SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON COMMUNICATIONS ON THE

CYBERCRIMES AND CYBERSECURITY BILL

[B -2017]

ON BEHALF OF

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WE WOULD BE GRATEFUL FOR THE OPPORTUNITY TO ADDRESS THE COMMITTEE

INTRODUCTION TO THE SUBMISSIONS

Thank you for the opportunity to provide comments on the Cybercrimes and Cybersecurity Bill, 2017 (the "**Bill**").

Our comments are narrow in their focus - we have concentrated on clause 18 of the Bill, which provides welcome statutory attention to the concept of so-called revenge pornography and non-consensual dissemination of private material.

For ease of reference, the generic term "revenge porn" will be used throughout these submissions to cover all instances of non-consensual distribution of private material, regardless of how the material was obtained (for example by hacking) or the intention for their distribution (causing harm, body shaming, extortion etc).

BACKGOUND THE DIGITAL LAW COMPANY

Emma Sadleir is the Director of the Digital Law Co (Proprietary) Limited (Registration number: 2014/044021/07) and Dr Elizabeth Harrison is her associate. These comments are therefore provided in light of The Digital Law Company's extensive experience at the forefront of social media law in South Africa and, in particular, in assisting clients who have been the victims of non-consensual distribution of private content. Both Emma and Elizabeth are actively involved in educating the public about the safe use of social media by providing training and workshops on the legal, disciplinary and reputational risks of social media (collectively, they given over 1000 talks on the topic to schools, universities and corporates in the last four years).

Emma and Elizabeth do a lot of work on revenge porn and regularly assist victims, usually on a *pro bono* basis. These victims are in desperate situations when they approach The Digital Law Company, having found that intimate images or footage of them has been distributed. The Digital Law Company have been involved in many cases. Significantly, The Digital Law Company serves as the first point of call for many victims of revenge porn. Emma and Elizabeth are regularly approached for advice on this topic by both the general public and the media. It would be fair to say that Emma has become the "face" of combating revenge porn in South Africa.

Emma is the co-author of "*Don't Film Yourself Having Sex…And Other Legal Advice for the Age of Social Media*", published by Penguin Random House in September 2014. Emma is also the co-author of the social media section of the legal textbook, "*Communications Law*" published by Lexis Nexis in January 2015. Elizabeth and

Emma are co-authors of *"Selfies, Sexts and Smartphones: A Teenager's Online Survival Guide*" to be published by Penguin Random House in October 2017.

THE REVENGE PORN EPIDEMIC

The unauthorised, non-consensual distribution of private material, particularly over the internet, is an increasingly prevalent and alarming phenomenon. Such distribution has the power to destroy the lives of those who are victims of such acts, and denigrates their constitutionally guaranteed rights to dignity (section 10), bodily and psychological integrity (section 12(2)) and privacy (section 14), as well as the rights of children to be protected from maltreatment, abuse and degradation (section 28(1)(d)).

In view of the seriousness and increasing prevalence of this threat, we welcome the fact that attention is being drawn to this area, and it is in this light that we would like our comments on the Bill to be viewed.

Emma and Elizabeth encounter many cases of revenge pornography every single day of the week. The cases vary dramatically in motive and method, and some of these cases would in fact fall outside of the remit of the clause as drafted currently. This is of concern, as these cases certainly should constitute the offence of revenge pornography. We are therefore proposing amendments to clause 18 that would make it more inclusive and comprehensive in its protection of victims. Before we discuss these amendments, however, we wish to draw attention to the question of whether this act is indeed the right vehicle at all for the discussion of revenge pornography.

RIGHT IDEA, WRONG ACT

We applaud the progressive stance taken to criminalize behaviour that can destroy lives, with South Africa being amongst the first countries in the world to take statutory action in this area. With that recognition, we wonder if this Bill is the correct vehicle to contain this vital statutory provision. The conduct that clause 18 correctly seeks to criminalize should, in our view, be more properly dealt with under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (the "**Sexual Offences Act**").

The purpose of the Sexual Offences Act is to criminalise any attempt, conspiracy or incitement to commit a sexual offence; to provide the South African Police Service with new investigative tools when investigating sexual offences; and to provide

certain support services to victims of sexual offences, inter alia, to minimise or, as far as possible, eliminate secondary traumatisation. Proceedings under the Sexual Offences Act are also required to be held in camera, to protect the dignity and reputation of the victim.

Not only is the nature of the offence of revenge pornography therefore more germane to the subject matter of the Sexual Offences Act, in our view it is also likely a more accessible vehicle for affected victims.

We further question why revenge pornography is addressed in not only this Bill but also in the amendment to the Film and Publications Amendment Bill which is currently before the very same parliamentary committee. Whilst revenge pornography is certainly a cybercrime, we maintain as above, that it is primarily in fact a sexual offence and therefore should fall under the Sexual Offences Act.

THE SUBMISSIONS

Clause 18 in the Bill states as follows:

> "***18. Distribution of data message of intimate image without consent***
> *(1) Any person who unlawfully and intentionally makes available, broadcasts or distributes, by means of a computer system, a data message of an intimate image of an identifiable person knowing that the person depicted in the image did not give his or her consent to the making available, broadcasting or distribution of the data message, is guilty of an offence.*
> *(2) For purposes of subsection (1), "intimate image" means a visual depiction of a person made by any means—*
> *(a) under circumstances that give rise to a reasonable expectation of privacy; and*
> *(b) in which the person is nude, is exposing his or her genital organs or anal region or, in the case of a female, her breasts.*"

We have eight main concerns with the clause, as it is currently drafted:

1. We submit that intention is not a necessary component of revenge porn, but that negligence is sufficient.
2. We argue for the removal of "*by means of a computer system*" as it may unduly limit other forms of data messages.

3. The requirement that the victim is "*identifiable*" must specifically include victims who are indirectly identifiable and victims who are incorrectly identified.
4. We address our concern with the requirement that the offender *"[knew] that the person depicted in the image did not give his or her consent*". In our submission, the requirement of knowledge should be deleted.
5. What constitutes consent? In revenge porn cases, the presumption should always be that there is no consent.
6. We question the limiting of the proposed offence to intimate images only, and not descriptions (in keeping with definitions of pornography in other South African legislation).
7. Clause 18(2) refers to "*circumstances that give rise to a reasonable expectation of privacy*". This should be extended to circumstances where the victim's dignity would be affected by the distribution.
8. We argue that an image does not require nudity or exposure of genitals to be worthy of protection under this clause.

These comments will be addressed in turn below

1. Intention v negligence

We submit that the concept of "intent", as a requirement for liability for the crime of revenge pornography, is unduly limiting and makes convictions using this Bill less likely. Proving the intent behind the publication of the private content is difficult. In our opinion, the motive behind the publication of the content essentially does not matter, as the harm inflicted upon the victim is the same regardless of the intent behind it i.e. private content has still been published without the consent of the victim. A lower threshold of fault, namely negligence or at least reckless disregard, would be more appropriate.

We are concerned that prosecution could be avoided on the part of perpetrators, by claiming that they did not "intend" to distribute the material. If you are in possession of private content belonging to another individual, it is your responsibility to be careful and mindful of what you do with that content.

By way of example, if a person "accidentally" sends a picture of their ex-girlfriend involved in a sexual act (when intending to send a different image), the damage to the ex-girlfriend is identical, even if the distribution was accidental/negligent.

2. **Removal of the clause "by computer system"**

We submit that there is no need to specify that the content must be distributed via computer system, but that instead a data message (as defined) is sufficient to cover most instances of revenge pornography.

If someone takes a naked picture of another without their knowledge, and then prints it and distributes it (sticks it on the school noticeboards, prints it on flyers etc), that person should be guilty of the crime of revenge pornography.

3. **"Identifiable" must specifically include indirectly identifiable and incorrectly identified victims**

We are concerned that "*identifiable individual*" sets too a high a bar for prosecution. In cases that we have been involved in, we have seen many individuals who would not be identifiable directly from the content (for example a photograph of a person's genitals sent to a WhatsApp group) – but the victim could still be indirectly identifiable from the context, personal knowledge, the rest of the content, identifiable tattoos, identifiable birth marks etc. We therefore submit that the individual in the content must be either *directly or indirectly* identifiable.

In addition, where the distribution incorrectly identifies an individual, that person is still a victim, because their dignity has been infringed. For example if someone tweets a picture of someone's genitals and says – "*This is my ex-girlfriend Miss X, serves you right for cheating on me*", Miss X should still be treated as the victim that she is.

4. **Removal of the requirement of knowledge in the clause "knowing that the person depicted in the image did not give his or her consent"**

We submit that the requirement that the offender "knew" that consent had not been given places an unacceptable additional burden on a victim, and may well provide a loophole through which many perpetrators can escape prosecution. We argue that the very nature of private, sexual content means that the presumption on the part of the perpetrator must be that consent has not been given.

To prove that a perpetrator "knows consent has been given" is far better than to prove that the perpetrator "knows that consent has not been given". This simple rephrasing would shift the onus of proof onto the perpetrator to prove that they had obtained consent, as opposed to on the victim to prove that the perpetrator knew that

they did not have consent. This would create the far more acceptable situation of forcing the perpetrator to prove that they had actively sought and received consent for the particular act of distribution concerned.

5. The meaning of consent

In cases of revenge porn, the presumption must always be that consent has not been given. Consent under clause 18 must be voluntary, informed and specific - that the individual depicted has not been unduly pressurised or coerced into providing consent; has been informed of the intended audience and nature of distribution; and has agreed to each specific incidence of distribution.

6. Why limit the offence to images only?

We are concerned that clause 18 solely deals with "images", but revenge porn can also take the form of written messages. We propose that this scope of clause 18 be broadened to accommodate these alternative formats.

As the definition of pornography states in the Films and Publications Act "*'pornography' means any image, however created, or any description of a person, real or simulated…*". This suggests that descriptions of sexual acts would fall under the remit of pornography and are therefore all able to become the subjects of revenge pornography. We propose that the definition in clause 18 be expanded to include the myriad of forms of pornography that the Films and Publications Act employs in its definition.

7. The dignity of the victim must be considered

Clause 18(2)(a) refers to *circumstances that give rise to a reasonable expectation of privacy*. The Bill should also consider circumstances were the victim's dignity would be infringed by the distribution.

8. Revenge pornography need not depict nudity or genitals

An image does not need to depict nudity or genitals to constitute an "intimate image". Instead we submit that the infringement of the victim's privacy and dignity is sufficient for content to fall within the ambit of clause 18. In other words, the requirement that 18(2)(b) should be met is incorrect.

By way of illustration, a common trend in the modern day is to take 'before and after' photographs in underwear in the context of weight loss, physical training programmes, pregnancy and surgery. The image in this context my be private, even if it does not show breasts or genitals. In our submission the nature of the image or footage is therefore less relevant than the intention of the victim in taking that photograph or film i.e. did they intend for the content to remain private? If so, the distribution of a content is a violation of their rights.

Many of the images that we have encountered do not, in fact, show any genitals but still significantly infringe the victim's right to privacy and dignity – these images must fall within the ambit of the criminalisation proposed by clause 18. For example, a common image seen today is the ejaculation-shot, where the victim is depicted with semen on his/her face, yet no nudity or genitals are depicted. This image is unquestionably a violation of the victim's right to privacy and dignity, despite the absence of nudity or genitals in the image.

We would propose therefore that an amended Clause 18 appears as follows:

18. (1) Any person who makes available, broadcasts or distributes a data message of intimate content of a directly or indirectly identifiable person, without having obtained specific consent for the making available, broadcasting or distributing this content in the specific scenario, is guilty of an offence.

(2) For purposes of subsection (1) "intimate content" means any image, however, created or any description of a person or act, real or simulated made by any means, which a reasonable person would agree is private and/or could affect the dignity of the person if distributed.

CONCLUSION

As we noted at the start of these submissions, we welcome the fact that Parliament has given consideration to introducing legislation to criminalise revenge pornography. This is an incredibly serious problem, which impacts on the lives and constitutional rights of those victimised by it.