



To what extent does South Africa's legal framework offer adequate protection to victims of non-consensual pornography?

By

Lara van der Spuy

(VSPLAR001)

Thesis submitted to the Faculty of Law, University of Cape Town in fulfilment of the requirements for the degree of master's by dissertation.

Under supervision of

Prof Jameelah Omar

Date of submission: 29 September 2023

Word Count: 24 236 (excluding bibliography)

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source.

The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I, Lara van der Spuy, present this dissertation in partial fulfilment of the requirements of the degree of Master of Law (LLM) for the approval of Senate in approved courses by minor dissertation and approved courses. The other part of this programme was the completion of various courses.

I declare I have read and understood the regulations governing the submission of Master of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

I know the meaning of plagiarism and declare that all of the work in the dissertation, save for that which is properly acknowledged, is my own. I have used the footnote convention for referencing.

I hereby grant the University of Cape Town free licence to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever of the above dissertation.

NAME Lara van der Spuy

STUDENT NO VSPLAR001

PEOPLESOFT NO

DATE 25 February 2023

SIGNED L van der Spuy (electronically signed)

Acknowledgements

I would like to express my sincere and deep gratitude to the following people, without whom this dissertation would not have realised:

My family: Pappa, Tannie Karin, Gerrit, Len, Jimmy and Anja. I am eternally grateful to have a family who have supported me through the writing process and who have cheered me on, even when I did not believe in myself.

Prof Jameelah Omar, for her guidance, kindness, understanding and feedback. I have found a role model in Prof Omar and will forever be grateful for the immense impact she has made on my life.

Bert, who will always be a friend.

The administrative staff of the Faculty of Law, who have always assisted when I needed them most.

Lastly, to my Heavenly Father, who have guided me through all the hardship I faced during the writing of this dissertation.

Abstract

This dissertation aims to analyse to what extent the South African legal framework offers adequate protection to victims of non-consensual pornography. Non-consensual pornography, understood as the unlawful distribution of intimate content without a person's consent, has gained popularity on the internet. This new form of cybercrime has posed challenges to lawmakers who have struggled to write legislation that could effectively combat it. Clear and effective laws against this offence are crucial in protecting victims and also their right to privacy and sexual autonomy. In South Africa two primary pieces of legislation deal with non-consensual pornography, the Films and Publications Amendment Act and the Cybercrimes Act. There are various non-criminal remedies available, such as initiating a civil claim for damages through the Protection of Personal Information Act 4 of 2013, but I argue that the harm caused by non-consensual pornography requires the maximum deterrence in the criminal law. This research aims to analyse the effectiveness of the South African legislation available to victims, and identify gaps that could be improved.

Table of Contents

Chapter 1	1
Background of the Study.....	1
Limitations	3
Chapter outline.....	4
Chapter 2: Terminology & History	6
Non-consensual Pornography	6
Correct Terminology.....	6
Origins of Non-consensual Pornography	8
Chapter 3: The Legal Framework Available in South Africa and Internationally	11
Introduction.....	11
The Constitution of the Republic of South Africa, 1996	11
Films and Publications Act 65 of 1996	14
Films and Publications Amendment Act 11 of 2019.....	15
Cybercrimes Act 19 of 2020	18
Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.....	21
The Protection of Personal Information Act 4 of 2013	22
International Case Law and Case Studies.....	27
R v SA, 2022 MBPC 28.....	28
Canadian Laws relating to Non-consensual pornography	28
Sentencing in R v SA, 2022 MBPC 28.....	29
Mitchell Joseph Brindley	30
Sentencing in the Mitchell Joseph Brindley case.....	30
Chapter 4: Victims, their Experiences and Secondary Victimization	32
A Gendered Phenomenon	32
Victim blaming & Shaming	34
Police Response and Secondary Victimization in the Legal System	35
Effects on the Victim of Non-consensual Pornography.....	38
Chapter 5: Effectiveness of the Legislation in Addressing the Issue of Non-consensual Pornography	43
Films and Publications Amendment Act.....	43
Intention.....	43
Private Photography.....	45

The Definition of “Sexual”	46
Cybercrimes Act	47
Intention	47
Intimate Image	49
Consent	51
Designated Point of Contact	51
Protection of Personal Information Act	52
Extensive Challenges Faced in Combatting Non-consensual Pornography	55
Anonymity of the Victim	55
Social Challenges and Change	56
Chapter 6: Conclusion	58
Bibliography	62

Chapter 1:

I INTRODUCTION

(a) Background to the Study

The internet is a platform that provides numerous beneficial services to users, augmenting the daily lives of so many. Unfortunately, the internet has also given rise to a new platform for criminal activity. The internet is now often used as a platform to assist and facilitate crime. Cybercrime is a global phenomenon that is taking the world by storm and the effects of cybercrimes grow by the day. Cybercrimes can be defined as computer-assisted crime in which technology, like computers, are used to assist in committing a crime.¹ Cybercrimes are borderless, just like the internet, and results in the widespread dissemination of criminality compared to other crimes.

The proliferation of the internet has given rise to a phenomenon known in the media as ‘revenge pornography’. The term refers to the disclosure of explicit images or videos without the consent of the person who is depicted in the image or video.² In this mini-dissertation, this phrase is predominantly not used and a more adequate term will be discussed in Chapter 2, namely that of ‘non-consensual pornography’. One of the biggest issues relating to so called ‘revenge pornography’ is the fact that the content is often shared on the internet which makes it increasingly more difficult to take the content down from the platforms it was shared and distributed on. The fact of the matter is that victims of revenge pornography often feel helpless and without possible recourse to bring them justice. With the development of the internet and social media platforms, the ease with which private and intimate content of a sexual nature can be shared is now greater than ever. Communities are now formed online which facilitates and encourages the sharing and consumption of non-consensual pornography. The evolution of cybercrimes has created a demand for legislation that addresses these concerns. The internet has provided new ways for perpetrators to harm victims. Images and videos that were once private can now be used as a weapon against a victim. Victims must have recourse available to them in order to receive justice for the wrong done to them.³ This form of image-based abuse can destroy a victim’s life as this type of abuse is not only extremely traumatising, but can also

¹ Adam M. Bossler & Tamar Berenblum ‘Introduction: new directions in cybercrime research’ (2019) 24:5 *Journal of Crime and Justice* 495.

² Mary Anne Franks ‘Revenge Porn Reform: A view from the Front Lines’ (2017) 69 *Florida Law Review* 1254.

³ *Ibid.*

hinder a victim's ability to have intimate relationships and can cause a massive upset in their professional lives. It is reported that victims are threatened with sexual assault, forced to change schools, get fired from their employment and are treated as outcasts in society.⁴ It is very troubling to realise that innocent victims are being exploited as unwilling participants for the entertainment of strangers who engage with such content.⁵

The legislation available to help victims are either very new or non-existent. In South Africa, steps have been taken to address the online abuse many experience. This topic is crucial to explore, especially in the South African context, as South Africa finds itself in a state where sexual violence is a public concern. South Africa is faced with a concerning high rate of sexual violence.⁶ Sexual violence, in any form, is a human rights violation that impacts victims deeply, and is a challenge that the South African government have grappled with for years. On the frontline and most well-known in South Africa is the extreme prevalence of rape. In the 2019/2020 year, 42 289 rapes were reported as well as 7 749 sexual assaults.⁷ It is known that we, as a country, struggle with understanding violence towards others, as can be seen in the high levels of rape, sexual abuse and gender-based violence. The motivations surrounding rape are contested, but a conclusion one can make is that it has less to do with sexual gratification, but more to do with exercising power and control over bodies that perpetrators feel an entitlement to.⁸ Rape, as an offence, is not only a sexual offence, but rather an offence that attacks a victim's bodily autonomy. Sexual violence is not based on sex, but rather on a social and cultural construct that is of the belief that a victim, in many cases a woman, is lesser than, deserves to be treated in an inhumane way, and is deserving of such degrading behaviours. This mini-dissertation is not focused on the crime of rape, but is based on the same cultural and societal ideologies that women, who are more often than not the victims of non-consensual pornography, 'deserves' to be the victims, they 'deserved' to be exposed, and they most

⁴ Mary Anne Franks 'Criminalizing 'revenge porn': Frequently Asked Questions' available at <https://ssrn.com/abstract=2337998>, accessed on 3 January 2023.

⁵ Ibid.

⁶ Sarah Jane Steele, Naeemah Abrahams, Kristal Duncan, Nataly Woollett, Bella Hwang, Lucy O'Connell, Gilles van Cutsem & Amir Shroufi 'The epidemiology of rape and sexual violence in the platinum mining district of Rustenburg, South Africa: prevalence, and factors associated with sexual violence' available at <https://doi.org/10.1371/journal.pone.0216449>, accessed on January 2023.

⁷ Ibid.

⁸ Jill Filipovic 'Rape is about power, not sex' available at <https://www.theguardian.com/commentisfree/2013/aug/29/rape-about-power-not-sex>, accessed on 3 January 2023.

certainly must have done something to make a perpetrator do what they did.⁹ It cannot be said that being a victim of non-consensual pornography is the same as being a victim of rape. That is not the purpose of the study and such a sweeping statement cannot be made about individual experiences. No, the golden thread in this case is that all of these offences are linked by not the act itself but by what is implied with the act and what the rationale is behind the act: Power. The exercise of power and control over victims, in whatever shape, can be so harmful.¹⁰ South Africa is known for having an issue with the culture of rape, gender-based violence and other forms of abuse but when looking closer, South Africa truly has an issue with power, violence, toxic masculinity and culture when it comes to respecting women, their bodies and their autonomy over their bodies.¹¹ It is because of this that abuse, like non-consensual pornography, should be looked at in a serious manner. The aftermath of being a victim of non-consensual pornography has many similarities with that of being a victim of another form of abuse.¹² In South Africa, it is concerning to know that non-consensual pornography is another way that South Africans can be victimised and harmed. The exploration of non-consensual pornography is essential and crucial in order to understand how persons are even more vulnerable with the development of technology, social media and other platforms.

It is for the reasons above that this study aims to answer the following question:

To what extent does South Africa's legal framework offer adequate protection to victims of non-consensual pornography?

(b) Limitations

The following limitations were identified in the current study:

After extensive research was conducted, the researcher was unable to find adequate South African sources dealing directly with non-consensual pornography. Subsequently, the South African legal system relating to non-consensual pornography is examined while also touching on international sources. Little research has been done in the African context on the subject matter that could shed light on the African experience of non-consensual pornography. The

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Tahlee Mckinlay and Tiffany Lavis 'Why did she send it in the first place? Victim blame in the context of 'revenge porn'' (2020) 27 *Psychiatry, Psychology and Law* 386.

limit of South African sources and literature resulted in the researcher incorporating data and literature from international sources as was relevant.

The researcher had to make use of international case law, as South African case law is not available that deals with non-consensual pornography. International case law provides a point of reference from which the South African context will be analysed and understood.

This study was done in the form of a desk review. Primary sources such as international and national laws around non-consensual pornography were used, which includes Acts, Bills and case law. Information was gathered from secondary sources like books, journals, the general media, the internet, government reports and other publications. Legal research is conducted to understand the practices of non-consensual pornography, the legislative reaction to it and whether it is effective in addressing the problem.

(c) Chapter outline

This mini-dissertation is structured as follows:

Chapter 1 introduces the reader to the study, by providing a background of the study, together with the problem statement, research question, objectives and the methodology of the study. The rationale behind this in the South African context is also examined.

Chapter 2 provides the reader with an understanding of what non-consensual pornography is, as well as what terminology should be used. Chapter 2 examines the origins of non-consensual pornography.

Chapter 3 provides a legal Framework in South Africa and Internationally together with case law from international sources.

This chapter discusses the various avenues of recourse available to a victim in terms of South African legislation. The chapter gives a brief history on the legislation as well as the reasoning for the drafting thereof. The chapter also provides international case law and studies that deal with non-consensual pornography.

Chapter 4 touches on the victims' experience of non-consensual pornography and how it affects their lives. The chapter discusses the importance of effective policing and the prevention of secondary victimisation of victims.

Chapter 5 provides a discussion on the effectiveness of the legislation available in South Africa and provides criticisms for some of the provisions in the legislation in terms of how the offense is seen and dealt with in the legal sphere.

The last chapter, Chapter 6, provides a conclusion and provides recommendations on how to more effectively deal with non-consensual pornography. Suggestions are highlighted for further development.

Chapter 2:

II TERMINOLOGY & HISTORY

(a) Non-consensual Pornography

Non-consensual pornography has so many different definitions, as the development and understanding of the crime has evolved throughout the years. Many who have researched the offence of non-consensual pornography refers to it as ‘sexually explicit images and videos disclosed without consent and for no legitimate purposes’.¹³ However, for the purposes of this research, the definition must be expanded upon. Non-consensual pornography does not only refer to images of a sexual nature. It is for this reason that I propose that the above-mentioned definition should read as ‘intimate images and videos disclosed without consent and for no legitimate purposes’. Not all images and videos that are disclosed and shared without consent are inherently sexual or were meant to be sexual in the creation of them, but are still intimate and shared without consent.¹⁴ In most cases, non-consensual pornography originated from some form of sexual act for some sexual purpose, but the definition of non-consensual pornography needs to be wide enough to speak to all experiences with the non-consensual distribution of intimate images and videos and must not only focus on the sexual intimate content, as that excludes some victims from defining what offence was done against them as ‘non-consensual pornography’.¹⁵

(b) Correct Terminology

It is a contested issue on what this form of abuse should be called. In 2013, Mary Anne Franks used the term non-consensual pornography and gave a definition of what this offence is, as it is stated above. This term opened connections between non-consensual pornography and other non-consensual acts, placing emphasis on the undermining of a victim’s lack of consent. It is of utmost importance to recognise that some academics and researchers have taken issue with the inclusion of ‘pornography’ in the terminology. Some argue that taking a picture of yourself in the nude or while engaging in a sexual act is not pornographic in nature and the use of the word ‘porn’ or ‘pornography’ implies that taking such pictures or videos are then deemed inherently pornographic. Another argument seen are that some are of the opinion that the use

¹³ Franks op cit note 2 at 1254.

¹⁴ Franks op cit note 2 at 1255.

¹⁵ Ibid.

of the word ‘pornography’ eroticises the offense and sensationalises the offense, especially in the media. These arguments and criticisms are valid, to a certain extent. However, the counterargument is that the creation of intimate images and videos which is then shared with someone who is intended to view the image or video is not pornography and does not constitute the creation of pornography.¹⁶ It is the act of disclosing the private images and videos to someone other than the intended audience that constitute the creation of pornography. The person who created the intimate images or videos are not the ones who are creating pornography, but it is the action of transforming a private moment into a public sexual display of entertainment that constitute the rightful use of ‘pornography’ in the terminology. The use of ‘pornography’ is not used to sensationalise the offense, shame the victim or to diminish the effects of the offense. It is more used as a way to show what being a victim of the offense is being a victim of the creation of pornography when one has not consented to being displayed in content that is intended to be viewed as pornography. While I recognise that the terminology can have great effect on how an offense is perceived, I also recognise that downplaying the severity of it will also have damaging effects on how it is perceived. The sensationalism in the media must be viewed from both sides: the offense is not just another headline and must be treated with the respect it deserves. However, the media is an entity that have played in favour of exposing this offense and bringing it to the attention of the everyday man and woman. The use of ‘pornography’ in this research is not to sensationalise the offense, but to speak to how many know and understand the offense, as well as to place emphasis on how invasive it is that the offense can cause someone to be the subject of pornography without their consent.¹⁷

‘Revenge porn’ is a term that is well known by many. The term ‘revenge pornography’ or ‘revenge porn’ is a media-friendly term that does not effectively describe the extent of the abuse suffered by victims. The term is most often connected with the narrative of a vengeful ex-partner who distributes intimate content of a sexual nature. However, the act of leaking intimate images and videos without a person’s consent encompasses much more than a scorned ex-partner.¹⁸ A wider set of harm is communicated with the term ‘revenge porn’- the term can refer to partners, but also to rapists, sex traffickers, strangers, family members, friends and so many more. The term ‘revenge porn’ reduces these harms to a scorned ex-boyfriend narrative, suggesting that the perpetrator was motivated by revenge, which supports the false narrative

¹⁶ Filipovic op cit note 8.

¹⁷ Mckinlay and Lavis op cit note 12 at 368.

¹⁸ Ibid

that the victim is at least partly to blame for giving a perpetrator a reason as to why they would need to seek revenge.¹⁹ ‘Revenge Porn’ can have damaging implications to the victim, as it may be interpreted that they had incited the perpetrator to commit the act that they had, which reinforces victim-blaming. Victim blaming, in essence, is when a victim is held responsible, to whatever degree, for what happened to them.²⁰ The practice of blaming the victim can occur in many circumstances, but have been linked to sexual assault cases in particular.²¹ The use of incorrect, inaccurate or harmful terms can cause a victim to be shamed and blamed, which can lead to underreporting and further victimisation. The use of ‘revenge porn’ is also not an accurate description of the offence, as the distribution of intimate images are not only done by previous lovers wanting to act in a vengeful manner. The motivations for the offence are nuanced and cannot be determined before examining the offence on a case-by-case basis. Even though this form of abuse is carried out by ex-partners, some may commit the offence for a possible profit, to become famous or for the entertainment it provides to others on the websites and forums.

In this research paper, the term ‘non-consensual pornography’ or ‘non-consensual porn’ will be used, unless the context indicates differently.

(c) Origins of Non-consensual Pornography

In the 1980s a pornography magazine ‘Hustler’ started a feature in their magazine called ‘Beaver Hunt’ where readers of the magazine could submit sexually explicit photographs.²² It turned out that very often, the females depicted in these images did not consent to the submission or the publication of the images. Some of the submissions made to Hustler were made by ex-partners, or because the photographs were stolen.²³ Long before the term ‘revenge porn’ was widely known and used, the practice thereof was committed. In 2010, Hunter Moore created the first known non-consensual pornography website *IsAnyoneUp*, where he started to publish images of a girlfriend on a web domain he owned.²⁴ 14 000 unique visitors had visited

¹⁹ Sophie Maddocks ‘From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names’ (2018) 33 *Australian Feminist Studies* 97 at 347.

²⁰ Claire R. Gravelin, Monica Biernat, Caroline E. Buchner ‘Blaming the victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors’ available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6348335/>, accessed on 12 May 2023.

²¹ Ibid.

²² Emily Poole ‘Fighting Back Against Non-Consensual Pornography’ (2014) 49 *The University of San Francisco Law Review* 186.

²³ Ibid at 187.

²⁴ Ibid at 188.

the website a week after he made the images public.²⁵ Over the course of 16 months, the website developed into a platform where users could submit images of a victim together with their full name, city of residence, social media handles, profession and other sensitive information.²⁶ The result was that any searches for a victim's name in a search engine would mean that the non-consensual pornography would appear. The popularity of the website grew substantially and it was reported that during a three-month period in 2011, the website received more than 10 000 submissions to the website.²⁷ Moore was one of the first people to capitalize on non-consensual pornography, and will always be a point of reference as to not only the vile nature of the offence but also of the absurd demand there is to this type of content.

Technological advances, like cell phones and easy access to the internet have made it easy to submit or distribute intimate images. The sending or receiving of sexually intimate content is growing in popularity, as technology allows anyone to engage with someone else through their phones or the internet. Sexting, a form of sexual messaging, has become a new form of 'sexual expression.'²⁸ Sexting often occurs between partners of two individuals who have a relationship of a sexual nature. Often images are sent willingly and without hesitation. However, in some cases the sharing of intimate images with a partner result in the receiver distributing those images when the relationship breaks down.²⁹ Non-consensual pornography often starts off as the consensual sharing of an image with a partner that you believe you can trust. The consensual act turns into a non-consensual act when the images are shared with those who were never meant to see it.

Non-consensual pornography encompasses a wider scope than only the distribution of intimate images as the result of a breakdown of a relationship. Non-consensual pornography refers to images obtained from through the use of hidden cameras, stolen images and recordings of assaults.³⁰ The abuse is further encouraged as websites (such as *IsAnyoneUp*) and forums solicit these images while protecting the perpetrator, as they can very often hide behind their screens. The objection to non-consensual pornography is, therefore, solely based on the incredible violation of privacy is holds for the victim and is not objected to because of a negative view or

²⁵ Ibid at 188.

²⁶ Scott R. Stroud 'The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn' (2014) 29 *Journal of Mass Media Ethics* 170.

²⁷ Ibid at 170.

²⁸ Tahlee & Lavis op cit note 12 at 386.

²⁹ Ibid at 386.

³⁰ Franks op cit note 2 at 1258.

perception about nudity, intimacy or sexual immorality.³¹ Instead, the objection to non-consensual pornography is because it is wrong to place a non-consenting person's body on display and violating that innate desire for privacy and control over one's body. It is that small distinction that holds the key to understanding why this issue is of such great importance. Mary Anne Franks draws comparison between the revealing of private medical records, credit card numbers or love letters and the revealing of intimate images and videos.³² She writes that the market for private nude photos is very much unlike the market for any other private information. There are not thousands of websites that cater to revealing private information like the private medical records of a person. There are, however, tens of thousands of websites dedicated to non-consensual pornography.³³ When discussing non-consensual pornography, the history and sudden and consistent growth of the phenomenon must be taken into consideration, as it shows the severity of the issue but also signals that attention must be given to the problem on a deeper level than just showing concern. Societal, legislative and cultural changes are needed to end image-based abuse like the distribution of non-consensual pornography.

³¹ Franks op cit note 2 at 1260.

³² Franks op cit note 2 at 1261.

³³ Poole op cit note 22 at 187.

Chapter 3:

III THE LEGAL FRAMEWORK AVAILABLE IN SOUTH AFRICA AND INTERNATIONALLY

(a) Introduction

The extremely harmful effects of non-consensual pornography on the victim have, in recent years, come to the attention of not only those who could potentially fall victim of this phenomenon, but also to authoritative bodies like governments and lawmakers. Internationally and nationally there has been a call for action, particularly for legislation to accommodate the rapid growth of online abuse, harassment and cybercrimes in general. The incredible violation that a victim experiences, which will be explored more later, is enough to justify the push for any form of law reform that could help victims who feel completely hopeless.

In South Africa there have been developments with regards to cybercrimes like the distribution of non-consensual pornography. The following sections address or tries to address the growing concerns of non-consensual pornography in South Africa.

(b) The Constitution of the Republic of South Africa, 1996

Non-consensual pornography, although unknown to many, is an offence that can be viewed through the lens of the Constitution of the Republic of South Africa.³⁴ If one were to view the offence of the distribution of non-consensual pornography through the Constitution of South Africa, the most supreme law of the land, it becomes clear that the offence truly does infringe on many rights that persons hold in terms of the Constitution. It is acknowledged that the rights vested in the Constitution are, in some form or another, present in the legislation that will be discussed later in the dissertation. However, these rights are first and foremost present in the Constitution. Section 9 of the Constitution promotes equality:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.³⁵

Section 9 also provides that neither the state nor any person may—

³⁴ Constitution of the Republic of South Africa, 1996.

³⁵ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.³⁶

Equality before the law is of utmost importance, especially when secondary victimisation by others including the legal system is a very real threat to victims. Secondary victimisation occurs when victims are made to feel guilt or shame because of being victimised as a result of the negative feedback they receive about their conduct.³⁷ Secondary victimisation can lead to many negative outcomes for not only the victim but also for preventing sexual abuse. It has been reported that secondary victimisation and the fear thereof can lead to under-reporting of rape to authorities.³⁸ Rape trials have been found to be extremely harmful and traumatising to the victim. Trials where the offence is rape or some other form of sexual abuse, has been described as a spectacle of 'degradation visited upon the victim, rather than the offender.'³⁹ It is argued that victims of non-consensual pornography can experience the same form of secondary victimisation when they attempt to approach the justice system for assistance and recourse. The basic right of equality is afforded to those who are victims of non-consensual pornography, as it is often the case that victims are discriminated against as a result of the supposed role that they had played in becoming a victim. The ideology of some that is centred around blaming the victim for sending intimate images, for being sexually active or for having sexual autonomy is unfair. The judgements towards those who are victims of non-consensual pornography, questioning their ethics, beliefs and sexual choices can often be very harsh. Section 9 aims to protect victims from discrimination that they may face and promotes equality in a very broad way.

Section 10 of the Constitution provides—

(10) Everyone has inherent dignity and the right to have their dignity respected and protected.⁴⁰

The breach of trust that often occurs in the unlawful distribution of non-consensual pornography infringes directly on the dignity of the person depicted in the intimate content. Although the motivations for the distribution of non-consensual pornography will never be fully the same in cases, it has been found that the motivation for these actions are often to

³⁶ Ibid.

³⁷ Kathy Doherty & Irina Anderson 'Perpetuating rape-supportive culture: Talking about rape' (1998) *The Psychologist* 583.

³⁸ Ibid at 584.

³⁹ Ibid at 583.

⁴⁰ Section 10 Constitution of the Republic of South Africa, 1996.

embarrass, to humiliate, to degrade and to distress the person depicted in the intimate content.⁴¹ In intimate relationships, one trusts one's partner with not only your intimate images and videos but also your dignity.⁴² The distribution of non-consensual pornography infringes directly on the trust in a relationship and therefore directly on the dignity of a partner. It must be noted that non-consensual pornography does not only occur within the confinement of a romantic relationship and that the infringement on dignity is not limited to romantic relationships. Victims are often mortified that their intimate images or videos have been leaked and report that they feel the embarrassment that it causes. The infringement on the dignity of victims is very clear and will be discussed in further detail in Chapter 4 of the dissertation.

Section 14 of the Constitution relates to privacy—

(14) Everyone has the right to privacy, which includes the right to not have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.⁴³

The Constitution of the Republic of South Africa makes direct mention of the right to privacy. From a non-consensual pornography perspective, the right to privacy, especially bodily privacy, is of utmost importance. The criminalisation of non-consensual pornography shows the important correlation between privacy and consent. The sharing of intimate images is not illegal, it is the distribution of private intimate content where no consent was given that constitutes an offence. That means that the intimate content was not only of an intimate nature but also of a private nature.⁴⁴ In our current technological climate, the definition of privacy extends to images, videos and online information. The violation of the right to privacy is, in essence, what causes so much of the harm related to the distribution of non-consensual pornography. Having the choice about what one wants to keep private and what one is willing to share with some or all is within one's own control. However, when that control is taken away, an infringement on rights like the right to dignity occurs that can cause irreparable harm

⁴¹ Raul Madden 'Equity, 'Revenge Porn', and Cambridge Analytica: The Doctrine of Confidence as a Protection for Human Dignity in the Technological Age' 2019 *Griffith Journal of Law & Human Dignity* 14.

⁴² Ibid at 15.

⁴³ Section 14 of the Constitution of the Republic of South Africa, 1996.

⁴⁴ Franks op cit note 2 at 1256.

to a victim. The distribution of non-consensual pornography goes to the core of what it means when there is an infringement against the right to privacy. The publication of such intimate content infringes upon one's ability to make decisions about your private life, sexual expression and autonomy. Privacy allows for the expression of, in this case, sexual autonomy. When non-consensual pornography is published, the law should not only object the offence itself, but also the invasion into the private life of a victim.⁴⁵

The Constitution rights to equality, human dignity and privacy are all imperative to understanding the offence of non-consensual pornography, especially from the perspective of the victim. I argue that the mere implication that a constitutional right is infringed upon when the offence of non-consensual pornography occurs, is sufficiently serious to warrant attention thereof.

(c) Films and Publications Act 65 of 1996

The Act provides that its purpose is 'to provide for the classification of certain films and publications; to that end to provide for the establishment of a Film and Publication Board and a Film and Publication Appeal Tribunal; to repeal certain laws; and to provide for matters connected therewith.'⁴⁶ Notably, the Films and Publications Act 65 of 1996 created the Film and Publication Board, often referred to the FPB. The board was formed under the Act in order to address issues and concerns relating to issues of child pornography and child abuse. The FPB board, under the Act, was tasked with receiving complaints, classifying films and publications and to do evaluations on content.

The Act is clear on its definition of child pornography but does not touch on non-consensual pornography. 'Explicit sexual conduct' is also defined but is mostly used to describe actions in relation to games, film publications or the classifications made to films and other publications.⁴⁷ In this Act a clear focus is on the dialogue that the legislation wants to implement between the creators of films and publications and the board the legislation formed. The most applicable section that one could possibly link to non-consensual pornography is Section 16, which dealt with complaints and applications concerning publications. Section 16(2) provides that—

⁴⁵ *Douglas v Hello!* 2006 (QB) 125 (CA) 106.

⁴⁶ Films and Publications Act 65 of 1996.

⁴⁷ *Ibid.*

Any person except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that—

- (a) Contains sexual conduct which—
 - (i) Violates or shows disrespect for the right to human dignity of any person;
 - (ii) Degrades a person; or
 - (iii) Constitutes incitement to cause harm

Shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.⁴⁸

Section 16(2) only speaks to the publication of sexual content and that such content must be submitted to the Board before the publication thereof. Section 16(2)(a), ironically, explains the impact on victims of non-consensual pornography.⁴⁹ However, the context in which sexual conduct is discussed in this Act is very far removed from non-consensual distribution of intimate content of a sexual nature. There is no mention of the type of distribution that is unlawful and that places a very heavy burden on the victim, as is the case in non-consensual pornography cases. The type of harm one can cause to another has shifted and changed just as technology has evolved and developed. When the Films and Publications Act 65 of 1996 came into operation, it was in an era where the technological advances were of a different kind.

The Films and Publications Act 65 of 1996 does not speak to the technological advancements with relation to digital content and the distribution thereof in this modern age. It is for that reason that the Films and Publications Amendment Act 11 of 2019 is of such significance as it aims to bring the Films and Publications Act into the current technological era.

(d) Films and Publications Amendment Act 11 of 2019

On 1 March 2022, the Films and Publications Amendment Act 11 of 2019 came into operation.⁵⁰ The Act was signed into law and published in the *Government Gazette* on 3 October 2019. The Films and Publications Amendment Act 11 of 2019 amends the Films and Publications Act 65 of 1996. The amendment proved to be essential, as the amendment spoke to issues ranging from child pornography, hate speech and importantly to non-consensual pornography.

⁴⁸ Section 16(2) of the Act.

⁴⁹ Section 16(2)(a) of the Act.

⁵⁰ Films and Publications Amendment Act 11 of 2019.

On 30 August 2016, the first public hearing was held in order to discuss the Films and Publication Amendment Bill. On day one of the public hearings, key submissions were made that would prove to be imperative in understanding the later amendments made to the Act. Emma Sadleir, a social media lawyer, made a submission focused solely on non-consensual pornography.⁵¹ The submission made mention of the incredibly harmful act of posting or sharing private sexual photographs and/or films. Sadleir placed emphasis on how easy it has become to share content of a private and sexual nature as a result of technological developments in the past few years. It has become socially acceptable to share one's nude images with a partner, which may lead to the distribution thereof.⁵² All of the issues raised were related to Section 18F. In the Bill, the new section 18F prohibits a person to distribute private sexual photographs and films in any electronic medium including the internet and social networking sites without the consent of an individual who appears in the photograph or film with the intention of causing that individual distress. The only circumstance under which such disclosure may be made is where it is necessary for the purposes of preventing, detecting or investigating crime. The submission made was that accordingly, section 18F that deals with 'Prohibition against distribution of private sexual photographs and films' should be amended to criminalise the sharing of explicit content to a third party without consent.⁵³

Another submission made by Emma Sadleir and her team was the proposal of an offence defined as the non-consensual creation, possession, solicitation, publication or distribution of any image, however created, or any description of a person, real or simulated, showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person.⁵⁴

Sadleir argued for the tightening of the wording of 'revenge pornography' (non-consensual pornography in order for it to reflect that it is a criminal act when sexually-implicit material is shared without the consent of the person depicted in the content, with the intention to embarrass, harm or gain financially from its distribution.⁵⁵

⁵¹ Films and Publication Amendment Bill: Public hearing day 1, available at <https://pmg.org.za/committee-meeting/23154/>, accessed on 12 December 2022.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

This discussion and public forum give a certain insight into the minds of those who worked in the sphere of this Amendment Act. Ms F Nkandimeng from the ANC asked what the difference is between pornography and ‘revenge pornography’.⁵⁶ It goes to show that many people do not understand what is meant by the term non-consensual pornography.

On 21 September 2016, the committee met to consider all the inputs received. They made mention of the stricter penalties argued for by various stakeholders for non-consensual pornography. The committee highlighted that stakeholders placed emphasis on provisions relating to non-consensual pornography and that provisions relating to it should be tightened to include prohibitions against dissemination.⁵⁷

The Bill was passed and the Films and Publications Amendment Act 11 of 2019 was born. Section 18F now reads:

- (1) No person may expose, through any medium, including the internet and social media, a private photograph or film, if the disclosure is made—
 - (a) Without the consent of the individual or individuals who appear in the photograph; and
 - (b) With the intention of causing the individual harm.⁵⁸

Section 18F (3) provides:

- (3) The prohibition referred to in subsection (1) shall apply notwithstanding that the individual who appears in the photograph or film might have consented to the original creation of such photograph or film.⁵⁹

Section 18F(4) provides:

- (4) For the purposes of this section and section 24E a photograph or film is ‘private’ if, judging from the context in which the photograph or film is taken or made, it was not intended by any individual in the photograph or film to be seen by others.⁶⁰

This section is crucial in understanding what the steps of consent in some cases may look like. Prior consent to being photographed or filmed does not carry over to having consented to it being distributed.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Section 18F(1) of the Act.

⁵⁹ Section 18F(2) of the Act.

⁶⁰ Section 18F(4) of the Act.

Section 24E provides:

(1) Any person who knowingly distributes private sexual photographs and films in any medium including the internet and social media, without prior consent of the individual or individuals in the said sexual photographs and films with the intention to cause the said individual harm shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

(2) Any person who knowingly distributes private sexual photographs and films in any medium including through the internet, without prior consent of the individual or individuals and where the individual or individuals in the photographs or films is identified or identifiable in the said photographs and films, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R300 000 or to imprisonment for a period not exceeding four years or to both a fine and such imprisonment.⁶¹

The only defence one could rely on when one has distributed a photograph or film, according to section 18F(2) reads:

(2) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.

(e) Cybercrimes Act 19 of 2020

On 13 September 2017, the first day of public hearings were held for the Cybercrimes and Cybersecurity Bill. The public hearings were opened with a word from Ms Phedhelaphi, the Director of The Centre for Constitutional Rights, where she stated that the Centre welcomed the Bill and that the Bill would bring South Africa into the modern world and the twenty-first century in terms of cybersecurity.⁶² The prospect of developing the legislation available in South Africa is welcomed, as it shows a positive development in the legal sphere of the country. The Centre, although expressing positive views of the Bill, stated that some clauses dealing with non-consensual pornography and fake news are ‘overboard and raise constitutional issues’. It was said that the provisions could limit constitutional rights to freedom of expression, privacy and access to courts.⁶³

⁶¹ Section 24E of the Act.

⁶² Cybercrimes and Cybersecurity Bill: Public hearing day 1, available at <https://pmg.org.za/committee-meeting/25008/> accessed on 12 December 2022.

⁶³ Ibid.

The Digital Law Company made a submission in relation to non-consensual pornography and the submission focused specifically on clause 18 that deals with non-consensual pornography.⁶⁴

In this Bill, clause 18 provides:

(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) 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.⁶⁵

The Digital Law Company, through representation by Dr Lizzie Harrison, expressed that they welcome clause 18, especially because very few countries internationally have criminalised non-consensual pornography.⁶⁶ The submission touched on the severity of non-consensual pornography; especially how destructive the consequences of non-consensual pornography can be on a victim. Clause 18(1) requires intention, and the submission was made that the use of the word ‘intention’ should be re-examined. The Digital Law Company argued that intention is nearly impossible to establish a level of intention, as many perpetrators will merely state that the content was distributed unintentionally.⁶⁷ One could argue that negligence should be added as an additional fault element, because negligence is a fault element that is applicable when dealing with confidential information in many different sectors, such as confidential information and secrets in companies.⁶⁸ The consequences are the same in that confidential information is unlawfully distributed. The Digital Law Company argued that this applies in cases of non-consensual pornography, even if images or videos are shared negligently, the consequences are the same for the person whose intimate images or videos were shared.

⁶⁴ ‘Submission to the Portfolio Committee on Communications on the Cybercrimes and Cybersecurity Bill’ available at https://static.pmg.org.za/170913Digital_Law_Company.pdf, accessed on 3 January 2023.

⁶⁵ Clause 18 of the Cybercrimes Bill 2017.

⁶⁶ Op cit note 64.

⁶⁷ Op cit note 64.

⁶⁸ Ibid.

Another submission was that the definition of ‘intimate image’, as stated in Clause 18(2) should be replaced with the definition of pornography in terms of the Criminal law Amendment Act.⁶⁹ The phrase ‘knowing a person did not give consent’ should be removed, as it places a burden on a victim to be the one who has to prove that they did not consent to their intimate images or videos being distributed.⁷⁰

Mr B Bongo from the ANC stated in the hearing that cybercrimes are a top priority on the African continent and that Parliament is truly wanting to address the concerns of many South Africans. The first day of the public hearing dealt with non-consensual pornography is quite an extensive manner. The Cybercrimes Act 19 of 2020 provides the following in relation to non-consensual pornography:

16. (1) Any person (‘A’) who unlawfully and intentionally discloses, by means of an electronic communications service, a data message of an intimate image of a person (‘B’), without the consent of B, is guilty of an offence.⁷¹

Thereafter, an explanation is given of all the terms used in subsection (1):

(2) For purposes of subsection (1)—

(a) ‘B’ means—

(i) the person can be identified as being displayed in the data message;

(ii) any person who is described as being displayed in the data message, irrespective of the fact that the person cannot be identified as being displayed in the data message; or

(iii) any person who can be identified from the information as being displayed in the data message; and

(b) ‘intimate image’ means a depiction of a person—

(i) real or stimulated, and made by any means in which—

(aa) B is nude, or the genital organs or anal region of B is displayed, or if B is a female person, transgender person or intersex person, their breasts, are displayed; or

⁶⁹ Clause 18(2) of the Bill.

⁷⁰ Op cite note 66.

⁷¹ Section 16(1) of the Act.

- (bb) the covered genital or anal region of B, or if B is a female person, transgender person or intersex person, their breasts, are displayed; and
- (ii) in respect of which B so displayed retains a reasonable expectation of privacy at the time that the data message was made in a manner that—
 - (aa) violated or offends the sexual integrity or dignity of B; or
 - (bb) amounts to sexual exploitation.⁷²

The Act also gives victims (complainant) the opportunity and recourse to approach the court on an *ex parte* basis where they will be able to apply for a protection order pending the finalisation of the criminal proceedings in order to

- (20) (1) (a) prohibit any person to disclose or further disclose the data message which relates to the charge; or
- (b) order the electronic communications service provider whose electronic communications service is used to host or disclose the data message which relates to the charge, to remove or disable access to the data message.⁷³

(f) Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The Cybercrimes Act provided for the insertion of a section into the Sexual Offences Act. Section 11A provides:

Persons 18 years or older: Harmful disclosure of pornography and orders to protect complainant against harmful effects of disclosure of pornography:

11A Harmful disclosure of pornography:

- (1) A person ('A') who unlawfully and intentionally discloses or causes the disclosure of pornography in which a person ('B') appears or is described and such disclosure—
 - (a) takes place without the consent of B; and
 - (b) causes any harm, including mental, psychological, physical, social or economic harm, to B or any member of the family of B or any other person in a close relationship to B,
 Is guilty of the offence of harmful disclosure of pornography.⁷⁴

⁷² Section 16(2) of the Act.

⁷³ Section 20 of the Act.

⁷⁴ Section 11A of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The offence in terms of Criminal Law (Sexual Offences and Related Matters) Amendment Act requires that the victim must be 18 years or older and includes the disclosure of analogue photos together with videos which contains pornography. The harmful disclosure of pornography requires that the disclosure caused the victim some form of harm, whether that be mental harm, psychological harm, physical harm, social harm or economic harm. Interestingly, the harm can extend to any member of the victim's family or any person with whom the victim has a close relationship.

This new inclusion also makes provision for the threatening of disclosing such pornography:

- (2) A person ('A') who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1) and such threat causes, or such disclosure could reasonably be expected to cause, any harm referred to in subsection (1)(b), is guilty of the offence of threatening to disclose pornography that will cause harm.⁷⁵

Additionally, the disclosure or threat to disclose pornography for the purpose to extort a victim is also mentioned:

- (3) A person ('A') who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1), for the purposes of obtaining any advantage from B or any member of the family of B or any other person in a close relationship to B, is guilty of the offence of harmful disclosure of pornography related extortion.⁷⁶

(g) The Protection of Personal Information Act 4 of 2013

The Protection of Personal Information Act 4 of 2013 (Hereafter referred to POPIA) defines 'personal information' as 'information relating to an identifiable, living, natural person, and where applicable, an identifiable, existing juristic person'.⁷⁷ The 1995 EU Data Protection Directive 95/46/EC has substantial influence on data privacy laws around the world.⁷⁸ In 2016, it was replaced by the General Data Protection Regulation (EU) 2016/679. These regulations will be used to draw comparison between it and the Protection of Personal Information Act. The Court of Justice of the European Union held, in *Frantisek Rynes v Úrad Pro Ochranu*

⁷⁵ Section 11A(2) of the Act.

⁷⁶ Section 11A(3) of the Act.

⁷⁷ The Protection of Personal Information Act 4 of 2013

⁷⁸ European Union 'Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data' available at <https://www.refworld.org/docid/3ddcc1c74.html>, accessed on 27 December 2023.

Osobnich Údaju that ‘personal data’, as is defined in the 1995 Data Protection Directive, also referred to the image of a person by a camera.⁷⁹ The reason being that it is possible to identify a person through the image taken by a camera.

According to POPIA, ‘processing’ is defined as—

‘Any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

- (a) The collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- (b) Dissemination by means of transmission, distribution or making available in any other form; or
- (c) Merging, linking, as well as restriction, degradation, erasure or destruction of information’⁸⁰

From these definitions, it is submitted that non-consensual pornography and the distribution thereof classify as processing of personal information. To further that argument, POPIA provides what lawfulness of processing, according to Section 9, is:

Personal information must be processed—

- (a) lawfully; and
- (b) in a reasonable manner that does not infringe the privacy of the data subject.

In the event that a person’s information has been processed in a manner that is not as stated above, Section 74(1) provides:

- (1) Any person may submit a complaint to the Regulator in the prescribed manner and form alleging interference with the protection of the personal information of a data subject.⁸¹

This means that any person may lodge a complaint with the Regulator where their personal information has been processed in a manner that is not lawful, not reasonable, or in a manner that infringes on that person’s privacy. In the event that an investigation occurs, the Regulator will have the same powers as that of a High Court and may summon and enforce the appearance of persons. The Regulator, in such an investigation, will also have the power to compel persons to give evidence under oath as well as produce any records that the Regulator may deem necessary to investigate the matter.⁸² Section 81(d) of the Act provides—

⁷⁹ Ibid.

⁸⁰ Section 1 of the Act.

⁸¹ Section 74(1) of the Act.

⁸² Section 81 of the Act.

(81) For the purpose of the investigation of a complaint the Regulator may-

(d) at any reasonable time, subject to Section 81, enter and search any premises occupied by a responsible party.⁸³

A Regulator is therefore empowered, for the purpose of an investigation, to enter and search any premises occupied by a responsible party. In the event where access is unreasonably refused or where an occupier refuses to comply with the Regulator and the request made by the Regulator, the Regulator can apply for a judge or a magistrate for a search warrant. Such a warrant not only authorises the Regulator's members to enter a certain premise or residence as listed on the warrant, but the warrant also allows for members to search, inspect, examine, test and seize any equipment, which was used for the processing of personal information.⁸⁴ The warrant also allows for the seizure of any evidence found while examining and inspecting equipment.

With relation to the section that speaks on warrants, it must be noted that The Protection of Personal Information Act provides certain requirements that have to be met before a warrant will be issued by a judge or magistrate. A judge or magistrate must be satisfied that the Regulator has given a notice of seven days to the occupier of the premises that the warrant is meant to give access to.⁸⁵ Moreover, the judge or magistrate must be satisfied that access to the premises was unreasonably refused or that the occupier of the premises did not cooperate with the Regulator.⁸⁶ There is, however, an exception to the seven-day notice period, where the notice period will not apply if the judge or magistrate is satisfied that the matter is of urgency or that the seven-day notice period would defeat the objection of the search.⁸⁷ When discussing The Protection of Personal Information Act through the lens of non-consensual pornography, it can be argued that in many cases these provisions will prove helpful in seizing computers, cell phones and other forms of technology in order to investigate any complaints of the distribution of non-consensual pornography. The warrant that can be issued could be used to further such investigations.

Section 92 of The Protection of Personal Information Act provides—

⁸³ Section 81(d) of the Act.

⁸⁴ Section 82(1) of the Act.

⁸⁵ Section 83(1)(a) of the Act.

⁸⁶ Section 83(1)(b)(i) of the Act.

⁸⁷ Section 83(2) of the Act.

- (1) After completing the investigation of a complaint or other matter in terms of this Act, the Regulator may refer such complain or other matter to the Enforcement Committee for consideration, a finding in respect of the complaint or other matter and a recommendation in respect of the proposed action to be taken by the Regulator.⁸⁸

The Enforcement Committee, an independent body from the Regulator, must consider the matters that are placed before them from the Regulator. This committee may then make a recommendation to the Regulator, in terms of Section 93 of the Act.⁸⁹ The Enforcement Committee will provide the Regulator with a recommendation and thereafter the Regulator will then consider the recommendation. The Regulator may then serve the responsible party in the matter with an enforcement notice.⁹⁰ The enforcement notice will require the responsible party to take specific steps and to stop the processing of personal information, in this case it will be to stop distributing non-consensual pornography.⁹¹ In the event that the Regulator deems it necessary that an enforcement notice must be complied with as a matter of urgency, the compliance notice may stipulate a period of three days within a person must comply. An enforcement notice, issues by the Regulator, could require of an offender or perpetrator to remove any non-consensual pornography that they may have distributes, whether that be on a website or a social media platform. When taking a closer look at POPIA, it points to section 100 and section 103, read in conjunction with section 107 of the act, which makes it an offence for a party to not comply with an enforcement notice brought by the Regulator. It is also an offence to obstruct the Regulator in performing its duties. Such an offence carries a punishment of imprisonment of up to ten years or a fine.⁹²

- (100) Any person who hinders, obstructs or unlawfully influences the Regulator or any person acting on behalf of or under the direction of the Regulator in the performance of the Regulator's duties and functions under this Act, is guilty of an offence.⁹³

And

- (103) (1) A responsible party which fails to comply with an enforcement notice served in terms of Section 95, is guilty of an offence.⁹⁴

⁸⁸ Section 92(1) of the Act.

⁸⁹ Section 93 of the Act.

⁹⁰ Section 95(1) of the Act.

⁹¹ Section 95 of the Act.

⁹² Section 107 of the Act.

⁹³ Section 100 of the Act.

⁹⁴ Section 103(1) of the Act.

Section 109 of POPIA states that a Regulator may impose an administrative fine on a perpetrator instead of the institution of criminal proceedings and prosecution on the perpetrator. The Act therefore states, in the event that a perpetrator is afforded punishment in such a form, that the perpetrator can either choose to pay the administrative fine or for the matter to be tried in court.⁹⁵ Section 109(4) of POPIA dictates that if a perpetrator chooses to have their matter heard in court, the matter must be handed over to the South African Police Service.⁹⁶ If the Regulator imposes an administrative fine on a perpetrator, and said perpetrator fails to pay the fine, the Regulator may file a statement, in which the amount of the fine will be set out and such a statement will have the effects of a civil judgement that is in favour of the Regulator for a liquid debt. The basic premise of all of these sections referenced from POPIA is therefore used to argue that a person who distributes non-consensual pornography can be required, through an enforcement notice, to remove non-consensual pornography and any such content. Non-compliance with the Regulator can result in a perpetrator facing severe criminal prosecutions or the perpetrator can be reprimanded in the form of having to pay a fine.

Section 99(1) states that a victim may claim non-patrimonial damages against a perpetrator:

(1) A data subject or, at the request of the data subject, the Regulator, may institute a civil action for damages in a court having jurisdiction against a responsible party for breach of any provision of this Act as referred to in section 73, whether or not there is intent or negligence on the part of the responsible party.⁹⁷

The Protection of Personal Information Act 4 of 2013 provides a victim the relief to initiate a civil claim for damages. This provision therefore states that a data subject, in this case a victim of non-consensual pornography, may institute a civil action for damages against a perpetrator for the breach of any conditions for the lawful processing of personal information, in this case it might be any type of intimate content as described in previous definitions of ‘non-consensual pornography’. Interestingly, section 99 provides for liability without fault. Typically, under common law, ordinary common law remedies would require negligence.⁹⁸

⁹⁵ Section 109 of the Act.

⁹⁶ Section 109(4) of the Act.

⁹⁷ Section 99(1) of the Act.

⁹⁸ Ibid.

In the event that a victim is unaware of the identity of the perpetrator or perpetrators who distributed non-consensual pornography of the victim, the victim can rely on Section 24 of the Act—

(24)(1) A data subject may, in the prescribed manner, request a responsible party to—

- (a) Correct or delete personal information about the data subject in its possession or under its control that is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully.⁹⁹

INTERNATIONAL REACTION TO NON-CONSENSUAL PORNOGRAPHY

The proliferation of non-consensual pornography has taken the world by storm and has also resulted in the adoption of legislation that aims to protect victims in many countries. The growing movement for countries to take issues like the distribution of non-consensual pornography seriously have been heard by many countries and some countries acted faster than others. Unfortunately, it must be acknowledged that banning non-consensual pornography has been a slow process by many countries and can be attributed to many causes - the gravity of the offence was and is not fully understood, there has been an extreme hostility towards women's autonomy, the dispute about what privacy truly means and not understanding the dynamics of the problem have all contributed to slow legislative change.¹⁰⁰

In 2009, the Philippines became one of the first countries to criminalise non-consensual pornography, where perpetrators of the distribution of non-consensual pornography will serve a minimum of three years in prison.¹⁰¹ Israel became the first country to define non-consensual pornography as a form of sexual assault. In 2014 Japan and Canada followed suite and criminalized non-consensual pornography conduct.¹⁰² In the United States, 48 states have passed bans on the distribution of sexualized images without the subject's consent. As of now there are no federal laws regarding non-consensual pornography content.¹⁰³ The offence of distributing non-consensual pornography is extremely new and the biggest issue lawmakers faces is to evolve with the times. Legislative evolvement is important to focus on, as society progresses. Years ago, the internet was not in existence and therefore, cybercrimes did not

⁹⁹ Section 24(1) of the Act.

¹⁰⁰ Danielle Keats Citron and Mary Anne Franks 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345.

¹⁰¹ Franks op cit note 2 at 1279.

¹⁰² Franks op cit note 2 at 1280.

¹⁰³ Franks op cit note 2 at 1281.

exist. As technology developed, so did the possibilities for crime. Legislation needs to play constantly a game of catch-up in order to effectively protect people from becoming victims of technological crimes. The next section discusses a selection of key cases in different jurisdictions to illustrate the treatment of non-consensual pornography in other countries. I have chosen to focus on cases that occurred in Canada and Australia, respectively. These countries and cases were chosen as they speak to the type of legal system we have in South Africa. In South Africa, a mixed legal system, also referred to as a hybrid legal system is present. A hybrid between Roman Dutch civilian Law and English common law influenced the legal system we have today.¹⁰⁴ As mentioned previously, cases that deal with non-consensual pornography are, for now, few and far between, because the offence is so new and legal developments are just now occurring in order to address the growing concern thereof. The Australian and Canadian case law, in my view, speaks to the viewpoints the legal system has when discussing non-consensual pornography and by analysing these cases, an understanding can be developed in how to better address the issue as a whole in South Africa.

(a) International case law and case studies

(i) R v SA, 2022 MBPC 28¹⁰⁵

In this Canadian case¹⁰⁶ non-consensual pornography is the main focus. SA, the accused, had been in a relationship with KD on again off again bases over the period of four years. During a time where KD and SA were not together, KD had a relationship with another man. 10 months later, on 6 March 2021, when SA found out about the relationship, they had an argument telephonically. SA followed up this call by calling KD approximately 200 times and sending her approximately 50 text messages. The text messages contained threatening messages that ranged from him saying he is going to kill the man KD had been ‘cheating with’ to him threatening to exposing intimate images of KD on every platform. After these threats, SA posted approximately 15 intimate images of KD on his personal Twitter account. SA had about 434 followers on Twitter, meaning that SA had some reach and the posting of the intimate content was posted for a group of at least 434 people to see. SA also tweeted the photos directly to KD. KD approached the police immediately and within five hours, just after midnight the

¹⁰⁴ Amanda Barrat and Pamela Snyman ‘Researching South African Law’ GlobaLex March 2018, available at https://www.nyulawglobal.org/globalex/South_Africa.html, accessed 28 September 2023.

¹⁰⁵ *R v SA, 2022 MBPC 28.*

¹⁰⁶ *Ibid.*

following day, the police arrived at SA's residence to arrest him. The photos were deleted from the Twitter account during this time. SA was released on an undertaking that morning, whereafter he sent KD a message, asking her to drop the charges. By doing so, he breached the no contact condition of the agreement.

SA proceeded to admit to criminal conduct by pleading guilty to the publishing of intimate images without consent of KD and to breaching his undertaking agreement. The Crown approached the court, asking the court to impose a one-year sentence of imprisonment for the distribution of intimate images without the consent of the person depicted in it.

(ii) Canadian Laws relating to Non-consensual pornography

In 2015, the Canadian legal system introduced section 162.1 to the *Criminal Code*¹⁰⁷, which speaks directly on the intimate sharing of images without the consent of the person who appears in the image. Section 162.1 reads—

(1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years;
or

(b) of an offence punishable on summary conviction.¹⁰⁸

Moreover, a court may decide to introduce a prohibition order, where the offender will be prohibited from using the internet or other networks. Offenders may be ordered to not have any contact with a victim, keep away from their homes, attend community service and other mandatory orders.

Section 162.1 also attempts to expand on what is meant by the term 'intimate image', by defining it as a visual recording in the form of a photograph, recording or film. In this visual recording, the person is nude, exposing their genital organs/ anal region, their breasts or is engaging in sexual activity in the visual recording. The definition of an 'intimate image' in this content, according to section 162.1 is based on the presumption of a reasonable expectation of

¹⁰⁷ Section 162.1 of the Criminal Code, available at <https://canlii.ca/t/55xf3>, accessed on 3 January 2023.

¹⁰⁸ Section 162.1 (1) of the Criminal Code.

privacy and where the person depicted retains a reasonable expectation of privacy at the time the offence was committed and the images were distributed.¹⁰⁹

Section 162.1 is clear that the motives of an offender/ accused are irrelevant.¹¹⁰

(iii) Sentencing in R v SA, 2022 MBPC 28

In sentencing, the court had to firstly determine whether a Conditional Sentence Order would be sufficient in this case, in order to still emphasize denunciation and deterrence of the kind of behaviour the accused engaged in. The court considered the proportionality of the case to determine whether a Conditional Sentence Order can satisfy the objectives and principles as it is set out in the *Criminal Code*. The gravity of the offence is of utmost importance, as well as the level of responsibility one can place on the offender. The court made express mention to the threats KD received from SA as well as him acting on those threats when he found out, according to him, that KD had cheated. The severity of the offence was discussed, where the court differentiated between sending the intimate images to one other person and distributing it on a platform like Twitter, where people who had access to SA's account also most probably knew about the relation between him and SA. The court concluded that a message of denunciation would not be satisfied by a Conditional Sentence Order and that a custodial sentence should be imposed. A sentence of nine months imprisonment was imposed on SA for the illegal distribution of non-consensual pornography. A two-year order of probation was also imposed following SA's time in custody, where he will have to attend counselling sessions. He is also not allowed to make contact with the victim or come closer than one block of their home, work, school or place of worship. SA was also prohibited from using or accessing social media websites and is not allowed to post or distribute any other images or videos in which KD appears. SA is prohibited from using the internet and other networks to make comments or distribute any images in which KD appears for a period of ten years.

(iv) Mitchell Joseph Brindley

Mitchell Joseph Brindley, an Australian, took intimate photos of the woman he was in a relationship with at the time. The photos were taken with the consent of the woman depicted in them. However, when Brindley and the victim ended their relationship, he proceeded to create five Instagram accounts in his ex-partner's name. On these Instagram profiles, Brindley

¹⁰⁹ Section 162.1 (2) of the Criminal Code.

¹¹⁰ Section 162.1 (4) of the Criminal Code.

posted ten intimate photographs on these pages over a period of four days. Brindley pleaded guilty the distribution of intimate content without a person's consent.¹¹¹

Under Western Australia laws, it is illegal to share intimate images of someone without their consent. The maximum penalty for such an offence is a penalty of 3 years in jail. It is also illegal to threaten to share intimate images of someone and the maximum penalty one can receive in such a case is 18 months in jail of up to \$18,000.¹¹²

(v) Sentencing in the Mitchell Joseph Brindley case

The perpetrator was the first person charged under Western Australia's non-consensual pornography laws in 2019. Brindley was handed down a sentence of a twelve-month intensive supervision order and ultimately avoided an immediate prison term. At sentencing, magistrate Dean Potter made several observations and remarks that gives an insight into the reasoning behind the chosen sentence. Magistrate Potter remarked that the perpetrator had acted impulsively and 'seemed to have been in the depths of despair.'¹¹³ Moreover, the magistrate noted that Brindley would have received jail time in if the offending could have been classified as sextortion, for instance.¹¹⁴ Sextortion involves active threatening to share intimate image or to obtain money from victims. It is clear that magistrate Potter viewed this offence as a 'relationship retribution' form of image-based sexual abuse, which is then deemed less serious. Even though the magistrate made mention of the hurt Brindley's behaviour inflicted on the victim, it was what he said about the sentencing that was worrisome. The Magistrate said that if Brindley's crime had been motivated by sexual gratification or to obtain money, that would have resulted in a jail term.¹¹⁵

¹¹¹ Charlotte Hamlyn 'First person convicted under new WA 'revenge porn' laws avoid jail sentence' *ABC News* 22 July 2019, available at <https://www.abc.net.au/news/2019-07-22/mitchell-brindley-first-person-in-wa-sentenced-for-revenge-porn/11331022>, accessed on 1 November 2022.

¹¹² Ibid.

¹¹³ 'No jail time for WA first revenge porn offender' *The Canberra Times* 22 July 2019, available at <https://www.canberratimes.com.au/story/6286378/no-jail-for-wa-first-revenge-porn-offender/>, accessed 15 October 2022.

¹¹⁴ Ibid.

¹¹⁵ Cathryn Palfrey 'Not Just for Jilted Ex-Lovers: The Criminalisation of the Non-Consensual Distribution of Intimate Images in WA' *The National Law Review* 23 July 2019, available at <https://www.natlawreview.com/article/not-just-jilted-ex-lovers-criminalisation-non-consensual-distribution-intimate>, accessed 14 September 2022.

Chapter 4:

IV VICTIMS, THEIR EXPERIENCES AND SECONDARY VICTIMISATION

(a) *A gendered phenomenon*

In 2013, a study showed that 90% of respondents who had been victimised by non-consensual pornography were women.¹¹⁶ Non-consensual pornography is a gendered phenomenon, affecting mostly women. In an Australian study, one in ten people have reported that they have had a nude or semi-nude image of themselves distributed online without their consent.¹¹⁷ Websites where one can view non-consensual pornography, feature more women than men.¹¹⁸ The Cyber Civil Rights Initiative is one of the only United States organizations that is dedicated to non-consensual pornography and the issues that go along with it. In 2016, the organisation reported that they heard from around 100 victims every month.¹¹⁹ A research report from a collaboration between the University of Exeter, the Revenge Porn Helpline and Professionals Online Safety Helpline have found that the offence of non-consensual pornography and the distribution of it is an offence deeply rooted in victimising women.¹²⁰ The research was carried out between March 2019 and May 2019. Both helplines used data to explore the experiences of victims of intimate image-based abuse. The data revealed that 73% of callers to the Revenge Porn Helpline were female and 97% of them reported intimate image abuse of some form and the other 3% reported sextortion cases.¹²¹ On the other hand, 27% of the callers were male and majority were victims of sextortion as opposed to intimate image abuse.¹²² Even though one can clearly see the contrast between the levels of calls the helpline received when comparing female callers to male callers, it should also be noted that there is a clear difference in what type of abuse the female and male callers experience.

¹¹⁶ Cyber Civil Rights Initiative CCRI's 2013 Nonconsensual Pornography Research Results' available at <https://www.cybercivilrights.org/ncpstats/>.

¹¹⁷ Anastasia Powell and Nicola Henry 'Digital Harassment and Abuse of Adult Australians: A Summary Report' (2015) RMIT University and La Trobe University 1.

¹¹⁸ Anastasia Powell and Nicola Henry 'The Picture of Who is Affected by 'Revenge Porn' is More Complex Than We First Thought' *The Conversation* 8 May 2017, available at <https://theconversation.com/the-picture-of-who-is-affected-by-revenge-porn-is-more-complex-than-we-first-thought-77155>.

¹¹⁹ Mary Anne Franks 'Drafting an Effective 'Revenge Porn' Law: a Guide for Legislators' (2015) available at <https://ssrn.com/abstract=2468823>, accessed on 10 August 2022.

¹²⁰ Elena Sharatt 'Intimate Image abuse in adults and under 18s: A comparative analysis of cases dealt with by the Revenge Porn Helpline and Professionals Online Safety Helpline' (2019) 5, available at <https://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf>, accessed on 1 November 2022.

¹²¹ *Ibid* at 12

¹²² *Ibid* at 12.

In the 2022 Law Commission Consultation Paper¹²³ published in the United Kingdom, statistics were produced that built on the statistics found in the above-mentioned study. In this report, 75% of the calls received by The Revenge Porn Helpline in 2021 were from women and it was reported by these women that the perpetrator was predominantly male.¹²⁴ One begins to wonder why this phenomenon is predominantly based around female victims and male perpetrators. It begs the question, is the distribution of non-consensual pornography just a new, elevated and more sophisticated way of perpetuating the same type of abuse and violence women and girls experience in other facets of their lives? Some argue that image-based abuse like the distribution of non-consensual pornography is steeped deep in our misogynistic society.¹²⁵ The motivation for distributing non-consensual pornography cannot be narrowed down to only one thing, as every perpetrator is motivated and triggered to commit such an act for various different reasons. In many cases, victims whose ex-partners have shared intimate images of them have reported that during their relationship, the perpetrator was controlling, manipulative and obsessive.¹²⁶ The perpetrator then distributing intimate images of their ex-partner is not just about ‘revenge’ but a means to shame them, control them and humiliate them.¹²⁷ The root runs deeper than an ex-partner wanting to maintain control. Misogyny and the entitlement of men also directly drives image-based sexual abuse.¹²⁸ Some men often proudly exercise their entitlement to and over a female’s body which re-enforces the cycle of demanding images and videos from partners or women. It also perpetuates the idea that women and their bodies are at men’s disposal for entertainment. The distribution of non-consensual pornography is a direct violation of sexual autonomy. If one investigates websites where non-consensual pornography is shared, especially where user submitted images are posted, it becomes evident that the premise is based on misogynistic ideas. The founders of these websites aim to commodify on the distress of victims.¹²⁹ They do so by charging men to view these images or videos but also extort the victims by asking for money in order for the image or video to be removed from the website.¹³⁰ It appears that non-consensual pornography is

¹²³ Intimate Image Abuse: A consultation paper (2022) Law Commission Consultation Paper No 407.

¹²⁴ Ibid at para 1.7.

¹²⁵ Clare McGlynn, Erika Rackley, Kelly Johnson et al ‘Shattering Lives and Myths: A Report on Image Based Sexual Abuse’ (2019) Durham University and University of Kent 4.

¹²⁶ Ibid at 4

¹²⁷ Ibid at 4.

¹²⁸ Ibid at 5.

¹²⁹ Michael Salter and Thomas Crofts ‘Responding to Revenge Porn: Challenges to Online Legal Impunity’ (2015) *New Views on Pornography: Sexuality, Politics and the Law* 5.

¹³⁰ Ibid at 7.

about more than just seeking out pornography. There are more pornography websites on the internet than one can count. It is the intentional seeking out of non-consensual pornography that can make one argue that viewers and consumers of non-consensual pornography relish in the pain or violation women experience when their images and videos are posted online without their consent.¹³¹

(b) Victim blaming & shaming

Victim blaming is a major issue victims of non-consensual pornography face. Women are often blamed for being the victim of a crime, especially if the crime is of a sexual nature. The most common form of victim blaming we know occurs when a woman is raped. The focus is shifted from the perpetrator to the victim, blaming them for ‘wanting it’ because of how they dressed, how drunk they were, how exposed they were and so forth.¹³² The same occurs with a victim of non-consensual pornography.

The blame is often not directed towards the person who distributed the image without consent, but it is rather put on the victim by questioning why they would take a nude picture of themselves in the first place.¹³³ Victim blaming occurs when a victim of a crime is judged by others as if they are responsible for that crime occurring.¹³⁴ Often, the forums or websites the images are posted on, are accompanied with a feature where viewers of the content can leave comments which are often salacious and degrading. The public shame and humiliation that often accompanies being a victim of non-consensual pornography takes an immense toll on the victim. Victims are frequently not seen as victims, but rather labelled as sexually promiscuous.¹³⁵

The ‘fundamental attribution error’ describes an individual’s tendency to attribute someone’s actions to their character but their own actions to external factors outside of their own control. This means that personality-based explanations are given to behaviours while under-

¹³¹ Jill Filipovic ‘Revenge porn is about degrading women sexually and professionally’ *The Guardian* 28 January 2013, available at <http://www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women>, accessed 2 November 2022.

¹³² Harold H. Kelley and John L. Michela ‘Attribution theory and research’ (1980) *31 Annual Review of Psychology* 459. Available at <https://www.annualreviews.org/journal/psych>.

¹³³ Mckinlay and Lavis op cit note 28 at 388.

¹³⁴ Ibid at 387.

¹³⁵ N. T Feather ‘Judgments of deservingness: Studies in the psychology of justice and achievement’ (1999) *3 Personality and Social Psychology Review* 92, Available at https://doi.org/10.1207/s15327957pspr0302_1, accessed 17 September 2022.

emphasizing situational explanations.¹³⁶ This occurs in many crimes and can also be seen in the reactions of others when discussing non-consensual pornography. Those viewing the non-consensual pornography are likely to attribute the motivation to the individual by saying ‘she really should not have taken/sent that picture, she is so promiscuous!’¹³⁷ The situational factors of victims of non-consensual pornography are often overlooked. Situational factors range from the victim not consenting to the image being shared on the internet to she did not know her partner would do such a thing.

In an Australian study, 70% of people who took part in the study agreed that an individual should be wiser than thinking about taking intimate photographs of themselves and 6% of the participants were of the belief that a person who sends an intimate image to someone is partially responsible in the event that the image appears online.¹³⁸ These statistics are alarming, as it places the burden on the victim to rather not take pictures or express their sexual behaviour or to not place trust in someone who may or may not turn out to post their intimate photographs. Women are shamed for behaviours that make them a victim and are met with expectations that they should take responsibility for their action. It seems like it is easier to blame a victim than it is to demand a perpetrator to take responsibility for their hand in making someone a victim of a crime.

The stigmatisation of expressing any sexuality results in a victim who feels immense shame for being exposed in the way non-consensual pornography exposes one. It is invasive, often unexpected and damaging. Blaming a victim is revictimizing them instead of showing them sympathy. When one places more emphasis on the behaviour of the victim and what they did wrong, it reinforces the false idea that victims are in the wrong, instead of the perpetrator. Victim blaming is to ‘blame the victim of misfortunes for their own fates.’¹³⁹

(c) Police response and Secondary victimisation in the legal system.

Victims of non-consensual pornography will not only experience hardship when they are victimised, but may experience other feelings like humiliation, shame and embarrassment.

¹³⁶ Philip E. Tetlock ‘Accountability: A social check on the fundamental attribution error’ (1985) 48 *Social Psychology Quarterly* 232.

¹³⁷ Mckinlay and Lavis op cit note 28 at 388.

¹³⁸ Nicola Henry, Anastasia Powell and Asher Flynn ‘Not just ‘revenge pornography’: Australians’ experiences of image-based abuse’ (2017) available at <http://dx.doi.org/10.13140/RG.2.2.29903.59045>, accessed 15 November 2022.

¹³⁹ Melvin J Lerner and Dale T. Miller ‘Just World Research and the Attribution Process: Looking Back and Ahead’ (1978) 85 *Psychological Bulletin* 1030.

Victims must also decide whether or not to approach the police. There are several barriers victims experience when thinking about approaching the police. In a study done to understand why victims do not come forward to report the crime to the police, it was found that the largest barrier relates to the crime itself. Victims feel high levels of shame and embarrassment and are afraid of the judgement that might be directed towards them.¹⁴⁰ In the study, only 24% of participants reported anything to the police and 90% of victims reported that they would have reported the incident, had there been better structures in place at in law enforcement, like guaranteed anonymity.¹⁴¹ 49% of participants felt uncertain about the role and response of the police and many felt that the police would not do anything to help them.¹⁴² Similarly, victims felt that they would be blamed for what had happened to them and that the police would be another source of shame that is placed on them.¹⁴³

The University of Suffolk conducted a study and surveyed police officers and staff in England and Wales regarding non-consensual pornography and their response thereto. From a number of 783 participants in this study, the majority of responders said that had some knowledge of non-consensual pornography but with significant gaps. 38.7% of responders reported that they had an average understanding of non-consensual pornography and 5.9% of responders said that they had no knowledge of what non-consensual pornography is. A mere 9 responders reported that they had an ‘excellent’ understanding of non-consensual pornography.¹⁴⁴ In this survey, participants were given scenarios where they had to identify whether the incident constituted non-consensual pornography. The one scenario reads: ‘A woman has entered your local police station to report a rape. She further explains that the perpetrator filmed the sexual assault and are now circulating the material online.’¹⁴⁵ This scenario constitutes an illegal case of non-consensual pornography and the response by the police participants were as follow: 49.6% said the conduct was illegal, 40.5% said that the conduct was not illegal and 9.9% said that they were unsure.¹⁴⁶ The answers given in the survey demonstrated the confusion surrounding non-consensual pornography under police officers. 94.7% of the police officers and staff who

¹⁴⁰ North Yorkshire Police, Fire & Crime Commissioner ‘Image-Based Sexual Abuse Report 2018’ 2018 at 2, available at <https://www.northyorkshire-pfcc.gov.uk/content/uploads/2018/11/Suffering-in-Silence-Report.pdf>, accessed 21 November 2022.

¹⁴¹ Ibid at 13.

¹⁴² Ibid at 8.

¹⁴³ Ibid at 8.

¹⁴⁴ Emma Bond and Katie Tyrell ‘Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales’ (2018) *Journal of Interpersonal Violence* 12.

¹⁴⁵ Ibid at 13.

¹⁴⁶ Ibid at 13.

partook in the survey reported that they had not received any formal training on how to conduct an investigation where non-consensual pornography is the offence or part of an offence.¹⁴⁷

The police are the first point of reference for many victims, which means that police must be trained and educated well to assist victim during a difficult experience. Similarly in South Africa, the South African government have tried to enhance efforts to supporting women and children when they are victimised. The government have established programmes like the Victim Empowerment Programme that aims to assist victims of violence to access of good support services.¹⁴⁸ It has been reported that the programme is facing issues of implementation as a result of poor engagement from several departments that are needed to make the programme successful.¹⁴⁹ Collaborations between the government departments who are to implement the Victims Charter is still a challenge, notwithstanding the existence of the National Policy Guidelines for Victim Empowerment. It has been reported that the planning, monitoring and evaluation that is required in these programmes are not being done. Research also shows that the Victim Empowerment Programme's implementation is hindered by the lack of relevant training of dealing with victims of crimes.¹⁵⁰ A study done in South Africa to understand police responses to victims found that officials are not adequately equipped to deal with victims of crimes.¹⁵¹ Participants from the General Detectives and the FCS Units reported that frontline officials often fail to ask relevant questions and treat victims in a fair manner. Participants were asked about the attitudes of officials, where participants reported that officials are often impatient, insensitive towards victims, they lack empathy and discretion towards victims.¹⁵² Victims of non-consensual pornography distribution are vulnerable victims who may feel revictimised when they approach the police and they react in an insensitive and impatient manner. In the same study, it was found that many officials at station levels do not have an adequate understanding of directives and legislation.¹⁵³ If the police do not understand that the distribution of non-consensual pornography is a crime or understand that there is recourse for victims, victims may be shown the door, treated unfairly or shamed for

¹⁴⁷ Ibid at 14.

¹⁴⁸ Tebogo Mmamabolo, Kobus Schwartz and Phil Vuma 'Rendering victim-friendly services for women and children in South Africa: Why is the SAPS's response to victims still unsatisfactory?' (2020) 5 *Africa Journal of Criminal Justice* 13.

¹⁴⁹ Ibid at 14.

¹⁵⁰ Ibid at 13.

¹⁵¹ Ibid at 16.

¹⁵² Ibid at 16.

¹⁵³ Ibid at 17.

approaching the police. Initial victim support at station level is crucial, as it may hinder the victim from participating in the criminal justice system. The police, as initial support to victims, must ensure that victims are provided with victim-friendly services that align with internal directives and legislation.¹⁵⁴

As seen in international studies, the police are not trained in their understanding of new and evolving crimes like the distribution of non-consensual pornography.¹⁵⁵ The uncertainty surrounding legislation and the sociological factors associated with non-consensual pornography can lead to ineffective communication and reporting between a victim and the police. The lack of training leads to police not being aware of online image-based abuse and can lead to inconsistencies in police responses, as some police officers may know about the offence and treat victims in the correct way while other police officers may not know about non-consensual pornography which may lead to a victim feeling misunderstood, unheard or like their experiences does not constitute a true crime.

(d) Effects on the victim of non-consensual pornography

A victim of any form of sexual harassment can experience a deterioration in their psychological and mental well-being.¹⁵⁶ Becoming a victim of non-consensual pornography does not only expose victim high levels of blaming and shaming.¹⁵⁷ The impact of being a victim of such an invasive form of abuse can lead to feeling humiliated, depressed, anxious and to experiencing other mental health challenges.¹⁵⁸ Some victims may even experience difficulties in finding new partners, securing employment and in some cases harassment and stalking.¹⁵⁹ In some studies it has been found that women who had experiences more extreme sexual harassment ultimately reported higher and more intense levels of PTS (Post-traumatic Stress) symptoms.¹⁶⁰ Post-traumatic stress is response to experiencing an event that one might perceive as being

¹⁵⁴ Ibid at 19.

¹⁵⁵ Ibid at 20.

¹⁵⁶ Ivy K. Ho, Khanh T. Dinh, Sarah A. Bellefontaine & Amanda L. Irving 'Sexual Harassment and Posttraumatic Stress Symptoms among Asian and White Women' (2012) 21 *Journal of Aggression, Maltreatment & Trauma* 96.

¹⁵⁷ Ibid at 97.

¹⁵⁸ Citron and Franks op cit note 100 at 4

¹⁵⁹ Ibid at 4.

¹⁶⁰ Samantha Bates 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2016) *Feminist Criminology* 5.

stressful or traumatic. It is argued that the experiences women have when being sexually harassed, like PTSD, is also felt by victims of non-consensual pornography.¹⁶¹

In a qualitative study conducted in the period of 2014 to 2015 with victims of non-consensual pornography, their experiences after becoming victims were discussed. Three main influences on mental health were observed in the study- Trust issues after non-consensual pornography; PTSD, depression and anxiety; and self-esteem, confidence and loss of control.¹⁶² After being victimised, women in the study felt a loss of trust in others and found it extremely hard to attempt to place trust in a person, as the betrayal of being exposed through non-consensual pornography left a lasting wound.¹⁶³ In the study, women reported feeling mental health effects as a result of being a victim. Such an invasion of privacy, coupled with the shame and stress of non-consensual pornography results in extremely disruptive challenges. Some of the participants reported that they had received official diagnosis of PTSD and depression and some attempted to commit suicide.¹⁶⁴ Many of the victims reported that they could not stop thinking about their intimate images being on the Internet and the obsessive thoughts did not subside for a long while.¹⁶⁵ The last observation made in the study was that victims often felt a shift in their self-esteem and confidence after being a victim.¹⁶⁶ In sexual assault and harassment cases, the loss of control and autonomy over their bodies is extremely traumatizing and the loss of control affects not only their self-esteem but also amplifies the level of distress a victim experience.¹⁶⁷ The same loss of control is experienced when one's intimate images are shared for others to see when one did not consent to the distribution. Victims feel a loss of control not only about the act itself, but also feel like they lose control over becoming victims again or when they give over the case to investigators.¹⁶⁸ The crime makes a victim feel out of control of everything surrounding the crime, their experiences, their recovery and so much more.¹⁶⁹ An important take-away from the study is that the effects of being a victim of non-consensual pornography bears many similarities with that of being a victim of sexual assault

¹⁶¹ Ibid at 5.

¹⁶² Ibid at 12.

¹⁶³ Ibid at 9.

¹⁶⁴ Ibid at 10.

¹⁶⁵ Ibid at 10.

¹⁶⁶ Ibid at 11.

¹⁶⁷ Patricia A Frazier 'Perceived control and distress following sexual assault: A longitudinal test of a new model' (2003) 84 *Journal of Personality and Social Psychology*, 1257.

¹⁶⁸ Ibid at 1257.

¹⁶⁹ Ibid at 1258.

of harassment. Because of that, it is understandable that victims have similar experiences after being victimised.

The effects of being a victim of non-consensual pornography is even wider than mental health challenges. Non-consensual pornography can cause victims to lose jobs, education and other opportunities.¹⁷⁰ Some victims have reported that the intimate images were sent to their employer and that they have lost their jobs as a result thereof. Future employment opportunities can also be deeply affected. In a study of 1244 participants, over 50% of the participants reported that not only did their intimate content appear online, but it was posted together with their full names and social network profiles.¹⁷¹ 20% of participants stated that their cell phone numbers as well as their e-mail addresses were also posted with the intimate images.¹⁷² This practice of exposing a victim's personal details like their home address or phone number is called 'doxing'. It is common knowledge that one can search a name on the internet and information and images will be shown. Because victims' images are linked to their full names, that will be shown when a name is typed into a search bar. In this day and age, employers are quick to do an internet search of applicants and/or employees and when victims of non-consensual pornography apply for a job, employers might find their intimate images on the internet. Employers are unlikely to want to hire employees that might reflect badly on the company, even though they have been a victim of non-consensual pornography.¹⁷³ In a study done in 2010, it was found that of the recruiters and HR professionals surveyed in the study, 70% say that they have rejected candidates based on the information they found when they had done online research about a candidate.¹⁷⁴ The practice of 'doxing' is not only harmful when in relation to your professional persona online. The exposure of one's personal information can be dangerous and can lead to a victim being harassed or subjected to secondary victimisation.

Becoming a victim of non-consensual pornography can truly alter so many facets of a victim's life and can be extremely damaging to not only their mental health but also to their potential prospects and future. It is for this reason that I put forth that the distribution of non-consensual pornography is a form of sexual violence and sexual abuse. As established in Chapter 1, there

¹⁷⁰ Franks op cit note 2 at 1272.

¹⁷¹ Cyber Civil Rights Statistics op cit note 116.

¹⁷² Ibid.

¹⁷³ Citron and Franks op cit note 100 at 4.

¹⁷⁴ 'Online Reputation in a Connected World' 2010, available at http://www.jobhunt.org/guides/DPD_OnlineReputationResearch_overview.pdf, accessed 12 November 2022.

are many correlations between being a victim of non-consensual pornography and, let's say, a victim of rape or any other form of sexual abuse and violence. It has been found that many victims describe their experiences of being a victim of non-consensual pornography as being a victim of sexual assault.¹⁷⁵ The connection can be made when looking at not only the practices but also the harm that is done to the victim. In a 2016 study done on sextortion, a victim reported that being a victim of the exposing of sexual images 'felt like...being raped through the phone.'¹⁷⁶ It goes to show that being a victim 'online' and being a victim of a physical act of sexual offending can, for some victims, not be distinguished. The effects felt in being a victim of online abuse, like non-consensual pornography, bears several similarities to that of being a victim of sexual assault or abuse in 'the real world'. In a study done on sextortion, the writer states that sextortion is 'closely akin to sexual assault in the physical world'.¹⁷⁷ In my mind, there is no argument to be made against classifying the offence of non-consensual pornography as a sexual abuse and a sexual assault. The extreme, deep-rooted and life-altering influence non-consensual pornography has on a victim and their lives is undeniable. This chapter has extensively delved in the aftermath and effects of being a victim of non-consensual pornography. It is, in my opinion, not logical to classify this offence as a mere media or cybercrime. This form of abuse happens in the 'online world' but should not be downplayed as a result thereof. In-person sexual abuse directly attacks a victim's autonomy and dignity and imposes serious emotional and psychological harm on the victim. Non-consensual pornography can have those same effects and have 'real-world' consequences for the victims. It is imperative that there are 'real-world' consequences for the perpetrator. Those consequences must be based on the belief that an offence like the distribution of non-consensual pornography is a serious one and on the same continuum as other forms of sexual abuse.

¹⁷⁵ Clare McGlynn, Erika Rackley & Ruth Houghton 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse' (2017) *Feminist Legal Studies* 30.

¹⁷⁶ Janis Wolak and David Finkelhor 'Sextortion: Findings from a survey of 1,631 victims' *Crimes Against Children Research Center* (2016) 31, available at https://www.wearethorn.org/wp-content/uploads/2016/08/Sextortion_Report.pdf, accessed 1 January 2023.

¹⁷⁷ Benjamin Wittes, Cody Poplin, Quenta Jurecic et al 'Closing the sextortion sentencing gap: a legislative proposal' *Center for Technology Innovation at Brookings* (2016) 4, available at <https://www.brookings.edu/research/closing-the-sextortion-sentencing-gap-a-legislative-proposal/>, accessed 1 January 2023.

Chapter 5:

V EFFECTIVENESS OF THE LEGISLATION IN ADDRESSING THE ISSUE OF NON-CONSENSUAL PORNOGRAPHY

The previous chapters have established what the offence of non-consensual pornography is, as well as what the effects are on the victim. Now, the effectiveness of the recourse available to victims must be analysed. The effectiveness of legislation is the extent to which a certain law is seen to achieve the purpose it was drafted for and that will be the primary indicator of the quality of that piece of legislation.¹⁷⁸ An effective and quality piece of legislation is one that produces the regulatory results that policy makers intended with the drafting thereof. Effective legislation that directly deals with non-consensual pornography must be clear, specific, narrow enough without infringing on other rights and should be implementable in the legal sphere but also in society.¹⁷⁹ The legislation available in South Africa are not without faults and in this chapter these issues will be discussed, as they might hinder the effectiveness of the legislation when a victim uses it as recourse. The South African legislation available to victims of non-consensual pornography have been discussed. Here follows an analysis of the effectiveness of those pieces of legislations, especially weaknesses that are observed.

(a) Films and Publications Amendment Act:

(i) Intention

The Films and Publications Amendment Act gives a very clear definition of non-consensual pornography and the distribution thereof without the consent of the person who is depicted in the intimate photograph or video. Section 18F (1), as quoted above, states that the conduct must not be done without a) consent and b) with the intention to cause harm to the individual.¹⁸⁰ The description of the offence is very clear in this section. Section 18F(1)(b) provides that no person may commit an offence of distributing non-consensual pornography ‘with the intention of causing that individual harm.’ The inclusion of a motive requirement, in this case to cause the victim harm, does distinguish between perpetrators who are motivated to cause an individual harm and other perpetrators who are motivated by other things — some perpetrators are not motivated to cause harm, but rather motivated by money, to become well-known on forums for

¹⁷⁸ Helen Xanthaki ‘Quality of legislation: An achievable universal concept or a utopia pursuit?’ (2011) L Mader & M Almeida (eds) Quality Legislation 78.

¹⁷⁹ Franks op cit note 119 at 14.

¹⁸⁰ Section 18(1)

distribution of non-consensual pornography, or for their own pleasure.¹⁸¹ By using the wording of ‘cause harm’ in the section, a whole group of people are ignored who do commit the act of distributing non-consensual pornography, but do it for completely different reason than to cause the victim of their act any harm. It is impossible to accurately describe the state of mind each and every perpetrator has when they decide to upload and share intimate content of another person.¹⁸² Ultimately, this section in the Films and Publications Amendment Act requires a certain type of intention and intention can be difficult to prove in some cases. Intention often requires a perpetrator to confess that they intended to hurt a victim because of some reason they might have. If that is not the case and intention cannot be proven in any other way, a perpetrator’s intention will be inferred from the circumstances of the case and a conclusion will have to be drawn about intention based on the evidence one can use or gather. This wording in the Films and Publications Amendment Act provides a perpetrator with an already structured loophole through which they can claim their innocence. A perpetrator can easily say that their intention was never to share intimate images of the victim and that they did not mean to cause any harm. The intention to cause harm can be twisted in such a way that it ultimately works in the favour of the accused and gives them a way to wash their hands in innocence.

It is my view that whether a perpetrator intends to cause a victim harm or not is beside the point. One could argue that if intention must be included in formulating a case against a perpetrator, the question to be asked is whether the perpetrator intentionally engages in non-consensual behaviour, instead of asking about their intention to cause harm. A perpetrator’s intention to cause harm or not cause harm will not ultimately cause the victim more or less harm. The harm done to a victim is not diminished if the perpetrator did not intend to cause harm. The aftermath of the distribution of non-consensual pornography is still traumatic for the victim, no matter what the intention was of the perpetrator. One would hope that lawmakers have the best intentions for the victim in mind when drafting these statutes and it is often difficult to understand how a seemingly positive recourse for victims can be weaponised and used against them. The section is phrased in such a way that the onus is placed on the victim of non-consensual pornography to prove that harm was done to them for it to be a legitimate complaint against the perpetrator. The phrasing perpetuates a certain stereotype that victims

¹⁸¹ Franks op cit note 119 at 6.

¹⁸² Ibid at 6.

must be irreversibly harmed for their claims and complaints to be legitimate. Victims must now prove that they have been harmed and that is dangerous, as all victims react differently to an offence and experience the results thereof differently. Some victims may experience that extreme was indeed done to them, others may feel less of an effect on their lives but are steady in their conviction that wrong is wrong and that an offender must be held accountable. Ultimately, a requirement of intention to cause harm could place victims in a position where they do not receive justice and works in favour of the perpetrator.

(ii) Private Photograph

Section 18F(1) of the Films and Publications Amendment Act states that ‘no person may expose, through any medium, including the internet and social media, a private photograph or film.’¹⁸³ The use of the word ‘private’ is problematic, especially when read in conjunction with Section 18F(4).

The definition given to ‘private’ in this context could be seen as inadequate. The section does not make mention of the context in which intimate photographs or videos were taken. However, the section is then clear in saying that the content is private if it was not intended by the individual in the photo or film to be seen by others. The use of the word ‘others’ implies that the intimate content was never meant to be seen by anyone, however that is not always the case in non-consensual pornography cases. If one investigates why intimate content is often created, like in sexting situations, it becomes clear that an individual can voluntarily send ‘private’ content to another person to see but not consent to the content being placed on the internet on forums, on social media platforms or shared in any other way. In previous chapters it has been established that intimate content can often be willingly created and voluntarily sent to others.¹⁸⁴ A clear distinction must be made between the voluntary sharing of content with a chosen person or persons and those persons then sharing the content outside of that circle. Victims may have had no objection to send the image or video to a specific person. The issue arises when the content is then shared with third parties without the consent of the person depicted in the content. The most significant concept in non-consensual pornography cases is that initial consent does not mean consent for further distribution. The word ‘private’ in this section is truly important in understanding the offence. However, the definition given in the Act does not

¹⁸³ Section 18F(1) of the Act.

¹⁸⁴ Matthew Hall & Jeff Hearn ‘Revenge Pornography and Manhood Acts: a Disclosure Analysis of Perpetrators’ accounts’ (2019) 28 *Journal of Gender Studies* 162.

speak to the offence as a whole. The definition is limiting the effectiveness of the use of the legislation.

(iii) The Definition of 'Sexual'

Section 18F(5) provides a definition of what 'sexual' means in this context:

- (5) For the purposes of this section a photograph or film is 'sexual' if such photography or film—
 - (a) it shows all or part of an individual's exposed female breasts, anus, genitals or pubic area;
 - (b) it shows something that a reasonable person would consider to be sexual because of its nature; or
 - (c) its content, taken as a whole, is such that a reasonable person would consider it sexual.¹⁸⁵

Section 18F(5) aims to provide a clear outline and definition of what content forms part of the offence of the distribution of non-consensual pornography, specifically by trying to give a concrete definition of what a 'sexual' image or video is.¹⁸⁶ Although the definition does cover traditionally sexual areas of the body and what persons may view as sexual, the provision excludes content that does not have any traditional sexual connotation. Images of someone undressing, taken by an onlooker or someone taking progress photos after a workout do not inherently fit the description of content that is sexual. There is a trend, especially in the weight loss community and in the training world to take before and after pictures that document any progress made. The images are not always taken in the nude but are intimate in nature and are deemed private by the ones who are depicted in the image or video. The distribution of such content, that the person in it deems private or only wanted to share with certain individuals, is problematic, as their right to privacy is infringed upon but it does not fit the description of what a 'sexual' image or video is. Other than weight loss before and after pictures, intimate and private photographs taken during pregnancy or during or after a surgery can also be private images but do not necessarily comply with the requirements of what 'sexual' is in order to be deemed non-consensual pornography.

To link back to victim shaming, the connotations of the term 'sexual' in this section could lead to negative interpretations, as it may shame a victim into thinking that they are to blame for what has happened to them. Sexuality and sexual expression are often shamed in society, especially when it is women who are expressing their sexuality.¹⁸⁷ Women, who are often the

¹⁸⁵ Section 18F(5) of the Act.

¹⁸⁶ Ibid.

¹⁸⁷ Maddocks op cit note 19 349.

victims of non-consensual pornography are shamed for sexual expression and very often women are burdened with the responsibility of ‘preventing’ sexual harassment and abuse, as society tells them to not act in an overly sexual manner, to not send intimate images to anyone and so forth. The disapproval in society for crimes of abuse, especially that of a sexual nature, are directed at the victim and not at the perpetrator who committed an offence.

(b) Cybercrimes Act:

(i) Intention

The prevalence of cybercrimes and in this case online abuse is important to address, as it will inadvertently affect more and more citizens as this form of abuse is becoming more common. One could say that the Cybercrime Act builds on the ideas that are in the Films and Publications Amendment Act that relate to non-consensual pornography. The Cybercrimes Act, as previously mentioned, is very clear on what non-consensual pornography is. In the definition given, there is the use of ‘intention’:

‘Any person who unlawfully and intentionally disclose...a data message of an intimate image of a person without the consent of that person, is guilty of an offence.’¹⁸⁸

Intention, as a requirement for liability for committing the offence of distributing non-consensual pornography seems extremely limiting. Having to prove intention makes one question how effective the Act would be in truly prosecuting an accused. It seems very difficult to prove the intention of the perpetrator in cases of non-consensual pornography. To prove the intent by which intimate content was shared seems like a very difficult task. The caution that should be taken when discussing the use of the word ‘intention’ is that perpetrators may use this as a way to exempt themselves from any responsibility by stating that they never intended for the images or videos to be distributed. It is worthy of noting that this section only mentions ‘intention’ and does not state ‘intention to do harm’ or any such wording as in the Films and Publications Act.

Dolus directus, also known as direct intention, comprises a person’s directing his will towards achieving a result that is prohibited or directing his will towards the prohibited act itself.¹⁸⁹ The person’s goal is the result or the act itself and therefore, one can say that the person who acts desires the act and / or the result that occurs as a result of the act. This form of intention is

¹⁸⁸ Section 1 of the Act.

¹⁸⁹ CR Snyman Criminal Law 6 ed (2014) 119.

usually what one associates with ‘intention’, in that a perpetrator or offender is certain of the fact that they are committing the prohibited act or causing a prohibited result.¹⁹⁰

Intent, as a requirement for liability for the crime of distributing non-consensual pornography, is very limiting and I do not know how likely convictions would be if the requirement of intention needs to be met first. The inclusion of intention seems to give perpetrators a defence - prosecution could possibly be avoided by merely claiming that the intention to distribute intimate content was not present when the offence occurred. It is for this reason that *dolus eventualis* used as a standard of intention must be discussed in this context. Dolus eventualis can be defined as when a person commits a crime or offence with intention in the form of dolus eventualis, which means that the commission of the unlawful act or the causing of the unlawful result is not the offender’s main aim.¹⁹¹ However, the offender subjectively foresaw the possibility that, in striving towards an aim, the unlawful act may be committed or the unlawful result may be caused. Additionally, the offender reconciles himself to the possibility that an unlawful act may be committed or an unlawful result may be caused by the act itself.¹⁹² Dolus eventualis is crucial when linking intention and the distribution of non-consensual pornography. If the courts find that, from the evidence, a person predicted or foresaw the possibility that their conduct may result in another person’s intimate images being distributed and that a person acted recklessly in respect of the possibility of that occurring, there would be sufficient grounds for a court to find that a person intentionally distributed the intimate images of another person.

I put forth that the legislation will have to be read widely to encompass all the various forms of intention and to not strictly read it by way of direct intention only. Different forms of intention must be considered when the perpetrator’s intention is analysed.

(ii) Intimate Image

Section 16(2)(b) provides a definition of an intimate image, as the definition of the offence makes it clear that the offence is the unlawful distribution of an ‘intimate image’:

“intimate image” means a depiction of a person—

(i) real or simulated, and made by any means in which—

¹⁹⁰ Snyman op cit note 189 at 178

¹⁹¹ Snyman op cit note 189 at 179

¹⁹² Snyman op cit note 189 at 479.

(aa) B is nude, or the genital organs or anal region of B is displayed, or if B is a female person, transgender person or intersex person, their breasts, are displayed; or

(bb) the covered genital or anal region of B, or if B is a female person, transgender person or intersex person, their covered breasts, are displayed.¹⁹³

As stated earlier, there are many trends like the taking of before and after photos in underwear, the taking of pictures during pregnancy and in the context of surgery that does not fall within the definition of an ‘intimate image’ as it stands in the Cybercrimes Act. There are intimate images where a person is depicted in an intimate setting that does not explicitly show any genitals. The images do, however, infringe on a victim’s right to privacy and dignity. Images like the ones described would require section 16(2)(b) to be expanded upon. Images that go by the questionable name of ‘ejaculation-shots’ are images or videos that show a person, specifically their face, covered in semen.¹⁹⁴ These images or videos do not show any nudity, they show no genital organs or anal region. Even though none of the previously-mentioned are visible in the content, the mere display of the victim’s face covered in semen could infringe on a victim’s right to privacy and dignity. The definition of an ‘intimate image’ in the Cybercrimes Act is inadequate and is very narrow, only referring to ‘traditionally sexual’ body parts that needs to be on display for it to constitute an intimate image. I put forward that an image does not need to depict nudity or show genitals for it to be an intimate image or video.

The Films and Publications Amendment Act is amending their definition of pornography to ‘[t]he explicit description or exhibition of sexual subjects or activity.’¹⁹⁵ Section 16(2)(b) expressly states that it only deals with images, but it should be noted that non-consensual pornography can take shape in the form of writing as well. Alternative forms of non-consensual pornography should be added to this scope in order to avoid not being able to help some victims of non-consensual pornography. The Cybercrimes Act should be amended in the same way Films and Publications Amendment Act is being amended. If this Act defines pornography in a certain way, there will then automatically be a possibility for it to become non-consensual pornography. The limiting definition can be detrimental to some victim who will not be able

¹⁹³ Section 16(2)(b) of the Act.

¹⁹⁴ Clare McGlynn ‘More than a breach of privacy: image-based sexual abuse and the Irish Law Reform Commission on harmful communications’ (2017) AJCRD 6.

¹⁹⁵ ‘Films and Publications Amendment Regulations 2022’, available at https://www.gov.za/sites/default/files/gcis_document/202209/46839gon2432.pdf, accessed on 1 November 2022.

to approach the courts, as their specific case falls outside of the definition of what the law says it is.

(iii) Consent

It could be argued that in a case of non-consensual pornography, there should be a presumption that consent was not given.

(iv) Designated Point of Contact

The Act provides, in Chapter 6, that a designated ‘Point of Contact’ must be established: ‘The National Commissioner must establish or designate an office within existing structures of the South African Police Service to be known as the designated Point of Contact for the Republic’.¹⁹⁶ The Act also provides that the designated Point of Contact are responsible for the provision of immediate assistance in relation to proceedings or investigations. The addition of the act making provision for such structures to be enacted is positive, as it will be beneficial to victims to have a designated unit that can deal with offences such as non-consensual pornography. As of December 2022, these Points of Contact has not been established and the Department of Justice has not announced a commencement date for Chapter 6 of the Act.¹⁹⁷ I put forth that the enforcement of Chapter 6 will not only help in combatting non-consensual pornography, but it will help victims in coming forward. Having a set and designated office where issues of cybercrime are tackled, will hopefully help in victims coming forward, as the point of contact will have knowledge of the offence of non-consensual pornography and will hopefully be able to accurately help victims in knowing what steps to take next. The enforcement of the designated Point of Contact is needed to fully analyse whether it is a successful way of assisting victims and combatting non-consensual pornography and cybercrimes as a whole. While it is commendable that there are provisions that lay out how to help victims, it is worrying that a ‘Point of Contact’ has not been established. It is unclear where a complaint that directly relates to a cybercrime should be lodged. Considering that Chapter 6 is not yet in commencement, what is the best way for victims to lodge such complaints if the ‘Point of Contact’ is not yet established.

¹⁹⁶ Section 52(1) of the Act.

¹⁹⁷ ‘Think twice before hitting retweet: major clampdown on digital abuse in South Africa’ *Businesstech* 29 December 2022, available at <https://businesstech.co.za/news/internet/652563/think-twice-before-hitting-retweet-major-clampdown-on-digital-abuse-in-south-africa/>, accessed on 3 January 2023.

The Act makes provision for many specialised resources that need to be implemented in order for the Act to be fully in effect. I put forth that the resources needed to bring to fruition all of the measures to combat cybercrimes are extensive and it must be done in a manner which will allow for it to truly work for the victims.

(c) Protection of Personal Information Act

From the Protection of Personal Information Act, together with the provisions mentioned in Chapter 3, it is clear that a victim can potentially lodge a complaint with the Regulator for an enforcement notice to be issued by said Regulator. It is not clear how long this process may take and that can be a hurdle victims may encounter. If the process of obtaining an enforcement notice is a lengthy and drawn-out process, victims may feel unmotivated to approach to Regulator in the first place. Victims need help urgently and with that comes the desire for speedy help. It would be beneficial to victims of non-consensual pornography that the process of approaching the Regulator is a seamless one, which provides quick relief. Additionally, the Protection of Personal Information Act does not provide an outline for what the possible fees are for the lodging of a complaint with the Regulator. Expensive proceedings and application fees hinder the access to relief that so many victims may need. The proceedings, according to some, is likely to be less costly than that of obtaining an interdict on an urgent basis.¹⁹⁸ The Protection of Personal Information Act also makes mention of a fine that may be imposed on a perpetrator. A fine, as previously discussed in Chapter 3, is not payable to the victim. A victim might feel as if the process of approaching a Regulator with their matter through the use of the Protection of Personal Information Act is too drawn out to result in any real punishment for the victim, if, after the proceedings, they might still have to pursue a civil claim for damages. For some victims the end result of using the Protection of Personal Information Act might be satisfactory in terms of the type of justice they receive, for others the damage done by the distribution of the non-consensual pornography is too great to be satisfied by the relief the Act can provide.

In the event that a victim is unaware of the identity of the perpetrator or perpetrators who distributed non-consensual pornography of the victim, the victim can rely on Section 24 of the Act—

¹⁹⁸ Paula Gabriel 'Can victims of revenge pornography rely on POPI's protection?' available at <https://www.derebus.org.za/can-victims-of-revenge-pornography-rely-on-popis-protection/>, accessed 3 January 2023.

(24)(1) A data subject may, in the prescribed manner, request a responsible party to—

Correct or delete personal information about the data subject in its possession or under its control that is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully

A responsible party, accordingly, could be search engines, as it is often search engines that hold and control personal data. ‘The right to be forgotten’,¹⁹⁹ in other words, for search engines to have control over the personal data is often referenced together with the international case of *Google Spain SL and Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez*.²⁰⁰ It is in this case where Mario Gonzalez filed a claim before the Spanish Authority for Personal Data Protection against a newspaper established in Spain, Google Spain SL and Google Inc. Mario stated that whenever his name is typed into the search bar on a search engine, users would see two publications that report on the confiscation orders for his house. He made the request that the newspapers must remove his name from the publication. An application was made to Google to remove his personal data in issue from the results it provides to internet users. Gonzalez felt that the confiscation order made against his property had been terminated and that any reference to the order made in the past is now irrelevant.²⁰¹ The Spanish Data Protection Authority approved the claim with regards to Google and, interestingly, the Authority concluded that search engines are processors of personal data, which meant that Google Spain and Google Inc had to erase personal data. The matter, after appeal, appeared before the Court of Justice of the European Union. The Union determined that Google is a processor of personal data, as it holds records, stores information, discloses and make available data in the form of search results. In this matter, the Court came to the conclusion that a data subject has a legitimate interest to deny the disclosure of personal information and data. The Court found that this right is based on the right to privacy and because of that, a data subject is within their right to request the data of themselves to be erased in the event that the information disclosed are ‘inadequate, irrelevant or no longer relevant, or excessive in relation to the purpose of the processing at issue carried out by the operator of the search engine’.²⁰² From this case, it is clear that in that jurisdiction a data subject has the right

¹⁹⁹ The right to be forgotten in a concept that has been implemented in various countries and regions, including the European Union. The right to be forgotten provides a person with the right to, under certain circumstances, have private information of that person, be removed from the internet and internet searches.

²⁰⁰ *Google Spain SL and Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez* (C-131/12, 13-5-2014).

²⁰¹ *Ibid.*

²⁰² *Ibid.*

to raise concerns but, together with that, a data controller has an obligation to erase data. This decision in this Court acknowledged the right to be forgotten as well as the obligation that is that of the data controller.

Victims of non-consensual pornography may find this remedy extremely helpful, as it is often the case that intimate images or videos are posted in conjunction with the victim's name and surname. Ultimately, their name and intimate images are easily linked when their names are typed into a search engine bar. The ruling, as described above, does however not mean that information must be deleted off of the internet or search engine as a whole. The ruling means that links to information about an individual should be removed from the results. Unfortunately, the European Court of Justice ruled that the 'right to be forgotten' only applies within the European Union.

I put forward the view that if courts within our country were to apply the 'right to be forgotten', it could be possible that victims of non-consensual pornography can approach search engines in request of removing links to intimate content from search results in terms of Section 24 of POPIA. It could be very beneficial to victims to have the recourse available to them as described in the Act. Victims may find relief in the fact that they are not directly linked to the images or videos that are posted and distributed. Chapter 4 discusses, in detail, what damage the distribution of non-consensual pornography can do and the removal of links to intimate content can aid in minimizing those harmful effects.

The Protection of Personal Information Act has several potential remedies that victims can rely on or apply to receive. However, there are still many unknowns about the process itself and about how effective the legislation is in practice. The reason being is a result of how new the legislation is in our justice system and the way it will function is not yet explored fully. The success of the Protection of Personal Information Act will truly rely on the speed by which the Regulator and the Enforcement Committee can address any applications made that are based on the unlawful distribution on non-consensual pornography. The capacity of the Regulator remains a question that cannot be answered unless one approaches the Regulator and the Committee with a query. Recognition must be given to the way the act is laid out and for giving concrete directions as to what to do when one is victimised. The act can be a beneficial tool in addressing the growing concern of non-consensual pornography. The act can potentially aid victims in addressing the offence done against them and can used as a main remedy or an addition remedy to other civil or criminal remedies.

(d) Extensive challenges faced in combatting non-consensual pornography

(i) Anonymity of the Victim

In the legal and academic sphere that tackle issues like non-consensual pornography, the concept of victim anonymity is heavily debated and discussed. In South Africa, poor reporting of crimes can, in many ways, be attributed to the fear victims feel towards not only offenders but also towards the criminal justice system.²⁰³ The fear of secondary victimisation, especially in cases of sexual abuse, can deter victims from coming forward completely.²⁰⁴ Secondary victimisation, as touched on in Chapter 4, is a substantial reason why victims fear coming forward or why victims are deterred from pursuing their matter any further after having reported an offence. It has been reported that secondary victimisation truly does leave its mark, as the experience of being victimised again will not only reduce the likelihood that a victim will engage further with the criminal justice system, but it may even prevent them from approaching the criminal justice system in future for any other matter or reason.²⁰⁵ The shame victims of non-consensual pornography have been established and it is for that reason why many argue that victim anonymity would be beneficial in addressing the offence, supporting victims and combatting the crime as a whole. Victim anonymity could be a valuable tool that could be used to support the engagement between a victim and the criminal justice system.

Moreover, after a victim has bravely approached authorities to report an offence, the anonymity of the victim must be made a priority by the authorities. The offence of non-consensual pornography is such an emotionally loaded offence, which is disempowering to the victim. Access to choice, privacy, respect and dignity are all elements that one is bereft of when becoming a victim of non-consensual pornography. One should be able to at least be able to regain some form of privacy when one is a victim. It is important to not draft legislation that will be effective in addressing an offence but to address the influence that the offence has on a victim's life. I put forth that victim support should be just as important in legislation as the 'effectiveness' of that legislation. The lack of anonymity will most definitely lead to further harm and further victimisation, as the prospect of details of the offence being reported in the media will cause distress. If a victim is not afforded the very needed anonymity or provision is

²⁰³ Andra le Roux-Kemp 'Witness anonymity and the South African Criminal Justice System' (2010) *South African Journal of Criminal Justice* 3.

²⁰⁴ *Ibid* at 4.

²⁰⁵ *Ibid* at 3.

not made for such anonymity in legislation, it will deter many from coming forward as victims. Moreover, the reporting of such cases with detailed points of the offence, like the victim's name, will ultimately lead to more shares, more views and more clicks on the non-consensual pornography.²⁰⁶

Anonymity is not a way to invalidate the experiences of victims, it is a way to protect them from further victimisation. I believe that the lack of provisions made in the South African law directly speaks to the lack of understanding of what a victim experiences, what they need from the criminal justice system and what the best way is to aid in their journey to seek justice. The lack of anonymity can be a barrier for victims of non-consensual pornography. In a 2016 ICM poll, 75% of people that took part in the poll expressed that they believe victims on non-consensual pornography should be given automatic anonymity.²⁰⁷ These numbers reflect what I believe to be the best way to tackle the issue of non-consensual pornography. It is established that this offence comes with many stigmas, stereotypes and critiques, usually directed towards the victim. It is for that reason why anonymity must be an essential part of how this offence is dealt with. It will be beneficial to victims to know that they are protected, it will in turn increase reporting and prosecution of perpetrators of the offence.²⁰⁸ It is unfathomable why anonymity for the victim would not be the most logical next step in addressing the growing concern of image-based abuse, as it will not only benefit the individual victim but will be a way from victims to come forward more freely.

(ii) Social challenges and change

Even though this chapter is mostly based on the legislation available in South Africa and their possible shortcomings, it is essential to address the environment in which these pieces of law need to be enacted and why there is often a disconnect between what the law says, how it plays out in 'the real world' and why that disconnect exists. The internet is such a fast-evolving force, and it has changed our lives dramatically. It is undeniable that the internet has made harassment and abuse easier, often immediate. When discussing non-consensual pornography, it must be seen within the context of abuse. When doing so, it places the offence in perspective to our

²⁰⁶ Victim Support available at <https://www.victimsupport.org.uk/wp-content/uploads/documents/files/Victim%20Support%20Policy%20Statement%20-%20Sexual%20violence.pdf>, accessed 27 December 2022.

²⁰⁷ Sandra Laville 'Revenge porn victims should get anonymity, says 75% of people' *The Guardian* 19 July 2016, available at <https://www.theguardian.com/law/2016/jul/19/revenge-porn-victims-should-get-anonymity-say-75-per-cent-of-people>, accessed 14 December 2022.

²⁰⁸ *Ibid.*

current societal climate. Non-consensual pornography is the by-product of a society that is fully practicing the culture of de-valuing a human, often women, their rights, autonomy and overall rights against being victimised in any way.²⁰⁹ It has been previously argued and confirmed in this research that women are, more often than not, the victims of non-consensual pornography. It is concerning to think that women are abused in yet another new way. The type of abuse may be new, but the reasoning behind the abuse is deeply-rooted in a structural issue of normalised abuse against 'weak' and 'deserving' women. We, as a society, are facing a massive challenge of controlling the bodies of women. One can argue that non-consensual pornography is an extension of the already active misogyny at play. I put forth that non-consensual pornography is an extension of rape culture, which is already so firmly established in our culture, especially in South Africa. The normalized view of 'she deserved it' is upsetting and concerning, as it creates allegiance with the perpetrator and places blame on the victim. That is, in essence, rape culture. It has been engrained in our society that the victim should have seen it coming instead of addressing how wrong and cruel it is for a perpetrator to commit any form of abuse. Non-consensual pornography shines a light on the greater system of normalised abuse, victim blaming and the protecting of perpetrators. It is because of this, that combatting non-consensual pornography is more than effective drafting, effective legislation and an effective criminal justice system. Real and true societal change is needed for the laws to be effective. The wheels all need to turn together and if not, there is no use in drafting laws that speak to abuse that we, as a society, accept as 'the norm'.

It is imperative, in combatting non-consensual pornography, to understand that it requires not only a change in law or a change in technology but also a change in our culture.

²⁰⁹ Emily Reynolds 'Why there's no 'silver bullet' for ridding the web of revenge porn' Wired 16 March 2017, available at <https://www.wired.co.uk/article/revenge-porn-facebook-social-media>, accessed 14 December 2022.

Chapter 6:

VI CONCLUSION

It is commendable that South Africa and its legal system have tried to evolve with the growing concern of non-consensual pornography. It is unavoidable to recognise the seriousness of online harassment, online image-based abuse and other cybercrimes. It is also undeniable that cybercrimes like non-consensual pornography have established itself as a great source of harm to many. Many debates are had about the best possible way to address the concerns relating to image-bases abuse, like the distribution of non-consensual pornography. In this research, the emphasis was placed on legislative reform and whether legislation, especially in South Africa, is an effective way to address the offence.

I am of the view that legislation is one of the best ways to try and address non-consensual pornography. It is and can be a very effective way to address the experiences of victims. One can commend lawmakers for their progressive thinking and for attempting to speak to the issues victims face in a world that is driven by technological advancements. However commendable their efforts may be, the effectiveness of the legislation available to victims is up for discussion and will be for the foreseeable future.

The issues mentioned in Chapter 5 are truly important, as many of these issues create loopholes, create misunderstanding and confusion and can lead to the acquittal of guilty perpetrators. One of the main issues I have with the legislations that address non-consensual pornography is exactly that- legislations. It is confusing to have so many pieces of legislation that address the same offence, but in different ways, each with their own unique twist on the issue. Which one should be relied one if a victim comes forward or are victims and their legal representation at liberty to choose which of the Acts speaks to the victim's unique experience the best? It would be much easier to have the offence of non-consensual pornography addressed in a concise way in one piece of legislation. Uniform protection is imperative when drafting laws. The way that the offence is described in each of the pieces of legislation as discussed in previous chapters can cause confusion and there is no indication which of the legislation takes 'preference' or which one must be used when addressing the offence. I also take issue with the fact that the offence is discussed under legislation like the Films and Publication Amendment Act and the Cybercrimes Act, while I put forth that it is an issue to be discussed under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021.

I argue that legislation available to victims are not victim focussed. The main focus of these laws should always be to help the victim, to understand what they experienced and to provide them with a level of justice that is sufficient when comparing it to the offence. One main takeaway from this should be that this type of offence is not just another ‘cybercrime’, but it is a sexual offence that is incredibly harmful to victims and their lives. I do not know whether lawmakers fully understand the issues that come with the offence of non-consensual pornography. The effects on the victim must be understood in order to effectively write law about the offence.

As previously discussed, lawmakers must address the ambiguous nature of the definitions given to certain terms in the legislation. Terms like ‘sexual’ and ‘private’ are not fleshed out enough. It is unclear what these terms truly mean and it is extremely limiting in addressing all the different circumstances under which this offence can take place. Some terms like ‘sexual’ and ‘private’ is overly rigid in some instances and I believe that this limits victims and their experiences of the offence, their sexuality and how they were victimised. If we criminalize breaches of a victim’s autonomy that only conforms to arbitrary standards, we are causing victims to feel excluded and unheard.

There remain many uncertainties about how the pieces of legislation will be enacted, how they will ‘perform’ in practice and how effective they will truly be. A lot of uncertainties remain surrounding the legislation available, as the offence is relatively new in comparison to other forms of abuse. The broadness of the law can hinder the effectiveness thereof. There are many definitions that I put forth should be drafted in a broader manner to make provision for all victims and circumstances.

It is commendable to see that South Africa is pushing for the development of laws that are forward-thinking, as we can see with the developments of legislation that aims to tackle issues like cybercrimes. However, the legislation is not fulfilling its role if it is difficult to enact or bring about in practice. As discussed in Chapter 5, the Cybercrimes Act speaks to the establishment of designate Point of Contact areas to enforce the Act itself, which aims to provide victims with immediate assistance when they become aware of being victimised by a form of cybercrime. The enforcement mechanisms are laid out in the legislation, but such facilities have not been established. It is worrisome that there does not seem to be any true follow-through when it comes to enforcing and implementing the piece of legislation. It is, however, unfair to discredit the hard work that have gone into drafting the legislation. The

criticism for not only the Cybercrimes Act but also all other legislation that deals with non-consensual pornography is that there seems to be less of a push for the actual enforcement of the legislation than there is for the drafting thereof.

I am of the opinion that the harm done to victims were not taken into consideration when drafting the legislation. I believe that many of the provisions tries to speak to the experiences of victims but are still limiting in how narrow the drafting was done. The use of words ‘sexual’ can cause a victim to feel like they cannot come forward with a complaint. Moreover, Chapter 4 speaks to the experiences of victims, and I argue that legislation should make better provision to protect victims from the shame, guilt and secondary victimisation that they so often feel when approaching the criminal justice system for assistance. Victims should be protected by the justice system and not further exploited by it. It is for this reason that the provisions in the legislation that speaks to providing victims with contact areas and resources must be enforced.

The legislation available to victims can be revised and can more effectively speak to the true nature of the offence as well as the true experiences of the victims. I do believe that South Africa understand that abuse is a serious issue that needs to be addressed and their eagerness to address non-consensual pornography in whatever Act they could is a positive step. A revision of all of the legislation is needed in order to update the provisions and to make sure they speak to current issues and experiences. A slow pace and not matching the true reality of society is always a concern and I believe a fast and effective revision of the legislation available to address non-consensual pornography can assist in the pro-active prevention and deterrence thereof.

It is essential that our laws in South Africa reflect the importance of a victim-forward approach when drafting legislation. In that sense, I believe that our legislation that discusses non-consensual pornography must include a certain level of anonymity given to a victim. A victim must be able to have the opportunity to be protected against the ‘name and shame’ trend, where they are ridiculed and victimised again by society.

I put forth that many of the provisions in the various legislation available to address the issue of non-consensual pornography is performing a symbolic role instead of practically stepping in to combat the offence head-on and deterring the offence.

When one steps back from the law, legislation and legal perspectives on the offence of non-consensual pornography, one’s view becomes clear. While this issue is one of great importance

in the legal sphere, it speaks to a larger issue within our society. The change must happen from the bottom up and the societal change must happen in and between communities. The deterrence of this victimisation must occur far before it reaches a court. With that said, the societal challenges and changes that will have to be address are many. As previously explained, the distribution of non-consensual pornography is, more often than not, a gendered issue. The abuse women face is frequently normalised in our country and there is not enough active deterrence for gendered abuse. In addressing gendered abuse, one must address not only the offence itself but also the patriarchal system and values that so many live by. That means that the system needs to be broken down to its pure and basic form, which starts at a young age.

Non-consensual pornography is not just another offence that we, as South Africans, must 'get used to'. It is imperative that we address it effectively while non-consensual pornography is still in the early stages. We need to address the legal system directly in order for it to speak for victims, as they often do not have a voice themselves. Image-bases abuse like the distribution of non-consensual pornography is harmful, dangerous, and rapidly growing in popularity. The time is now to deter anyone from the distribution of intimate images.

BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996.

Statutes

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Cybercrimes Act 19 of 2020.

Films and Publications Act 65 of 1996.

Films and Publications Act 65 of 1996.

The Protection of Personal Information Act 4 of 2013.

Foreign

Douglas v Hello! 2006 (QB) 125 (CA) 106.

Google Spain SL and Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez (C-131/12, 13-5-2014).

R v SA, 2022 MBPC 28.

Secondary Sources

Barratt, Amanda and Pamela Snyman 'Researching South African Law' GlobaLex March 2018, available at https://www.nyulawglobal.org/globalex/South_Africa.html.

Bates, Samantha 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2016) *Feminist Criminology*.

Bond, Emma and Katie Tyrell 'Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales' (2018) *Journal of Interpersonal Violence*.

Bossler, Adam M & Tamar Berenblum 'Introduction: new directions in cybercrime research' (2019) 24:5 *Journal of Crime and Justice*.

Cyber Civil Rights Initiative CCRI's 2013 Nonconsensual Pornography Research Results' available at <https://www.cybercivilrights.org/ncpstats>.

- Cybercrimes and Cybersecurity Bill: Public hearing day 1, available at <https://pmg.org.za/committee-meeting/25008/>.
- Doherty, Kathy & Irina Anderson 'Perpetuating rape-supportive culture: Talking about rape' (1998) *The Psychologist*.
- European Union 'Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data' available at <https://www.refworld.org/docid/3ddcc1c74.html>.
- Feather, N. T 'Judgments of deservingness: Studies in the psychology of justice and achievement' (1999) 3 *Personality and Social Psychology Review* 92, Available at https://doi.org/10.1207/s15327957pspr0302_1.
- Filipovic, Jill 'Rape is about power, not sex' available at <https://www.theguardian.com/commentisfree/2013/aug/29/rape-about-power-not-sex>.
- Filipovic, Jill 'Revenge porn is about degrading women sexually and professionally' *The Guardian* 28 January 2013, available at <http://www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women>.
- Films and Publication Amendment Bill: Public hearing day 1, available at <https://pmg.org.za/committee-meeting/23154/>.
- Films and Publications Amendment Regulations 2022, available at https://www.gov.za/sites/default/files/gcis_document/202209/46839gon2432.pdf.
- Franks, Mary Anne 'Criminalizing 'revenge porn': Frequently Asked Questions' available at <https://ssrn.com/abstract=2337998>.
- Franks, Mary Anne 'Drafting an Effective 'Revenge Porn' Law: a Guide for Legislators' (2015) available at <https://ssrn.com/abstract=2468823>.
- Franks, Mary Anne 'Revenge Porn Reform: A view from the Front Lines' (2017) 69 *Florida Law Review*.
- Frazier, Patricia A 'Perceived control and distress following sexual assault: A longitudinal test of a new model' (2003) 84 *Journal of Personality and Social Psychology*.
- Gabriel, Paula 'Can victims of revenge pornography rely on POPI's protection?' available at <https://www.derebus.org.za/can-victims-of-revenge-pornography-rely-on-popis-protection/>.
- Gravelin, Claire R., Monica Biernat, Caroline E. Buchner 'Blaming the victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors' available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6348335/>.

- Hall, Matthew & Jeff Hearn 'Revenge Pornography and Manhood Acts: a Disclosure Analysis of Perpetrators' accounts' (2019) 28 *Journal of Gender Studies*.
- Hamlyn, Charlotte 'First person convicted under new WA 'revenge porn' laws avoid jail sentence' *ABC News* 22 July 2019, available at <https://www.abc.net.au/news/2019-07-22/mitchell-brindley-first-person-in-wa-sentenced-for-revenge-porn/11331022>.
- Henry, Nicola, Anastasia Powell and Asher Flynn 'Not just 'revenge pornography': Australians' experiences of
- Ho, Ivy K., Khanh T. Dinh, Sarah A. Bellefontaine & Amanda L. Irving 'Sexual Harassment and Posttraumatic Stress Symptoms among Asian and White Women' (2012) 21 *Journal of Aggression, Maltreatment & Trauma*.
- image-based abuse' (2017) available at <http://dx.doi.org/10.13140/RG.2.2.29903>.
- Intimate Image Abuse: A consultation paper (2022) Law Commission Consultation Paper No 407.
- Keats Citron, Danielle and Mary Anne Franks 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review*.
- Kelley, Harold H. and John L. Michela 'Attribution theory and research' (1980) 31 *Annual Review of Psychology* 459.
- Laville, Sandra 'Revenge porn victims should get anonymity, says 75% of people' *The Guardian* 19 July 2016, available at <https://www.theguardian.com/law/2016/jul/19/revenge-porn-victims-should-get-anonymity-say-75-per-cent-of-people>.
- Le Roux-Kemp, Andra 'Witness anonymity and the South African Criminal Justice System' (2010) *South African Journal of Criminal Justice*.
- Lerner, Melvin J and Dale T. Miller 'Just World Research and the Attribution Process: Looking Back and Ahead' (1978) 85 *Psychological Bulletin*.
- Madden, Raul 'Equity, 'Revenge Porn', and Cambridge Analytica: The Doctrine of Confidence as a Protection for Human Dignity in the Technological Age' 2019 *Griffith Journal of Law & Human*.
- Maddocks, Sophie 'From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names' (2018) 33 *Australian Feminist Studies* 97.
- Mcglynn, Clare 'More than a breach of privacy: image-based sexual abuse and the Irish Law Reform Commission on harmful communications' (2017) *AJCRD*.
- McGlynn, Clare, Erika Rackley & Ruth Houghton 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse' (2017) *Feminist Legal Studies*.

- McGlynn, Clare, Erika Rackley, Kelly Johnson et al ‘Shattering Lives and Myths: A Report on Image Based Sexual Abuse’ (2019) Durham University and University of Kent.
- Mckinlay, Tahlee and Tiffany Lavis ‘Why did she send it in the first place? Victim blame in the context of ‘revenge porn’” (2020) 27 *Psychiatry, Psychology and Law*.
- Mmamabolo, Tebogo, Kobus Schwartz and Phil Vuma ‘Rendering victim-friendly services for women and children in South Africa: Why is the SAPS's response to victims still unsatisfactory?’ (2020) 5 *Africa Journal of Criminal Justice*.
- No jail time for WA first revenge porn offender *The Canberra Times* 22 July 2019, available at <https://www.canberratimes.com.au/story/6286378/no-jail-for-wa-first-revenge-porn-offender/>.
- North Yorkshire Police, Fire & Crime Commissioner ‘Image-Based Sexual Abuse Report 2018’ 2018 at 2, available at <https://www.northyorkshire-pfcc.gov.uk/content/uploads/2018/11/Suffering-in-Silence-Report.pdf>.
- Online Reputation in a Connected World 2010, available at http://www.jobhunt.org/guides/DPD_OnlineReputationResearch_overview.pdf.
- Palfrey, Cathryn ‘Not Just for Jilted Ex-Lovers: The Criminalisation of the Non-Consensual Distribution of Intimate Images in WA’ *The National Law Review* 23 July 2019, available at <https://www.natlawreview.com/article/not-just-jilted-ex-lovers-criminalisation-non-consensual-distribution-intimate>.
- Poole, Emily ‘Fighting Back Against Non-Consensual Pornography’ (2014) 49 *The University of San Francisco Law Review*.
- Powell, Anastasia and Nicola Henry ‘Digital Harassment and Abuse of Adult Australians: A Summary Report’ (2015) *RMIT University and La Trobe University*.
- Reynolds, Emily ‘Why there’s no ‘silver bullet’ for ridding the web of revenge porn’ *Wired* 16 March 2017, available at <https://www.wired.co.uk/article/revenge-porn-facebook-social-media>.
- Salter, Michael and Thomas Crofts ‘Responding to Revenge Porn: Challenges to Online Legal Impunity’ (2015) *New Views on Pornography: Sexuality, Politics and the Law*.
- Sharatt, Elena ‘Intimate Image abuse in adults and under 18s: A comparative analysis of cases dealt with by the Revenge Porn Helpline and Professionals Online Safety Helpline’ (2019) 5, available at <https://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf>.
- Snyman, CR *Criminal Law* 6 ed (2014) LexisNexis.
- Steele, Sarah Jane, Naeemah Abrahams, Kristal Duncan, Nataly Woollett, Bella Hwang, Lucy O’Connell, Gilles van Cutsem & Amir Shroufi ‘The epidemiology of rape and sexual violence in the platinum mining district of Rustenburg, South Africa: prevalence, and

factors associated with sexual violence' available at <https://doi.org/10.1371/journal.pone.0216449>.

Stroud, Scott R. 'The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn' (2014) 29 *Journal of Mass Media Ethics*.

Submission to the Portfolio Committee on Communications on the Cybercrimes and Cybersecurity Bill available at https://static.pmg.org.za/170913Digital_Law_Company.pdf.

Tetlock, Philip E. 'Accountability: A social check on the fundamental attribution error' (1985) 48 *Social Psychology Quarterly*.

The Criminal Code, available at <https://canlii.ca/t/55xf3>.

Think twice before hitting retweet: major clampdown on digital abuse in South Africa *BusinessTech* 29 December 2022, available at <https://businesstech.co.za/news/internet/652563/think-twice-before-hitting-retweet-major-clampdown-on-digital-abuse-in-south-africa/>.

Wittes, Benjamin, Cody Poplin, Quenta Jurecic et al 'Closing the sextortion sentencing gap: a legislative proposal' *Center for Technology Innovation at Brookings* (2016) 4, available at <https://www.brookings.edu/research/closing-the-sextortion-sentencing-gap-a-legislative-proposal/>.

Wolak, Janis and David Finkelhor 'Sextortion: Findings from a survey of 1,631 victims' *Crimes Against Children Research Center* (2016) 31, available at https://www.wearethorn.org/wp-content/uploads/2016/08/Sextortion_Report.pdf.

Xanthaki, Helen 'Quality of legislation: An achievable universal concept or a utopia pursuit?' (2011) L Mader & M Almeida (eds) *Quality Legislation*.

ORIGINALITY REPORT

25%

SIMILARITY INDEX

23%

INTERNET SOURCES

13%

PUBLICATIONS

17%

STUDENT PAPERS

PRIMARY SOURCES

1	www.derebus.org.za Internet Source	2%
2	lawlibrary.org.za Internet Source	1%
3	hdl.handle.net Internet Source	1%
4	pmg.org.za Internet Source	1%
5	Submitted to University of Witwatersrand Student Paper	1%
6	www.saflii.org Internet Source	1%
7	s3-eu-west-2.amazonaws.com Internet Source	1%
8	open.uct.ac.za Internet Source	1%
9	Submitted to University of Cape Town Student Paper	1%

10	www.ellipsis.co.za Internet Source	1 %
11	Submitted to University of South Africa (UNISA) Student Paper	1 %
12	researchspace.ukzn.ac.za Internet Source	<1 %
13	Submitted to University of Venda Student Paper	<1 %
14	www.sistersforchange.org.uk Internet Source	<1 %
15	journals.sagepub.com Internet Source	<1 %
16	icfp.co.za Internet Source	<1 %
17	Submitted to University of the Free State Student Paper	<1 %
18	etd.uwc.ac.za Internet Source	<1 %
19	www.michalsons.com Internet Source	<1 %
20	Submitted to North West University Student Paper	<1 %
21	mural.maynoothuniversity.ie	

Internet Source

<1 %

22

repository.up.ac.za

Internet Source

<1 %

23

csprok.co.za

Internet Source

<1 %

24

www.franciscronje.com

Internet Source

<1 %

25

www.homodigitalis.gr

Internet Source

<1 %

26

Submitted to University of Melbourne

Student Paper

<1 %

27

Kate Walker, Emma Sleath. "A systematic review of the current knowledge regarding revenge pornography and non-consensual sharing of sexually explicit media", *Aggression and Violent Behavior*, 2017

Publication

<1 %

28

Submitted to University of Kent at Canterbury

Student Paper

<1 %

29

obiter.mandela.ac.za

Internet Source

<1 %

30

parlinfo.aph.gov.au

Internet Source

<1 %

papers.academic-conferences.org

31

Internet Source

<1 %

32

Submitted to Macquarie University

Student Paper

<1 %

33

Submitted to University of Auckland

Student Paper

<1 %

34

Submitted to University of Technology,
Sydney

Student Paper

<1 %

35

dbis.eprints.uni-ulm.de

Internet Source

<1 %

36

www.natlawreview.com

Internet Source

<1 %

37

Submitted to Curtin University of Technology

Student Paper

<1 %

38

researchportaltest.northumbria.ac.uk

Internet Source

<1 %

39

www.publichealth.uct.ac.za

Internet Source

<1 %

40

theses.gla.ac.uk

Internet Source

<1 %

41

www.mdpi.com

Internet Source

<1 %

42

Submitted to University of Waikato

Student Paper

<1 %

43

Submitted to University of Liverpool

Student Paper

<1 %

44

swgfl.org.uk

Internet Source

<1 %

45

businessstech.co.za

Internet Source

<1 %

46

www.fordham.edu

Internet Source

<1 %

47

academic.oup.com

Internet Source

<1 %

48

Submitted to University of Huddersfield

Student Paper

<1 %

49

Submitted to University of Northumbria at
Newcastle

Student Paper

<1 %

50

provincialgovernment.co.za

Internet Source

<1 %

51

Submitted to Brunel University

Student Paper

<1 %

52

Submitted to Central Queensland University

Student Paper

<1 %

53

Submitted to Kaplan College

Student Paper

<1 %

54

www.itm.nrw

Internet Source

<1 %

55

Submitted to University of KwaZulu-Natal

Student Paper

<1 %

56

onlinelibrary.wiley.com

Internet Source

<1 %

57

scholar.uwindsor.ca

Internet Source

<1 %

58

eprints.lse.ac.uk

Internet Source

<1 %

59

escholarship.mcgill.ca

Internet Source

<1 %

60

www.slideshare.net

Internet Source

<1 %

61

Submitted to University of Leeds

Student Paper

<1 %

62

Submitted to Bond University

Student Paper

<1 %

63

Mattia Falduti, Sergio Tessaris. "Mapping the Interdisciplinary Research on Non-consensual Pornography: Technical and Quantitative

<1 %

Perspectives", Digital Threats: Research and Practice, 2023

Publication

64

Submitted to Trinity College Dublin

Student Paper

<1 %

65

Submitted to University of Queensland

Student Paper

<1 %

66

ir.lawnet.fordham.edu

Internet Source

<1 %

67

classic.austlii.edu.au

Internet Source

<1 %

68

www.cigionline.org

Internet Source

<1 %

69

Submitted to University of Portsmouth

Student Paper

<1 %

70

www.ajol.info

Internet Source

<1 %

71

www.women.gov.za

Internet Source

<1 %

72

Andrea Slane, Ganaele Langlois. "Debunking the Myth of "Not My Bad": Sexual Images, Consent, and Online Host Responsibilities in Canada", Canadian Journal of Women and the Law, 2018

Publication

<1 %

73	Submitted to Hull College, Humberside Student Paper	<1 %
74	Submitted to National Law School of India University, Bangalore Student Paper	<1 %
75	Submitted to Syracuse University Student Paper	<1 %
76	Submitted to University of Edinburgh Student Paper	<1 %
77	Submitted to University of South Africa Student Paper	<1 %
78	www.cap-press.com Internet Source	<1 %
79	Submitted to La Trobe University Student Paper	<1 %
80	Submitted to National University of Ireland, Galway Student Paper	<1 %
81	Sizwe Snail ka Mtuzze. "THE CONVERGENCE OF LEGISLATION ON CYBERCRIME AND DATA PROTECTION IN SOUTH AFRICA: A Practical Approach to the Cybercrimes Act 19 of 2020 and the Protection of Personal Information Act 4 of 2013", <i>Obiter</i> , 2022 Publication	<1 %

82 Submitted to University of Stellenbosch,
South Africa <1 %
Student Paper

83 script-ed.org <1 %
Internet Source

84 www.researchgate.net <1 %
Internet Source

85 Submitted to University of Gloucestershire <1 %
Student Paper

86 Submitted to University of Sussex <1 %
Student Paper

87 www.upeace.org <1 %
Internet Source

88 dro.dur.ac.uk <1 %
Internet Source

89 uir.unisa.ac.za <1 %
Internet Source

90 www.probation.ie <1 %
Internet Source

91 Mills, L. "Stop the press: why censorship has
made headline news (again)", Potchefstroom
Electronic Law Journal/Potchefstroomse
Elektroniese Regsblad, 2009. <1 %
Publication

Submitted to University of Warwick

92

Student Paper

<1 %

93

Submitted to Walter Sisulu University

Student Paper

<1 %

94

dc.uwm.edu

Internet Source

<1 %

95

www.coursehero.com

Internet Source

<1 %

96

Mathen, Carissima. "Crowdsourcing Sexual Objectification", Laws, 2014.

Publication

<1 %

97

powersingh.africa

Internet Source

<1 %

98

Submitted to Cardiff University

Student Paper

<1 %

99

Submitted to Nelson Mandela Metropolitan University

Student Paper

<1 %

100

Submitted to University of Sunderland

Student Paper

<1 %

101

www.scribd.com

Internet Source

<1 %

102

www.victimsupport.org.uk

Internet Source

<1 %

103	"Gender-Based Violence: A Comprehensive Guide", Springer Science and Business Media LLC, 2023 Publication	<1 %
104	country.db.com Internet Source	<1 %
105	laws-lois.justice.gc.ca Internet Source	<1 %
106	openaccess.leidenuniv.nl Internet Source	<1 %
107	research-information.bris.ac.uk Internet Source	<1 %
108	Submitted to Maastricht University Student Paper	<1 %
109	bmcwomenshealth.biomedcentral.com Internet Source	<1 %
110	collections.concourt.org.za Internet Source	<1 %
111	igf2016.sched.com Internet Source	<1 %
112	static.pmg.org.za Internet Source	<1 %
113	www.fao.org Internet Source	<1 %

114	www.herald.ns.ca Internet Source	<1 %
115	www.thefreelibrary.com Internet Source	<1 %
116	www.utpjournals.press Internet Source	<1 %
117	Submitted to Intercollege Student Paper	<1 %
118	dash.harvard.edu Internet Source	<1 %
119	documents.parliament.qld.gov.au Internet Source	<1 %
120	epubs.surrey.ac.uk Internet Source	<1 %
121	fra.europa.eu Internet Source	<1 %
122	pure.manchester.ac.uk Internet Source	<1 %
123	www.bustle.com Internet Source	<1 %
124	www.diva-portal.org Internet Source	<1 %
125	www.justice.gov.za Internet Source	<1 %

126	www.lawinsider.com Internet Source	<1 %
127	www.scielo.org.za Internet Source	<1 %
128	www.unswlawjournal.unsw.edu.au Internet Source	<1 %
129	www.up.ac.za Internet Source	<1 %
130	www2.bspseminars.co.za Internet Source	<1 %
131	"International Human Rights Law in Africa", Brill, 2004 Publication	<1 %
132	LexisNexis Publication	<1 %
133	Moira Aikenhead. "Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence", Canadian Journal of Women and the Law, 2018 Publication	<1 %
134	Submitted to University of Wolverhampton Student Paper	<1 %
135	core.ac.uk Internet Source	<1 %

136	Internet Source	<1 %
137	dokumen.pub Internet Source	<1 %
138	ebin.pub Internet Source	<1 %
139	justice.gov.za Internet Source	<1 %
140	lawreview.law.miami.edu Internet Source	<1 %
141	learning.ufs.ac.za Internet Source	<1 %
142	openresearch.lsbu.ac.uk Internet Source	<1 %
143	pmg-assets.s3-website-eu-west-1.amazonaws.com Internet Source	<1 %
144	research.edgehill.ac.uk Internet Source	<1 %
145	researchmgt.monash.edu Internet Source	<1 %
146	www.ci.org.za Internet Source	<1 %
147	www.pmg.org.za Internet Source	<1 %

<1 %

148 www.pulp.up.ac.za
Internet Source

<1 %

149 www.research.aqmen.ac.uk
Internet Source

<1 %

150 www.tandfonline.com
Internet Source

<1 %

151 "African Data Privacy Laws", Springer Science
and Business Media LLC, 2016
Publication

<1 %

152 "Non-Discrimination Law: Comparative
Perspectives", Brill, 1999
Publication

<1 %

153 Anastasia Powell, Nicola Henry. "Sexual
Violence in a Digital Age", Springer Science
and Business Media LLC, 2017
Publication

<1 %

154 Jason Haynes. "Legislative Approaches to
Combating 'Revenge Porn': A
Multijurisdictional Perspective", Statute Law
Review, 2018
Publication

<1 %

155 Wayne Madsen. "Handbook of Personal Data
Protection", Springer Nature, 1992
Publication

<1 %

156

Anna C. Barron, Lydia Woodyatt, Emma F. Thomas, J.E. Katherine Loh, Katherine Dunning. "Doing good or feeling good? Justice concerns predict online shaming via deservingness and schadenfreude", Computers in Human Behavior Reports, 2023

Publication

<1 %

157

Mary Anne Franks. "The Cult of the Constitution", Walter de Gruyter GmbH, 2019

Publication

<1 %

Exclude quotes On

Exclude matches Off

Exclude bibliography On