

Submission

to the

Select Committee on Security and Justice

on the

Cybercrimes Bill [B 6B-2017]

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1. Introduction

1.1. The Centre for Applied Legal Studies ('CALs') is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALs connects the worlds of both academia and social justice. CALs' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALs operates across a range of programs including rule of law, business and human rights, environmental justice, basic services, and gender.

1.2. The gender programme at CALs focuses on ensuring the rights of all individuals from different self-identified genders, sexual designations and/or sexual orientations are realised and protected as set out in the Constitution of South Africa.

1.3. Historically CALs has engaged in gendered issues through numerous submissions to parliament. Some of CALs' submissions include submission to the Department of Women on the United Nations, Convention on the Elimination of Discrimination Against Women (CEDAW)¹, the Speaker of the National Assembly on the Choice on Termination of Pregnancy Amendment Draft Bill², the Director-General of Justice and Constitutional Development on the Draft Regulations to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 made in 2015³, to the Director-General of Justice

¹ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/CALS%20submission%20CEDAW%20Final-Oct%202015.pdf>.

² <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Submissions%20on%20the%20Termination%20of%20Pregnancy%20Amendment%20Bill%20.pdf>.

³ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Sexual%20Offences%20Court%20November%202015.pdf>.

Constitutional Development on the Draft Regulations Relating to Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) in 2018⁴, to the Joint Multi-Party Women’s Caucus on the Response to the South African Law Reform Commission’s Report on ‘Sexual Offences: Adult Prostitution’ in 2018⁵, to the Department of Basic Education on the Draft National Policy on the Prevention and Management of Learner Pregnancy in Schools in 2018⁶ and to the Minister of Justice and Correctional Services on the Recognition of Customary Marriages Draft Amendment Bill, 2018⁷.

1.4. As a law clinic, CALS has also worked with a number of women and girl children facing domestic violence, sexual violence, and harassment. These matters have also included aspects of online threats and coercion of minors that led to sexual offences, for example in the recent criminal case of *S v Kyd*. We are thus not only well-versed in research around gender-based violence and online sexual harassment, but are aware of how this kind of violence plays out practically including in the serious consequences for survivors and the difficulties they face currently in reporting crimes of this nature.

1.5. In light of this experience, we assert that CALS has sufficient expertise and institutional knowledge to comment on the Cybercrimes Bill (“the Bill”). Our

⁴ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Centre%20for%20Applied%20Legal%20Studies%20-%20Submissions%20on%20the%20Draft%20Regulations%20Relating%20to%20Sexual%20Offences%20Courts.pdf>.

⁵ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20-%20Response%20to%20the%20SALRC%20Report%20on%20Adult%20Prostitution%20.pdf>.

⁶ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Comments%20on%20Draft%20National%20Policy%20on%20the%20Prevention%20and%20Management%20of%20Learner%20Pregnancy%20in%20Schools.pdf>.

⁷ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20-%20submission%20on%20the%20draft%20RMCA%20Amendment%20Act.pdf>.

submissions focus on those sections of the Bill relating to the areas with which we have the most familiarity as summarised above. Our submissions are primarily concerned with the offences outlined in Part II of the Bill and related sections on sentencing and protection orders but may make reference to other sections. In instances where we have not commented directly on a portion of the Bill, this should not be taken to signify implicit agreement with the correctness or appropriateness of that section.

- 1.6. We commend the Select Committee on Security and Justice for taking a proactive approach and particularly for recognising the seriousness of what is often referred to as ‘revenge porn’. We welcome the opportunity to comment on the Bill and would like to draw attention to a number of aspects of the current draft, which we believe could benefit from the reflections we set out in detail below.

2. Reflections on the Bill

2.1. The scope of the Bill

The purpose of the Bill is *inter alia* to ‘criminalise the distribution of data messages which are harmful and to provide for interim protection orders’. The types of data messages contemplated in Part II of the Bill and termed ‘Malicious Communications’ only represent a tiny fraction of the possible forms of online interaction that may be considered ‘harmful’ (or as per the heading of Part II, ‘malicious’).⁸ The offences outlined criminalise a few examples of the kinds of conduct that constitute online harassment and, more specifically, online sexual harassment.

⁸ The language used in the Bill around its purpose, to criminalise the distribution of data messages which are harmful, has a different focus and different determining factor around criminal action to that of Part II of the Bill which looks at content which is malicious. Harm is concerned with consequence of an action on the individual, whereas malice or a malicious intent is concerned with the intention of the accused. These are different tests, one based on looking at the effect on the victim of the offence and the other on the subjective state of mind of the accused. It must be made clear which approach the Bill takes and the language must align with this.

Online harassment is a well-documented phenomenon involving the use of digital content to threaten, coerce, extort, discriminate against, humiliate or otherwise cause harm to an intended victim. It can take many different forms and can include cyberstalking, cyberbullying and cyber-grooming or online predation. These forms of online harassment may be sexual or not in nature, but tend to have a disproportionate impact on vulnerable groups like women and children.

Instances of online harassment may be said to fall into two broad categories: data messages which are sent directly to victims and those which are posted about victims. Section 14 and 15 of the Bill criminalise messages sent to victims only if they contain a threat or incitement to cause damage or bodily harm. Section 16 criminalises messages about victims only if they include an 'intimate image' posted without the victim's consent.

These sections are extremely limited in focus and do not take cognisance of the wide variety of forms of online harassment women and children, in particular, may be exposed to. It is irrational to include, for example, online threats of damage to property as a criminal offence and yet make no mention of grooming minors for the purposes of committing other sexual offences or exposing them to sexual content online. In effect, the Bill criminalises very few examples of online harassment while ignoring others which may be similarly or more harmful – for no apparent reason. This creates the impression that the forms of violence listed in the Bill are the only forms of 'serious' or unwanted online sexual conduct which warrant criminal sanction, while others do not. Our courts, however, have recognised that all sexual violence can result in comparable trauma to victims and survivors, and must be treated seriously in our law. The Constitutional Court has, for example, judged that there should be no prescription period for prosecuting any sexual offence, stating, '[s]exual abuse in all forms... infringes the survivor's right to bodily and psychological integrity'.⁹

⁹ *Levenstein and Others v Frankel and Others*.

If a few examples of online sexual harassment are to be included in the Bill as offences, it would be irrational not to include other forms of online sexual harassment which may have similar effects on their intended victims. There is nothing to say the consequences for victims of online attacks are not just as serious or in some cases even more serious than offline attacks – especially considering the ease of access to victims and audiences online and the sheer volume of messages that may be sent or shared.

2.2. The difference in the legal treatment of online harassment versus offline harassment

In our analyses of the Bill, we assert that sections 10 (cyber extortion), 14 (data message which incites damage to property or violence), 15 (data message which threatens persons with damage to property or violence) and 16 (distribution of data message of intimate image) may all be relevant to online harassment and online sexual harassment.¹⁰

According to section 19 (Part V Sentencing) of the Bill sections 10; 14; 15; 16 and 17 all attract criminal sanction. This creates an uncoordinated or unaligned system of laws around harassment, sexual harassment, and domestic violence in the South African legal landscape. Under both the Domestic Violence Act 116 of 1998 ('Domestic Violence Act') and Sexual Harassment Act 17 of 2011 ('Sexual Harassment Act') there are no criminal sanctions for the acts of violence contained in the statutes *per se*, instead there are criminal sanctions linked to the contravention of a protection order which has been obtained under either of the acts.¹¹ The consequence of such is that harassment and domestic violence are not considered as criminal offences in South African law.

¹⁰ The fact that these sections may be read to include (although not explicitly so) many forms of online harassment and online sexual harassment is problematic as legislation must always be unambiguous. The Bill must be broader in acknowledging the forms of violence online yet exact in listing such.

¹¹ See section 18 of the Harassment Act and section 17 of the Domestic Violence Act.

The reasons for making the processes around harassment, sexual harassment and domestic violence a quasi-criminal one appears to be a contentious one, where it is stated in the Law Commission Paper of 1999 (which was published after the enactment of the Domestic Violence Act) that the idea of dealing with harassment and domestic violence outside of the criminal court is really an act of undermining the seriousness of the crimes of harassment and domestic violence.¹² Important to note is that the predominant victims of these forms of violence are women, which emphasises that violence against women is not seen as serious as other crimes, such as assault, and is relegated to the realm of the private sphere and private law.

Under the Bill, there is the option of a protection order against the perpetrator(s) of online harassment/sexual harassment as contained in Part VI, yet the offences attached to perpetrating the crimes under these sections are not dependent on the protection order being issued and contravened but rather the protection order acts as an interim order 'pending finalisation of criminal proceedings'. This is different from the procedure for harassment, sexual harassment and domestic violence that occurs offline.

The anomaly which is created is that online harassment, online sexual harassment, and online domestic violence are escalated to the status of statutory offences yet offline harassment, sexual harassment, and domestic violence remain subject to the quasi-criminal process.

Ultimately a decision must be made as to whether harassment, sexual harassment and domestic violence should become criminal offences or alternatively online harassment, sexual harassment and domestic violence must form part of the quasi-criminal procedure. The reason for this is not only the coordination and alignment of the law but also the escalation of online harassment, sexual harassment and domestic violence to criminal offences sketches these violations as more serious than those not occurring online which is incorrect.

¹² South African Law Commission *Research Paper on Domestic Violence* April 1999. Available at <http://www.justice.gov.za/salrc/rpapers/violence.pdf>.

2.3. Sentencing and penalties

Setting aside the irrationality of criminalising some forms online harassment and not others, there are also issues with the penalties imposed for those offences which are listed in the Bill. Section 19 (7) states that '[a]ny person who contravenes section 14, 15 or 16 is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment'.

In instances of online sexual violence, no sentence should result in a mere fine. Although a fine is an option for certain sexual offences as set out under section 56A in SORMA, this is an incorrect approach to dealing with sexual violence offences. As mentioned above, the Constitutional Court has acknowledged that the resultant harm to the individual in all sexual offences may be comparable when it stated that 'sexual offences may differ in form, but the psychological harm they all produce may be similar'.¹³ In light of the comparable harm, all sexual offences should be treated as serious sexual offences and be added to the list of offences that attract minimum mandatory sentencing as set out under section 51 of the Criminal Law Amendment Act 38 of 2007.¹⁴

In focusing on the seriousness of sexual offences and particularly online sexual offences, some jurisdictions such as the United States have recognised that committing a sexual offence using a computer should actually be seen as a *more serious* crime carrying a corresponding stronger penalty. For example, the United States Sentencing Commission Guidelines Manual suggests at sub section 2G1.3 (b) (3) that the use of a

¹³ *Levenstein and Others v Frankel and Others*.

¹⁴ For further reading on the irrationality of not including all sexual offences under minimum mandatory sentencing offences see S Swemmer 'Attempted rape is not seen as a serious offence in SA law' *Daily Maverick* (3 March 2019). Available at <https://www.dailymaverick.co.za/opinionista/2019-03-03-attempted-rape-is-not-treated-as-a-serious-offence-in-sa-law/>.

computer to ‘persuade, induce, entice, coerce, or facilitate the travel of, [a child] or to engage in prohibited sexual conduct” should result in an *enhanced* sentence’.¹⁵

In many cases, using online platforms gives an offence a greater potential for harm. For example, posting an ‘intimate image’ of someone without their consent to a platform with a large audience means the image may be seen and copied by thousands or even millions of people and the resulting damage to the person’s reputation, relationships and even earning potential could be enormous. Using online tools makes it possible to distribute more material to more people more efficiently in less time than corresponding ‘offline’ crimes.

2.4. The language of the Bill

There are some specific instances where the Bill could benefit from a more inclusive approach to language use, particularly around the definitions of some terms and expressions relating to gender identity. Perhaps most pressing are the use of ‘intimate image’ and ‘a female’ as set out in section 16.

‘Intimate image’ is defined in the Bill as a depiction of a person, real or simulated, in which they are nude or specific parts of their bodies are displayed whether exposed or covered ‘in a manner that violates or offends [their] sexual integrity or dignity’. Though this appears to be quite a broad definition, there are a number of aspects which need to be clarified and amended.

The word ‘image’ is usually taken to refer to a still picture or photograph. Including only still images would not account for the many kinds of files that could be included as offending data messages, such as video clips, audio clips, moving images or ‘gifs’, as well as text-based messages. It is, however, defined as a ‘depiction’ which would be a

¹⁵ United States Sentencing Committee ‘2018 Chapter 2 E-K’. Available at <https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-2-e-k#NaN>.

much broader term and may include all of these possibilities, including a description of the complainant. This should be clarified.

Using the term 'intimate' to describe the 'images' in question is telling. The word is usually used to refer to close relationships or to something personal and private. The connotation it gives is thus that there is some inherent characteristic of certain images (or the body parts they depict) that is private. The body parts in question are limited to 'genital organs or anal region, or if B is a female, her breasts'.

This does not, however, do justice to possible complainants who may face online sexual harassment of this nature. Use of the words 'a female' connotes a biological category primarily used to refer to animals and may be seen as a disrespectful way to refer to a group of people. It is also exclusionary; conflating the word 'female' with 'woman' effectively erases gender non-conforming people and trans men and women. This also does not make any sense in light of the fact that the people depicted may be children, who may not have 'breasts' but who should all be offered the greatest possible protection under the law regardless of gender or stage of development.

The definition should be made as inclusive as possible for children and adults of all gender identities and expressions. Instead of referring to specific body parts and biological categories, it should rely on the second part of the definition which opens what makes an 'image' violating and offending open to interpretation. To assist in signaling this, the word 'intimate' should be changed to 'sexualised or intimate'.

2.5. Responding to the realities of cyberspace and online sexual harassment

Not only is the Bill limited in terms of the forms of online sexual harassment it criminalises, it is unclear whether it sufficiently addresses the realities of these kinds of cybercrime. For example, at section 20 (1) (b) the Bill allows for a magistrate to "order an electronic communications service provider or person in control of a computer system to remove or disable access to the data message in question".

While it may have admirable intentions, this section appears to misunderstand the nature of this kind of practice. The data message in question may well have already been posted to numerous online platforms, shared and downloaded by thousands of different internet users or bots and currently saved on multiple servers in areas located around the world. The message may also be shared on parts of the internet the complainant has no knowledge of or access to, such as private messages on social media platforms and even the Dark Net or Deep Web. Deleting such a data message from the entire internet and every device that has come into contact with it is not as simple as blocking access from a single 'computer system'.

2.6. The balancing of rights

Various cultures and religions have practices that may be manipulated and become a form of online abuse. Furthermore, unwanted consequences of taking part in the various practices may not always be communicated to the potential victim. By way of example, the 'reed dance' of Zulu custom is known as the ceremony where young women are celebrated for keeping their virginity. The Zulu King (currently Goodwill Zwelithini Zulu) upholds this culture and encourages young women to keep their virginity and abstain from sexual activities. There are however negatives factors which can arise from the ceremony, any person at the ceremony can take pictures and videos without the consent of the individuals taking part in the practice and subsequently share them on any online platform.

The forms of violations that can emerge in this instance can go beyond that of merely sharing images without the individual's consent. It can include the illegal depiction of naked children, which cannot be consensual, and is deemed child pornography in South African law. Furthermore, there can be online bullying and harassment informed by patriarchal views on women, where the bodies of the individuals taking part in the ceremony may be criticised and/or ridiculed.

In light of this the Bill will need to balance the right to certain cultural practices (section 15 and section 30 of the Constitution) with right of vulnerable individuals to protection of their dignity (section 10 of the Constitution) as well as their right to safety and security (section 12 of the Constitution) as an individual.

Another example of the need of the Bill to balance individuals' rights to religion and cultural practices is the influence this may have on definitions around what constitutes an 'intimate' image as contained in section 16 of the Bill. As pointed out by Huber some women in Muslim communities may consider an intimate image of themselves to be one where they are not wearing religious clothing.¹⁶ The Bill ultimately will not serve these individuals as the definition of 'intimate' is extremely narrow.

3. Further recommendations

3.1. INTERPOL draws a useful distinction between 'cybercrime' on the one hand and 'cyber-enabled crime' on the other. 'Cybercrime' is a term used to refer to crimes that are by nature technological and involve attacks on computers, while 'cyber-enabled crimes' are existing crimes which are now taking place using online media like child pornography.¹⁷ We would propose adopting a similar approach and restricting the Cybercrimes Bill to 'cybercrimes' while adapting existing legislation to incorporate 'cyber-enabled crimes'.

3.2. Should the above approach prove unfeasible, we would recommend that several of the sections be amended to be as inclusive as possible.

3.2.1. Section 10 should be amended to include a specific reference to extortion for sex acts and be included as a sexual offence with a corresponding stronger sentence imposed.

¹⁶ A, Huber 'Revenge porn law is failing victims – here's why' *The Conversation* (25 January 2018). Available at <https://theconversation.com/revenge-porn-law-is-failing-victims-heres-why-90497>.

¹⁷ <https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime>.

- 3.2.2. Section 12 should likewise be amended to include specific reference to theft of sexualised or “intimate images” and/or sound and/or video and/or text and be included as a sexual offence with a corresponding stronger sentence imposed.
- 3.2.3. Section 14 should be amended to account for any unwanted messages of a sexual nature and included as a sexual offence.
- 3.2.4. Section 15 should likewise be amended to account for any unwanted messages of a sexual nature and included as a sexual offence. It should also incorporate threats to release content such as that contemplated in section 16.
- 3.2.5. Section 16 should be broadened to include sexualised or “intimate images” as well as sound and/or video and/or text. It should also be amended to remove mentions of “a female” and rather include any kind of data message which the complainant subjectively identifies as sexualised.
- 3.2.6. Section 19 (7) should be amended to have the option of a fine removed for those convicted of a sexual offence.
- 3.2.7. Section 20 (1) should be amended to remove reference to the finalisation of the order to be dependent on separate criminal proceedings.
- 3.2.8. Section 22 (1) should likewise be amended.