities, could also be provided a remedy. The focus is not on the relationship between

¹⁴ Collins “Revenge porn” <www.collinsdictionary.com>.

¹⁵ Crimes Act 1961, s 216H.

the depicted person and the perpetrator, but on the extreme breach of privacy inherent in such acts. The term “intimate” is broad, and not limited to pornographic or explicit imagery. For example, images of implied sexual acts that do not necessarily reveal nudity could be considered “intimate” and carry an expectation of privacy.

C The Nature of the Harm

Revenge porn can cause immense harm to its victims. This essay outlines these harms to highlight the need for a specific crime. A specific criminal remedy would not only make it clear to perpetrators when they will be liable, but would provide victims with a clear path to justice and recognise the inherent harm that revenge porn causes.

1 Emotional harm

A perpetrator’s motive in revenge porn is often to shame, humiliate, and upset the victim. The impact of this can be devastating, and it has been described as a form of abuse.¹⁶ Some victims have committed suicide due to the depth of their emotional harm.¹⁷

Beyond the initial feelings of shame and humiliation, society’s attitudes to revenge porn can increase its emotional impact. The media often admonishes revenge porn victims for allowing the images to be produced in the first place.¹⁸ Some go as far to say that no law change is required to prevent revenge porn, as if the images do not exist the crime cannot occur.¹⁹ Inherent in this reproach is the suggestion that those who do create intimate images themselves or allow others to take them are personally responsible for any harms that may result.

This perspective is problematic for several reasons. When framed as a general statement, it has surface logic similar to the rape commentary that focusses on what victims can do to avoid the harm, rather than focussing on the perpetrator. However, in some cases the depicted person can be reluctant to share or produce intimate images, and it is the

¹⁶ (21 July 2014) 755 GBPD HL 969.

¹⁷ See Emily Poole “Hey Girls, Did You Know? Slut-Shaming on the Internet Needs to Stop” (2013) 48 USF L Rev 221 at 240 for an exploration of revenge porn cases that have resulted in suicide.

¹⁸ Michael Salter and Thomas Crofts “Responding to revenge porn: Challenging online legal impunity” in Lynn Comella and Shira Tarrant (eds) *New views on pornography: Sexuality, politics and the law* (Praeger Publishers, Westport, 2015) 233 at 236.

¹⁹ Eric Goldman “What Should We Do About Revenge Porn Sites Like Texxxan?” (28 January 2013) Forbes <www.forbes.com>.

perpetrator of revenge porn who has pushed to create them.²⁰ Further, this general wording is often aimed at limiting only women's behaviour. When half the population remains empowered to send images that the other half cannot, it is clear where the blame for revenge porn lies. The act of taking or sending intimate imagery is not wrong, where it is done legally and consensually. Arguing for a limitation on these acts detracts from the true problem and reinforces dangerous stereotypes about male and female roles and responsibilities.²¹

Further, the emotional harm caused by revenge porn is exacerbated if a victim feels responsible or that others are holding her or him responsible for the harm. Avenues towards justice may become closed off and remain unconsidered if a victim's thoughts turn inward to self-blame rather than outward at the perpetrator. Thoughts of suicide and self-harm may also be likely to increase where a victim has no outlet of support or culpability.

2 *Social harm to the victim*

Revenge porn is designed to shame its victims. In a seminar on public shame, Monica Lewinsky spoke of the "very personal price of public humiliation".²² Even where a victim of revenge porn refuses to be ashamed of participating in a consensual and non-harmful act such as sharing intimate images, the public view of that person can be irrevocably changed. Social harm is both isolating and beyond the victim's control, and this only gets intensified when revenge porn is posted online.

The case of Holly Jacobs is a compelling example of the extent of social harm that can occur.²³ Holly's intimate images that she had shared with an ex-boyfriend were posted on hundreds of websites, as well as being sent to her workplace. She was subjected to suspicion at her university, changed her job, and was forced to change her identity to hide from men who constantly messaged her after seeing the pictures. Her social image was greatly affected, to the point that she had to legally change her name.

²⁰ See the claimant's evidence in *L v G* [2002] DCR 234.

²¹ Citron and Franks, above n 5, at 353.

²² Monica Lewinsky "The price of shame" (March 2015) TED <www.ted.com> at 12.55.

²³ Mary Anne Franks "Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators" (17 June 2015) <www.endrevengeporn.com> at 11.

Few other acts can alter the public perception of a victim so much due to no fault of their own. Victims of revenge porn face harassment and stalking after the initial disclosure, as it is often an Internet crime often involving victims' names and contact details published alongside the images or videos. Interviews with revenge porn victims reveal that many are afraid to leave their homes.²⁴ Women victims especially face an explicit onslaught of threatening behaviour that is usually designed to force the individual to remove themselves from the public sphere of the Internet.²⁵ Socially, revenge porn can harm a victim irreparably and expose them to a legitimate fear of being attacked.²⁶

3 *Pecuniary harm*

An online reputation study found that over 70% of employers in the United States have rejected potential employees based on their online presence.²⁷ A person's reputation or existence on the Internet can be a potential employer's most accessible source of information about them beyond their résumé. If revenge porn imagery is connected to an individual's name on the Internet, victims may struggle to find work or keep their jobs.²⁸ While such images could create feelings of sympathy, it is likely that an individual would face stereotypically negative assumptions made about their lifestyle and personality.

The case of *Wilson v Ferguson* exemplifies the far-reaching consequences and harms of revenge porn.²⁹ The plaintiff and the defendant worked together and began a sexual relationship. During this time they exchanged sexual images and videos of themselves and each other. When the plaintiff ended the relationship, the defendant publicised images and videos of her on Facebook, which were seen by their workmates.³⁰ The plaintiff suffered an extreme emotional reaction and became unable to return to work. She took leave without pay for almost three months, and her position was terminated.³¹ When she

²⁴ Citron and Franks, above n 5, at 350.

²⁵ Salter and Crofts, above n 18, at 237.

²⁶ Citron and Franks, above n 5, at 350.

²⁷ Cross-Tab "Online Reputation in a Connected World" (January 2010) Microsoft <www.microsoft.com> at 3.

²⁸ Citron and Franks, above n 5, at 352.

²⁹ *Wilson v Ferguson* (2015) WASC 15.

³⁰ At [37].

³¹ At [40].

succeeded in court, her economic loss during this period was calculated by the judge, and the amount was added to an award of equitable compensation for breach of confidence.³²

Pecuniary impact may be seen as a secondary harm to a victim of revenge porn, as it is perhaps the only harm that can be fully compensated and thus may be less intrinsically damaging. However, victims can be denied full participation in society, and pecuniary harm affects their economic potential.

III THE AVAILABILITY AND EFFECTIVENESS OF CIVIL REMEDIES

The level of harm caused by revenge porn has not gone ignored by the New Zealand legal system. Civil suits do provide some remedies to victims of revenge porn, but their prevailing hurdle is the requirement that the claimant demonstrate that the defendant's actions have caused them harm. The claim is compensatory in nature,³³ rather than providing a punitive remedy.

There are arguments that rather than a criminal sanction, tort law is the appropriate remedy for revenge porn. An adaptable tortious approach is arguably preferable to the rigidity of criminal law for acts like revenge porn, around which social norms and attitudes can rapidly change.³⁴ Jenna Stokes speaks of "a societal problem, not an Internet problem", claiming that criminal laws are too online-focussed and do not adequately encompass the wider social context.³⁵ This may be a major flaw of the Harmful Digital Communications Act, as its revenge porn offence is limited to digital communications. This essay's proposed offence instead focusses on the inherent harm of revenge porn itself, regardless of the platform of disclosure. Rather than an Internet-specific legislative reaction, a specific offence would provide a long-lasting solution. It is appropriate to have a specific criminal law remedy alongside the civil regime, due to the need to deter and penalise perpetrators of this uniquely destructive crime.

³² At [85].

³³ B Atkin, G McLay, and B Hodge *Torts in New Zealand* (4th ed, Oxford University Press, 2006) at 4.

³⁴ Jenna Stokes "The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn" (2014) 29 Berkeley Tech LJ 929 at 949.

³⁵ At 946.

A *Civil Remedies Available in New Zealand*

Privacy, as a “state of desired inaccess”³⁶, is a logical cause of action following an act of revenge porn, as such an act directly violates an individual’s right to be inaccessible. It requires that facts subject to a reasonable expectation of privacy are published, and that publicity would be highly offensive to a reasonable person.³⁷ Images of private sexual activity are undoubtedly encompassed by this test.³⁸ As a moniker, the tort of intentional infliction of emotional distress also seems well suited to a revenge porn scenario. However, a revenge porn action under this tort could struggle with the requirement that the intentional infliction of emotional distress cause physical or psychiatric harm.³⁹ Not all cases would result in the evidence required to satisfy this third element.

The Australian case of *Giller v Procopets* implemented the civil law to provide a compensatory remedy.⁴⁰ It was the first Australian case to accept that a claimant could recover damages under a breach of confidence action. The defendant publicised secret videos he had made of their sexual activities. The claimant was successful in an action for breach of confidence, gaining \$40,000 in damages.⁴¹ While the tort is also applied in New Zealand, actions under the tort of breach of confidence do face similar issues to the *Wilkinson v Downton* tort in its requirement that the victim be harmed to a specific degree by the perpetrator’s acts. Liability is limited to the person who is under an obligation of trust and confidence, so subsequent disclosures by those outside of the confidence relationship would face no liability for their actions under this tort. As revenge porn involves the disclosure of private material, it makes sense that further disclosures should also be subject to liability in order to deter wider dissemination, as well as to recognise that each stage of disclosure carries culpability.

These causes of action can provide victims with injunctions, a useful remedy as they can be swiftly granted to prevent further dissemination of intimate images or videos. As noted

³⁶ Nicole Moreham “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis NZ Limited, 2008) 231 at 232.

³⁷ *Hosking v Runting* [2005] 1 NZLR 1 at [117].

³⁸ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [98].

³⁹ *Rhodes v OPO* [2015] UKSC 32 at [73].

⁴⁰ *Giller v Procopets* [2008] VSCA 236.

⁴¹ Salter and Crofts, above n 18, at 241.

in *Contostavlos v Mendahun*, “details of a person's sexual life have ... been recognised for very many years as high on the list of matters which may be protected by non-disclosure orders”⁴². The courts have also recognised that images and films are of a different and ultimately more damaging nature than intimate information. As each successive viewing of an intimate image or film is a “fresh intrusion of privacy”⁴³, injunctions are likely to be granted in revenge porn cases. However, an injunction only prevents the further spread of revenge porn; it is not aimed at deterring the original act and thus may have little bite as an effective remedy.

B The New Civil Regime under the Harmful Digital Communications Act

The Act establishes an approved agency to investigate complaints, negotiate, mediate, and educate, among other functions.⁴⁴ The new civil regime is designed to streamline and expedite the process by which harmful digital communications can be taken down and responded to, recognising the lack of controls on digital communications. It relieves some of the procedural and financial burdens of alternative civil law remedies. However, court orders that can be made under the new civil regime do not provide the victim with damages.⁴⁵

The Act also closes a loophole in the Privacy Act, where information that has been gathered in the course of domestic affairs could not be subject to an expectation of privacy.⁴⁶ Under the new Act, this exception is inapplicable if that information being collected or disseminated would be “highly offensive to a reasonable person”.⁴⁷ Since revenge porn images or films are often created in the context of a domestic relationship, and the act of revenge porn usually occurs at a relationship’s dissolution, closing this loophole is an important step forward in privacy liability. Before the Act, a privacy claim for the disclosure of revenge porn would not have succeeded if the parties had been living together.

⁴² *Contostavlos v Mendahun* [2012] EWHC 850 (QB) at [25].

⁴³ *Douglas v Hello!* [2006] QB 125 at [105].

⁴⁴ For a full list of its powers see s 8 of the Harmful Digital Communications Act 2015.

⁴⁵ See s 19.

⁴⁶ Privacy Act 1993, s 56.

⁴⁷ Harmful Digital Communications Act 2015, s 41.

C Platform Liability

The Internet gives anyone with a connection a free way to share material. If that material is harmful to another person, its rapid online dissemination will serve to aggravate that harm. Without the Internet, such a fast and easy method of distribution would be almost impossible.⁴⁸ Looking at a crime like revenge porn, where a Google search can bring a person to suicide, the Internet becomes a very real and immediate problem.

While it is beyond the scope of this essay, platform liability is an important consideration in recent revenge porn literature. This approach would facilitate the removal of revenge porn imagery from the Internet by holding those platforms that host such content liable. This would have the potential to mitigate some of the resulting harms. However, such discussions are often met with freedom of speech and e-commerce arguments,⁴⁹ with providers claiming that self-regulation is a sufficient response to the problem.⁵⁰ Further, emphasising platform liability lacks the deterrent effect that personal liability would have on the original perpetrator,⁵¹ and moves the focus from a criminally immoral act to a lack of responsibility on the part of the host. Thus revenge porn risks becoming viewed as an unpreventable act, controllable only after the fact by those who host it or are subject to it, rather than the perpetrator themselves.⁵²

D The Insufficiency of a Civil Approach

Expanding the available remedies for offences like revenge porn into the criminal sphere would relieve victims from the burdens of civil process. The initial financial hurdle of a civil action is insurmountable to many. Conversely, the costs in a criminal action lie with the state, rather than the individual.

Further, pursuing civil action leaves the responsibility in the hands of the victim, and suggests that gender-based harms of this kind are not a social issue. A civil action is seen as an individualised harm and thus has far less symbolic value.⁵³ In contrast, a conviction

⁴⁸ Jonathan Barrett and Luke Strongman “The Internet, the Law, and Privacy in New Zealand: Dignity with Liberty?” (2012) 6 *International Journal of Communication* 127 at 128.

⁴⁹ *Jones v Dirty World Entertainment Recordings* F 3d 219 (6th Cir 2014) at 20.

⁵⁰ At 11.

⁵¹ Lauren Gambier “Entrenching Privacy: a Critique of Civil Remedies for Gender-Motivated Violence” (2012) 87 *NYU L Rev* 1918 at 1943.

⁵² See Stokes, above n 34, at 930.

⁵³ Gambier, above n 51, at 1945.

has staying power as a reputational black mark.⁵⁴ In a criminal action, while the victim's individual harm is considered as an aggravating factor, the victim is essentially removed from the process. A crime is against the state, and the harm is to society.

This is not to say that civil remedies should be abandoned or neglected in a consideration of how best to tackle revenge porn. Victims may choose to avoid the criminal law for a variety of reasons, and the availability of alternative civil remedies is important.⁵⁵ It is inherent in the nature of the offence that the victim will often know the perpetrator at an intimate level. The victim may harbour goodwill towards the perpetrator or their family. They may simply be satisfied with the result of civil action, rather than leaving the outcome to the criminal system which carries greater stigma and punishment. Further, it is recognised that there are degrees of revenge porn as there are degrees of any crime. A victim may prefer the apparent normalcy of a civil action as opposed to a criminal trial.

It is appropriate to discuss why offences such as revenge porn may go unreported, or have only civil jurisdiction. Gender-based crimes were traditionally considered to be in the realm of "private" offences, and thus ill-suited to public retribution through the criminal law.⁵⁶ This brand of thinking is rooted in a patriarchal view of women as living in the "private sphere".⁵⁷ While this view can be swiftly rejected in the present day, it lingers in the shameful associations these crimes can raise. There is still an expectation on the victim to protect themselves, to prevent the crime, and to get on with their lives in the too-often event that justice is not forthcoming. A legal change of mind from civil to specific criminal control of revenge porn would be a step towards that justice being delivered.

IV THE GOVERNMENT RESPONDS: THE HARMFUL DIGITAL COMMUNICATIONS ACT 2015

A Legal Background

Until 2015, revenge porn offences were not covered by New Zealand criminal law. The covert filming section of the Crimes Act relates only to non-consensually created

⁵⁴ Citron and Franks, above n 5, at 348.

⁵⁵ Poole, above n 17, at 260.

⁵⁶ Gambier, above n 51, at 1919.

⁵⁷ Gambier, above n 51, at 1921.

images.⁵⁸ If an instance of revenge porn occurred, victims had little choice but to take the civil law route.

The lack of effective criminal remedies led judges to twist the law in some cases. Section 124 of the Crimes Act which criminalises “distributing an indecent model or object” was enacted well before the rise of the Internet. Although this section’s wording seems to envisage only physical distribution such as the sale of “indecent” goods, media reports indicate that it was implemented in 2010 to punish an act of revenge porn.⁵⁹ The Law Commission discussed this case in their report on the Harmful Digital Communications Bill, concluding that the development of a modern criminal offence was necessary in light of the “strained interpretation” placed on other offences in recent criminal law cases.⁶⁰

1 The Law Commission’s report

The Law Commission had rejected the idea of criminalising the non-consensual publication of consensually created intimate images in its Issues Paper on the Invasion of Privacy: Penalties and Remedies.⁶¹ It emphasised the focus of criminal privacy provisions on the method of obtaining material, rather than the impact on the victim. Thus if a person had consented to the creation of a private image, they were entitled to civil remedies only. It spoke of such offences in a hypothetical way and pointed to the case of *L v G*, where the plaintiff was awarded \$2,500 for breach of privacy.⁶²

The Commission’s report on the Harmful Digital Communications Bill recognised the rapidly growing number of revenge porn complaints in the short time period since its privacy report. In light of these developments, it recommended that the covert filming section of the Crimes Act be amended to include a new offence. This offence would cover situations where a creator of an intimate image publicises that image without consent, regardless of whether the depicted person consented to its creation.⁶³ Further, the

⁵⁸ Section 216G.

⁵⁹ “Naked photo sends jilted lover to jail” Fairfax NZ News (online ed, 13 November 2011) <www.stuff.co.nz>.

⁶⁰ Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at 87.

⁶¹ Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC IP14, 2009) at 175.

⁶² *L v G* [2002] DCR 234.

⁶³ Law Commission, above n 59, at 88.

Commission considered that the focus of the law should now be on the publication, rather than the creation, of such images.⁶⁴

In the Commission's view, the creation of a criminal offence was justified by the strong deterrent effect which "would clearly signal the outer limits of internet freedoms".⁶⁵ The Commission also had regard to the largely youthful demographic that commits such offences, but still found grounds to criminalise a limited form of revenge porn.⁶⁶

This recognition of the need for a revenge porn offence was an important push for change, but it did not go far enough. The offence is consciously limited to situations where the publisher of the image is the person who created it.⁶⁷ The rationale for this limitation is that it focusses on the "serious breach of trust" envisaged in such situations, which they presumably do not find exists in situations where the victim of publication created the image themselves.⁶⁸ If the focus is truly changing to the act of publication, rather than creation, who created the image should become practically irrelevant. A similar breach of trust exists in both situations, and to differentiate on the basis of who created an image would lead to an arbitrary distinction between two identical harms.

2 *The Harmful Digital Communications Act*

The Act aims to "provide victims of harmful digital communications with a quick and efficient means of redress".⁶⁹ The Act was passed amid an atmosphere of growing legal and political concern regarding online conduct, particularly cyber-bullying.

There was some debate during the passing of the Act as to whether it should include a criminal offence. At the Act's third reading, it was argued that a criminal offence was required in the Act as a "backstop provision for the most egregious, vile, and reprehensible conduct".⁷⁰ One minister felt that a more specific offence of making an intimate digital recording and distributing it without the depicted person's consent would

⁶⁴ At 88.

⁶⁵ At 88.

⁶⁶ At 88.

⁶⁷ At 89.

⁶⁸ At 89.

⁶⁹ Section 3(b).

⁷⁰(30 June 2015) 706 NZPD at 4850.

create a more updated offence with modern technological scope.⁷¹ The argument for a more specific crime was examined with regard to the Bill of Rights Act, concluding that a targeted revenge porn crime would create a reasonable limit on freedom of expression.⁷² In contrast, the criminal offence in the Act covers a broad ambit of communications, and is ambiguous as to the extent the Act will infringe rights.

Section 22 of the Act creates the offence of posting a harmful digital communication. It reads:⁷³

A person commits an offence if—

- (a) the person posts a digital communication with the intention that it cause harm to a victim; and
- (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
- (c) posting the communication causes harm to the victim.

The court may take additional factors into account in assessing the harm requirement, including the extremity of language, the age and characteristics of the victim, whether the posting was anonymous or repeated, the extent to which it was circulated, whether the digital communication was true or false, and the context in which it appeared.⁷⁴ The offence carries a sentence of up to two years in prison, or a fine not exceeding \$50,000.

B The Act's Weaknesses

The creation of this offence is a strong push by the New Zealand legal system to eradicate cyber-bullying and other Internet crimes. Revenge porn could certainly be covered by this section, and the sentence recognises the potential severity of such offences. However, this essay argues that the requirement of intent to cause distress or harm should be excluded from the definition of revenge porn. The harm requirement is problematic for several reasons.

Requiring evidence of intention to cause harm could mean those offenders who were purportedly motivated by other reasons such as humour, or those that simply did not think

⁷¹ At 4850.

⁷² At 4850.

⁷³ Harmful Digital Communications Act 2015, s 22.

⁷⁴ Section 22(2)(a).

of the impact their action would have on the victim, would escape liability.⁷⁵ It also excludes those who subsequently disseminate the material after the original disclosure for other reasons, such as monetary reward.⁷⁶ If revenge porn liability was limited to require intention to harm the victim, then many subsequent disclosures of intimate images or videos would escape liability even though that harm is likely to still occur. Attitudes need to change about intimate images disclosed without consent; the fact of possession does not give potential subsequent disclosers a right to on-share that material.

Further, the Act defines “harm” as “serious emotional distress”, meaning that a person will be liable for an offence when their digital communication would ordinarily cause harm and does cause harm to the victim. This is an arguably necessary element as it ensures the offence only covers acts that cause harm. However, to use revenge porn as an example, the fact of sharing intimate images without the consent of the depicted individual is inherently culpable in itself. Regardless of whether a victim is harmed by it, the act of revenge porn necessitates a specific criminal law response to the content of the digital communication, rather than its effects. The offence is too broadly worded to provide a strong deterrent to perpetrators of revenge porn, as its focus is on the outcome rather than the act itself.

Jenna Stokes argues that “Internet exceptionalism”, or treating the Internet as though it is somehow outside of the normative legal system, has affected the pace and style of online regulation.⁷⁷ Rather than a functional response to a societal problem, the offence in the Harmful Digital Communications Act may be a knee-jerk reaction to an online problem. New Zealand still needs a specific offence targeted at criminalising revenge porn in all its forms.

V A CRIMINAL SOLUTION

A United Kingdom

The recently passed section 33(1) of the Criminal Justice and Courts Act (UK) is specifically targeted at criminalising revenge porn. It is now an offence in the UK to:⁷⁸

⁷⁵ “‘Revenge porn’ criminalised in England and Wales” (17 February 2015) Brett Wilson <www.brettwilson.co.uk>.

⁷⁶ “‘Youtube Star in ‘Revenge Porn’ Case” (3 June 2015) Media Lawyer <www.medialawyer.press.net>.

⁷⁷ Stokes, above n 34, at 930.

⁷⁸ Criminal Justice and Courts Act 2015 (UK), s 33(1).

Disclose a private sexual photograph or film if the disclosure is made (a) without the consent of the individual who appears, and (b) with the intention of causing that individual distress.

In a circular providing guidance on the Criminal Justice and Courts Act, the government explicitly referred to revenge porn as a motivator for the introduction of this new section.⁷⁹ Its discussion makes the scope of the crime clear – this is not an online-only offence, and further disclosures will be held liable if the discloser intends to cause the victim distress. Offenders face up to two years in prison. The government also expressed hope that this crime will encourage website and service providers to tighten their security and monitoring measures.⁸⁰ The UK's stance sends a clear message to perpetrators and potential hosts of revenge porn. It also indicates that the government recognises and understands how harmful the offence can be.⁸¹

The new offence has already earned its place in the UK criminal justice system, with revenge porn prosecutions reaching record numbers since its introduction.⁸² A necessary implication of the increased case volume is that the new offence has given victims an avenue of support and validation, making them more likely to report incidents of revenge porn. The specific criminal offence has proved an effective instrument against revenge porn in the UK.

B United States

The United States (US) has undergone a flood of state legislation against revenge porn in recent years. Prior to 2013, just three US states had applicable law relating to revenge porn.⁸³ Since then, 18 more states have legislated against it.⁸⁴ A New York law firm's website keeps an up-to-date record of revenge porn laws; in total, 25 states have enacted

⁷⁹ Criminal Law and Legal Policy Unit *Criminal Justice and Courts Act 2015* (Ministry of Justice (UK), Circular 2015/01, 23 March 2015) at 52.

⁸⁰ At 52.

⁸¹ See (19 June 2014) 582 GBPD HC 1368 where Maria Miller described revenge porn as “sexual abuse”; (21 July 2014), above n 16, where Lord Marks of Henley-on-Thames recognised that “the betrayal and the hurt it causes could hardly be worse”.

⁸² “Revenge Porn Laws Having an Impact, Says DPP” (10 August 2015) Media Lawyer <www.medialawyer.press.net>.

⁸³ Mary Anne Franks, above n 34, at 4.

⁸⁴ At 4.

or pending legislation.⁸⁵ The government has sought help with federal legislation from the Cyber Civil Rights Initiative, which started the “End Revenge Porn” campaign in 2012. By consulting with experts who have often been victims of revenge porn themselves, the federal law is likely to be well informed.

The first state to criminalise revenge porn was New Jersey, which illegalised the “non-consensual observation, recording, or disclosure of intimate images” in 2004.⁸⁶ The Wisconsin legislature’s definition of revenge porn reflects an early conception that is still pervasive.⁸⁷

Captur[ing] a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.

Such a definition has merit in its reference to an expectation of privacy. However, it is limited in its application as it fails to address representations depicting nudity where the person depicted consents to the production of such a representation. Thus situations where the victim has consented to the perpetrator or another producing the image, or where the victim has produced the image themselves, would be excluded from liability under this statute. This exception can greatly limit some statutes’ application, as up to 80% of revenge porn images are produced by the victim themselves.⁸⁸ California criminalised the taking of intimate photos in 2013, but that law also had no penalty for material created by the victim.⁸⁹ Following consultation with the Cyber Civil Rights Initiative, this law was amended in 2014 to apply to images regardless of their creator.⁹⁰

⁸⁵ “State Revenge Porn Laws” (13 August 2015) CA Goldberg <www.cagoldberglaw.com>.

⁸⁶ New Jersey Code §2C: 14-9.

⁸⁷ Wis Stat § 942.09.

⁸⁸ Cyber Civil Rights Initiative “Revenge Porn by the Numbers” (3 January, 2014) End Revenge Porn <<http://www.endrevengeporn.org>>.

⁸⁹ See Stokes, above n 34, at 941 for a comparative discussion of these laws.

⁹⁰ Cal Penal Code § 647(j)(4)(A).

Illinois' new law came into effect on June 1, 2015, and is perhaps the most effective current revenge porn law in the US.⁹¹ The offence does not require that the defendant intends to harm the victim. Critically, it introduces an objective reasonableness test for dissemination, so that an offender may be liable where he or she:⁹²

- ... (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
- (3) knows or should have known that the person in the image has not consented to the dissemination.

This provision means that disseminators who share the material beyond the initial disclosure are subject to liability on the same grounds as the original perpetrator. These avenues of liability decrease the likelihood of an image being virally distributed online,⁹³ and may make the process of removal from the Internet both faster and easier. Further, it recognises the culpability of all disseminators who meet the objective test, sending a clear social message that intimate images are not automatically public property.

The Washington statute, which is yet to come into force, echoes this catch-all attitude.⁹⁴ It is hoped that this trend of objective standards will continue. These statutes send an important social message that sexual material, on the Internet or otherwise, should not be shared further without pause for thought as to consent and privacy.

The argument that limiting the disclosure of revenge porn infringes on an individual's right to free speech is the primary bulwark against the rapid progression of revenge porn legislation in the US. An analysis of free speech arguments is explored later in this essay, as these arguments are also relevant in a New Zealand context. However, where New Zealand's Bill of Rights Act is given subordinate status to other legislation,⁹⁵ the right to freedom of expression and association has been granted constitutional status in the US and thus presents a very real barrier to criminalisation.

⁹¹ "Seven Reasons Illinois is Leading the Fight Against Revenge Porn" (31 December 2014) End Revenge Porn <www.endrevengeporn.org>.

⁹² Illinois Criminal Code §11-23.5.

⁹³ "Seven Reasons Illinois is Leading the Fight Against Revenge Porn", above n 91.

⁹⁴ Wash Rev Code § 9A new section 1. This was unanimously passed on 11 June 2015 and will come into force 25 September 2015.

⁹⁵ Bill of Rights Act 1990, s 4.

It is difficult to argue that revenge porn laws do not limit freedom of expression, as they do create a content-based restriction on what a person is legally allowed to disclose.⁹⁶ However, such a restriction has been recognised as an exception to the First Amendment before; a distributor of child pornography, for example, would have no First Amendment defence.⁹⁷ Arguably, revenge porn should be included in this narrow category of exceptions.

Despite this, the Supreme Court has upheld First Amendment rights in relation to videos of animal cruelty and anti-gay hate protests, recognising that morally repugnant acts can be protected under the Constitution.⁹⁸ Former judge Andrew Napolitano has stated that “the First Amendment is not the guardian of taste”.⁹⁹ While it is hoped that revenge porn would qualify as an exception, the US may face obstacles in relation to freedom of expression that the New Zealand legal system can avoid.

C New Zealand

1 The introduction of a specific crime

“Criminal liability is the strongest formal condemnation that society can inflict”.¹⁰⁰ Following the conclusion that the New Zealand legal system does not provide sufficient sanctions against revenge porn perpetrators, this essay argues that the Crimes Act should be amended to include a new offence of unauthorised disclosure of intimate images. The crime should be inserted into the category of sexual crimes, and specifically drafted to include the essential elements of revenge porn. A proposed draft wording follows:

- 1) Every one who intentionally discloses an intimate image or video of any person is liable to imprisonment for a term not exceeding 2 years where:
 - a) the image or video was disclosed without the consent of the depicted person; and
 - b) the image or video was subject to an expectation of privacy; and
 - c) the discloser knows or should have known that the depicted individual did not consent to the disclosure; and

⁹⁶ Mark Bennett "Are Statutes Criminalising Revenge Porn Constitutional?" (14 October 2013) Defending People <www.blog.bennettandbennett.com>.

⁹⁷ “Here's What The Constitution Says About Posting Naked Pictures Of Your Ex To The Internet” (2 October 2013) Business Insider <www.businessinsider.com.au> at 1.

⁹⁸ At 1.

⁹⁹ Interview with Andrew Napolitano, Fox News senior judicial analyst (Fox News, 23 September 2013).

¹⁰⁰ Andrew Ashworth *Principles of Criminal Law* (Oxford: Oxford University Press, 2006) at 1.

- d) the discloser knows or should have known that those images or videos were produced under an expectation of privacy.
- 2) Whether the depicted individual created the image or video themselves is immaterial to this offence.
- 3) For the purposes of this section, “discloses” includes showing or sending the image or video to any person who is not the depicted person.

The law should be limited to instances where the image or video was created under an expectation of privacy, as this allows it to be extended to hacking situations but does not cast the ambit of the offence too widely.

2 *Balancing a specific crime with freedom of expression*

In its review of the Harmful Communications Bill, the Law Commission discussed the inevitable tension between freedom of expression and harmful publications. It examined whether the term “freedom of expression” applies to all expressions, whether harmful or not, or only legitimate expressions that serve a purpose. Revenge porn would be outside of the ambit of the latter, and thus not subject to a freedom of expression argument under section 5 of the New Zealand Bill of Rights Act.¹⁰¹ Under such an analysis, an instance of revenge porn would clearly struggle when arguing a freedom of expression standpoint. Intimate images distributed without consent would fall under the lowest level of speech value and would require minimal justification to restrict them.¹⁰² However, the Law Commission found that “even the most offensive and objectionable publications fall within the ambit of section 14”, and thus would be subject to the same rights of freedom of expression.¹⁰³ It is necessary to strike a careful balance between those rights and the rights of a victim of revenge porn.

Mary Anne Franks, speaking of a federal law in the US, argues that:¹⁰⁴

¹⁰¹ Law Commission, above n 59, at 69.

¹⁰² Jacob Rowbottom “To Rant, Vent and Converse: Protecting Low Level Digital Speech” (2012) 71 CLJ 355.

¹⁰³ Law Commission, above n 59, at 70.

¹⁰⁴ Mary Anne Franks “Federal Legislation On Tap to Fight ‘Revenge Porn’” (2015) Progressive Law Practice <www.progressivelawpractice.com>.

A clear, narrow, and precise law that only criminalizes intentional violations of sexual privacy that have no legitimate purpose not only does not violate the First Amendment - it in fact helps protect the values of free expression and association.

This competing freedom of expression narrative is compelling, and highlights why a specific crime is a viable solution. The Harmful Digital Communications Act's focus on acts causing harm means that an unquantifiable range of content could be restricted under the Act, as the focus is on the outcome of the communication rather than the elements of the communication itself. In contrast, a specific offence targeting revenge porn would pose a more justified and clear limitation on freedom of expression, as its focus is on the objective content of the disclosure, rather than its potentially variable effect.¹⁰⁵ Freedom of expression would be protected by a specific offence that delineates the boundaries of acceptable communication.

In the UK, defences in the revenge porn statute make allowance for freedom of expression.¹⁰⁶ These defences include where the defendant had no reason to believe that the victim had not consented to the disclosure of the images, and reasonably believed that the initial disclosure had been for reward. Thus if a defendant reasonably believed that the original material was consensual commercial pornography, they are provided a defence. Defences are also available if the disclosure was made in a journalistic context and the defendant reasonably believes that disclosure would be in the public interest, or where disclosure was necessary in the interests of crime prevention.¹⁰⁷

These defences have merit, and should be considered for incorporation into a specific revenge porn offence. They create reasonable exceptions to the crime in the interests of freedom of expression.

3 *Removing the intention to cause harm and actual harm requirements*

As outlined above, the intention of the offender should not be considered beyond the offence being an intentional act of disclosure, where the offender knows or should have known that the material was produced under an expectation of privacy, and that the depicted individual has not consented to the disclosure. While it is inarguable that almost

¹⁰⁵ (30 June 2015), above n 70, at 4850.

¹⁰⁶ Criminal Law and Legal Policy Unit *Criminal Justice and Courts Act 2015* (Ministry of Justice (UK), Circular 2015/01, 23 March 2015) at 52.

¹⁰⁷ Criminal Justice and Courts Act 2015 (UK), s 33(3)-(5).

all revenge porn results in harm, removing the requirements that the offender intends to cause harm and that the victim suffers harm expands the revenge porn offence to a wider range of potential offenders. These would include those who share intimate images or videos without a provable intention to harm the victim, and those who may not know the victim at all.

This may seem to cast the net too widely, but it can be justified by the objective elements of the offence that require the defendant to act reasonably. While it is clearly undesirable to punish innocent distribution, the offence would make potential offenders think twice when in possession of intimate material. It would remind them that having access to such material does not confer the right to disclose it further. The proposed offence's non-inclusion of a harm requirement moves the focus from the level of impact on the victim to the act itself, enshrining revenge porn as an inherently culpable act.

4 *The aims of sentencing*

Since this essay proposes a legislative change within New Zealand, it is appropriate to examine the local goals of sentencing. Creating a specific offence of revenge porn should achieve the objectives of criminalisation in New Zealand.

In some cases, it will be advantageous to remove perpetrators of revenge porn from society. As a gender-based crime, revenge porn can expose misogynist attitudes that may manifest against women again in the future. As one of the criminal law's goals is incapacitation, the proposed offence should carry the possibility of a sentence of imprisonment to remove the offender from society if necessary.¹⁰⁸

Retribution provides "punishment that reflects the seriousness of the offence".¹⁰⁹ Sentencing offenders for revenge porn could see a wide range of situations come through the courts. Alternative sentences to incarceration may be appropriate in some circumstances. However, it is important to emphasise that revenge porn sometimes slips into the realm of socially acceptable behaviour, where it should properly be regarded as a serious offence. Some acts of revenge porn can suggest a criminally reprehensible mind justifying retributory action.

¹⁰⁸ Judy Paulin, Wendy Searle, and Trish Knaggs *Attitudes to crime and punishment: A New Zealand study* (Ministry of Justice, December 2003) at 53.

¹⁰⁹ At 54.

Deterring future offending is a fundamental tenet of the criminal law.¹¹⁰ Deterrence can involve both specifically deterring a particular offender, and generally deterring society from viewing certain acts as acceptable or inconsequential. In an Australian case in 2011, a man posted nude photographs of his ex-girlfriend on his Facebook page.¹¹¹ When he refused to remove them, she took legal action and he was sentenced to six months in jail.¹¹² The judge determined that an imprisonment sentence was appropriate due to the level of harm that can be done by posting intimate images on a public forum, and stated that, “there does have to be a general deterrence aspect to these sorts of offences because they are offences that are easy to commit”.¹¹³ The ease with which revenge porn can be disclosed both initially and by subsequent disclosers is an important consideration in its criminalisation. As outlined above, a specific offence would make potential offenders think before they act, creating an effective deterrent regardless of the offender’s level of involvement in the offence.

Criminalising revenge porn with a specific offence would achieve multiple goals of sentencing. While the criminal offence in the Harmful Digital Communications Act goes some way to achieving these goals, it creates an insufficient deterrent at the societal level. The lack of a reference to revenge porn in the statute means that it risks failing to send a message to the general public of the culpability of such acts.

VI CONCLUSION

This essay argues for the introduction of a specific revenge porn offence in New Zealand. It has established that revenge porn causes a range of harms for its victims, having emotional, social, and pecuniary consequences. These harms can lead victims to blame and harm themselves and retreat from society.

The available civil remedies are not inapplicable to revenge porn, but they do have limitations. The monetary and time hurdles that a victim must overcome to initiate civil proceedings are not feasible for the majority of society. Further, a civil action places responsibility on the victim to pursue a claim. Given the extent of harm that revenge porn

¹¹⁰ A P Simester and W J Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 1.2.2.

¹¹¹ *Police v Usmanov* [2011] NSWLC 40.

¹¹² At [4].

¹¹³ *R v Usmanov* [2012] NSWDC 290 at [4].

can cause, the state should be able to step in where appropriate to relieve victims of this burden. Civil claims are also limited to providing damages if a claimant should be successful, whereas it has been demonstrated that the wider range of sentences provided by a criminal sanction, and the associated stigma, are appropriate to control revenge porn. Platform liability for revenge porn is an important avenue to explore. While it is outside of this essay's scope, exploring the potential for liability of website and social media providers could be an effective method of tightening their security regimes and encouraging swift responses.

Comparative jurisdictions are taking rapid strides towards effective revenge porn laws. These are imposing criminal sanctions and are increasingly worded with regard to the variety of situations that can produce and surround the disclosure of revenge porn. In particular, the Illinois statute introduces a "reasonable person" standard that can make downstream distributors of revenge porn liable. The New Zealand legislature should create a new offence to reflect social and technological change, as the UK and the USA have done. The Harmful Digital Communications Act is a useful tool, but its focus on the outcome rather than the content of digital communications renders the Act an insufficiently clear and effective deterrent to revenge porn perpetrators.

Introducing a specific crime would send a clear message about the place of revenge porn in today's society. The creation of an explicit criminal sanction is no small ask, but it is a necessary step towards the eradication of revenge porn. A targeted revenge porn crime would provide its victims with long-overdue justice.

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