Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from Lilian Edwards

ss 2-3 ("disclosure of intimate photograph or film")

1. I am responding to the call for evidence on this Bill in my capacity as an expert on the Internet, and on crimes using the Internet and technology. I was Special Advisor to the HL Select Committee on Communication on social media offences in summer, and am regarded as an international expert on "revenge porn". I am also an expert on the liability of Internet intermediaries (such as Facebook, Google et al) and on privacy and data protection online. I have in the past advised WIPO, the Council of Europe and the OECD on intermediary liability issues; and was one of two international experts asked to help with the impact assessment for the EC General Data Protection Regulation (GDPR - still in progress). As such (with the greatest respect for the quality of the names on the consultation response list) I think I am possibly your only consultation respondent who has experience of the wider issues around Internet content and how to police it effectively. As such I have been encouraged to provide further evidence, as per below, which would supplement the expertise on Scottish and international criminal law aspects. I would add that I would be happy to give evidence orally to the Committee if this was of use. I am only commenting on ss 2-3 and Schedule 1 and on selected aspects I think are problematic.

Public interest defence (s 2(3)(d))

2. I am not sure this is required. The courts have shown an ability in areas such as copyright and defamation to read in a public interest defence where they feel it necessary. While I understand the desire for certainty in criminal matters, it is hard to imagine a case where disclosing an image, taken without consent, *with intention to cause fear alarm or distress (or recklessness as to such)* (s 2(1)(b)) could meet a public interest test; and if such a very rare example arose, the courts could surely deal with it (or the prosecutor). As it stands it encourages the imagination of spurious defences (eg "I needed to warn others about that slut") and thus encourages the commission of the defence.

Consent

3. There is no definition of consent in the Bill which seems odd. By contrast SOSA2009 has a definition of consent in s 12 to mean "free agreement". It is not clear to me if this is imported into the 2015 Bill (it is not referred to as far as I can see in Part III, General) though I imagine a court might draw on it. (It is also not clear judging from SLC No 209 *Report on Rape and Other Sexual Offences* 2007 if that 2009 Act definition of consent codifies common law or reforms it. This may further muddy the waters.)

4. Section 2, 2015 Bill, is an odd offense in that the main vice is not an *original sexual act* done without consent (as in rape and similar) but a *disclosure* done

without consent. As such it is nearer a data protection (DP) offence than a sexual offense (the actual content is likely to be perfectly legal by normal standards of obscenity law, hence I am pleased to not see the term "pornography" used, however handy). As such, I think it would be useful to go beyond the 2009 definition and include the definition from the **Data Protection Directive 1995 art 2** which is "*any freely given specific and informed indication of his wishes*". [underline added]

5. This definition solves a few other problems I see in the draft Bill. First, I do not think s 2(4)(b) is appropriate to include. A blanket consent to any future disclosure of intimate photos in any circumstances to do anything with cannot exculpate. (It can of course mitigate sentence, or question if a prosecution should be brought.) But the essence of laws protecting personal data (and we are talking here of "sensitive personal data" which has the highest protection, in DP law, of requiring explicit consent to process) is that a consent must be to specific disclosures, with some degree of understanding (the informed part) of how the personal data will be processed eg where the content might end up, who might see it and how to get it down. I suggest therefore that only *specific* consent (s 2(4)(a)) should be a defence. Professor Chalmers in discussion concurred in the view that both at common law and in the 2009 Act, consent must be to a specific act.

6. Furthermore, there is an issue of whether consent must be explicit or can be implied. DP law (primarily, though not exclusively, civil) prescribes that personal data relating to sexuality is sensitive personal data and should be processed only with the explicit consent of the data subject. While criminal law may not think it is appropriate to impose the same standard, I do think this is another support for defining consent as free and specific, and ideally, informed.

7. Assuming implied consent is acceptable, this interacts with s 2(3)(d) which allows for a reasonable belief as to consent to suffice. In relation to "reasonable belief", I note that SOSA 2009 in its definition of consent has in s 16, "*regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were*." This is very relevant to the s 2 offense here and should I think be explicitly imported, perhaps by reference. Taking a picture is an explicit act that takes thought; it is not hard to ask explicitly if it can be shared, at the time or later and it is very easy to claim one honestly thought there was implied consent to the point of seriously diluting any effectiveness of the provision. It would also seem useful to import the refinements to consent in ss 13-15 of SOSA2009 into 2015 Bill. In particular, it is useful to clarify that even if consent to disclosure is given it can be withdrawn at any time (see SOSA 2009, s 15(4).

Defenses: "intimate situation" and public places

8. There seems here to be an attempt to remove images taken in public places, and then disclosed without consent, from the remit of the offense. I am not convinced this is appropriate.

9. Examples are given of taking pictures of naked protestors in public, with the implication sharing these without consent should not be criminal. However , as I noted in my response to the consultation, we all know that with phone cams, private

sexual images are captured everywhere these days and if they are then disclosed without consent as much harm will be caused as if they had been taken in a locked bedroom. I do think it is excessively formalistic to assume that anyone who has an intimate image photographed in public impliedly gave consent for it to be shared anywhere. I also think the current definition will lead to very odd results, eg, if a picture of a sexual act was taken in a car parked in a public carpark after hours ("dogging"), there will be a defense if there was another car there also with occupants similarly engaged, but not if it was the only car(s s2(5)(ii)). This seems silly and will be hard to explain to juries.

10. Would it not simply be easier to delete entirely s2(5) and instead add to the definition of an "intimate situation" in s 3(1) a subsection (1A) requiring also that a person has a reasonable expectation of privacy? This phrase has a long interpreted understanding in English and Scots law and can clearly refer to instances where private acts are performed in public. Naked protesters would however not have such a reasonable expectation.

Intermediaries, hosts or service providers and their role/liability

11. As I noted in my response to the consultation, the key issue for victims of this crime is often not the infliction of criminal justice on perpetrators but a way to obtain speedy removal of the material from the site where it is hosted. This may be a reputable site like Facebook or Twitter or it may be a dedicated revenge porn site where pictures are displayed, often with full names, email addresses and other personal information alongside, till "ransom" is paid to have them taken down. The business model of these sites is extortion. Such sites are to date mainly based in the US. The dominant legitimate sites are also primarily run from the US.

12. It is not currently clear if such platforms are under a legal obligation to remove these images and what priority they give it. Dedicated US sites based around extortion will simply not take down because it is their business model. Legitimate sites such as Facebook, Twitter, Reddit and Google have only very recently started to take revenge porn seriously. All these sites are eventually likely to take down voluntarily on request but since it is not legally mandated, it has a low priority, especially when compared to requests for take down of, from the criminal side, child pornography or from the civil side, copyright infringing material. Given the vast volume of material such sites are asked to remove, and the small sizes of abuse teams, requests may take a very long time to process. Such sites also tend to run on their own internal rules without reference to the domestic laws of the countries where their users live. It is often reported as particularly difficult to get takedown from some US based sites because their home law ethos centres around freedom of expression, and websites in the US are also given a complete immunity from liability for content created by a third party (here, the person who discloses the image) (US Communications Decency Act s 230 ©).

13. The best way to incentivise removal quickly and effectively is by placing legal liability on the platform if they do not remove. Criminalising the host site may sound draconian. However this liability can be *entirely removed* if takedown is done expeditiously. This is the basic framework for illegal and actionable content encouraged by the EC Electronic Commerce Directive 2000, arts 12-15, which is

implemented into UK law in Regulations 2002 No 2013. However for the immunity to act as a carrot, there must be a stick - a primary offence committed by the platform if they keep the material up, ie, host and/or publish it.

14. In the current Scottish Bill, is there no such primary offence by the platform. (As such, Sched 1 is in fact redundant.) This is because the platform does not intend to cause fear, alarm or distress, nor is it reckless as to such a consequence. Platforms will claim correctly that they cannot monitor the vast volume of apparently legal pictures posted on their sites each day. However what they can easily do is take down when they are pointed at an image and told it is illegal and that they will commit a crime if they do not remove expediently. This is how child pornography was eradicated from UK and EU websites.

15. I suggest the new Scottish legislation makes it an offence for a platform, network or communications provider ("host" or "mere conduit" in the language of the ECD Regs) to distribute or publish a relevant image if the image is removed expeditiously after reasonable notice was given. The offence should be subject to an intent simply to publish the material (contra the English Act offence for service providers, only where there IS intent to cause distress etc, also rather strangely restricted to foreign service providers only) except that any defences could apply for the platform as for any other accused.

16. The one point of uncertainty here is how long "expediently" might mean. The ECD does not define this nor does the general transposition into UK law. However it would be quite possible to state a time for the purpose of the 2015 Bill. Two weeks might seem reasonable but service providers could give advice on this. There is a UK precedent for naming a precise time in the Electronic Commerce (Terrorism Act 2006) Regulations 2007, which gives host two days to remove material encouraging terrorism unless they have "reasonable excuse" with a maximum sentence of seven years for not so doing.

17. In my view this will actually contribute more to solving this problem for its victims than the mere creation of a criminal offence for primary perpetrators, and is my main reason for responding to this consultation. If Scotland took this approach it would be leading the world in providing remedies for victims, as to my knowledge no revenge porn law in the English speaking world has yet taken note of this part of the problem.

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