



# COMBATING SEXTORTION

A COMPARATIVE STUDY OF LAWS TO PROSECUTE CORRUPTION  
INVOLVING SEXUAL EXPLOITATION

IN PARTNERSHIP WITH





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# FOREWORD

What is sextortion? The International Association of Women Judges (IAWJ) coined the term in 2008 to define corruption involving sexual exploitation: from government officials granting permits in exchange for sexual favors, to teachers and employers trading good grades and career opportunities for sex with students and employees.

Sextortion is a pervasive yet under-reported phenomenon that affects the safety as well as the physical and emotional wellbeing of thousands of people worldwide, the majority of whom are women and young girls. While the personal and social costs of sextortion are high, the phenomenon is less likely to be reported or prosecuted than other forms of corruption due to significant cultural and legal obstacles. These range from misinformation, misogynistic attitudes and social stigma, to weak legal and institutional frameworks.

One of the goals of the Thomson Reuters Foundation is to strengthen women's rights through the rule of law. Our annual Trust Women Conference forges tangible commitments to empower women to know and to defend their rights. We also support women's rights through TrustLaw, our global pro bono programme connecting leading law firms and corporate teams around the world with NGOs and social enterprises in need of free legal assistance.

This guide is the result of a close collaboration between TrustLaw, the IAWJ, and a team of dedicated lawyers around the world. It outlines laws and practices relating to sextortion in nine jurisdictions spanning across six continents in order to explore effective legal tools to help strengthen justice systems internationally, protect and empower victims, and ensure that they get access to justice.

Marval, O'Farrell and Mairal played a leading role in producing the guide, together with Mishcon de Reya, Torys LLP, Rakhee Ditta, Hewlett-Packard Company, Norton Rose Fulbright (South Africa), Hogan Lovells, and Simba & Simba Advocates, among others. I am incredibly grateful to the contributing law firms and corporate teams for committing their time and expertise to make this guide possible.

I am confident this study will become a powerful tool to raise public awareness around sextortion, and to effectively support legislators, advocates and citizens in the fight to end this shameful practice worldwide.



Monique Villa





# INTRODUCTION







The International Association of Women Judges (IAWJ) traces its work on “sextortion” to two conversations, close in time, but far apart in geography and, seemingly, subject matter. The IAWJ was exploring with some of its African chapters the ways in which violence against women was contributing to the spread of the HIV virus, and the contexts in which HIV-related issues were coming before the courts. A discussion among judges in Uganda took an unexpected turn when one of the judges mentioned the challenges faced by detainees and prisoners in Ugandan jails. The judge explained that the prisons were not equipped to dispense anti-retroviral drugs (or, indeed, any form of medication), so the only way a prisoner could get medication was if a family member or friend came to the jail every day to deliver it. As a practical matter, the judge continued, in a matter-of-fact tone, this meant that women prisoners often died. Male prisoners were better off because they usually had wives or girlfriends willing to visit them with the life-saving drugs. The judge had heard reports, however, of prison guards who refused to deliver the medication unless the wife or girlfriend had sex with them. Around the room, judges nodded in agreement. Another judge talked about how personally difficult she found it to sentence defendants to prison in these circumstances, even if only for six months. In effect, the difficulty of getting medication to prisoners was potentially turning misdemeanors into capital offenses – not only for the defendant, but sometimes for a defendant’s significant other as well.

At about the same time, the IAWJ was working with some of its Central American chapters on issues, such as labor migration, that crossed national borders. In discussing how migrants and their families came before the courts, one judge noted a problem that was not coming before the court, but concerned her nonetheless. In Central America, the ultimate destination of many would-be migrant workers is the southern border of the United States. To get there, Central American migrants must cross at least two, and often multiple, national boundaries. If they are caught at the first border, they may be asked to pay a monetary bribe. If a female migrant has no cash, she may be asked for sex instead. Even if a female migrant has the cash to pay a bribe at the first border, she may no longer have it by the second or third. Again, around the circle, judges nodded their agreement. Desk research confirmed that the judges had identified a significant problem: border guards and police seeking sexual favors in return for not arresting women migrants and returning them to their home countries. Indeed, the problem was so widespread in Central America that those women who did return to their home communities were often being ostracized as prostitutes.

For the IAWJ, the juxtaposition of these two conversations sparked an epiphany – the realization that these superficially disparate phenomena shared a common pattern; both involved the abuse of power in exchange for sex. However, as soon as we began discussing what had happened to these women – the wives and girlfriends of the prisoners in Uganda, the migrant women in Central America – we realized that we did not have the vocabulary with which to describe this common pattern. Was it rape? Legally, it was a tough argument to call these abuses rape in some jurisdictions, as they typically did not involve physical violence – there was no knife to the throat or gun to the head. Was it sexual harassment? Again, existing legal frameworks seemed inadequate, as many sexual harassment laws only apply to specific contexts – usually workplaces (supervisor/employee) or schools (professor/student). The wives, girlfriends or family members of the prisoners in Uganda had no formal

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relationship with the men who sought sexual favors from them. Neither did the migrant women have a formal relationship with the border guards and police officers who preyed on their desperation. Was it corruption? Certainly the transaction was corrupt in the sense that the government official was trading on his entrusted authority for private gain. However, we found that anti-corruption statutes often referred specifically to cash or pecuniary advantages. At best, they had broad, catch-all phrases such as “a thing of value” – phrases that required further interpretation by courts and did not expressly reach this kind of sexual quid pro quo.

We were convinced that these corrupt transactions shared a common core. The challenge was that it is difficult to discuss, let alone analyze or develop strategies to combat, an abuse you cannot name. So the IAWJ chose the name “sextortion” to capture both the sexual and the corruption component of these transactions. With support from the Government of The Netherlands through its Millennium Development Goal-MDG3 Fund, the IAWJ undertook a three-year pilot project with its chapters in Bosnia-Herzegovina, the Philippines, and Tanzania, to look at the forms “sextortion” takes in different countries and the legal frameworks available to reach the offense.

The more we investigated, spoke at public fora, and asked questions, the more we became convinced that we had identified a global problem with far-reaching consequences. At public fora, women would come up to us, sometimes in tears, describing different permutations of the phenomenon. As we realized how pervasive sextortion was, we explored its complexities and came to realize that the national laws available to redress these offenses could be quite specific and difficult for lawyers from other countries to access. Research requires consideration not only of civil and criminal codes, but also of ethics provisions that govern particular professions or civil servants.

In short, we needed to look beyond the three initial countries, but lacked the capacity to do the research that would enable us to take our sextortion work to the next level. We are grateful to TrustLaw and the participating lawyers for the many hours that went into compiling this research about sextortion and the legal framework available for addressing it in nine very different jurisdictions around the globe. Forty years ago, sexual harassment was commonplace around the world, but not something women felt empowered to stop. However, the term was coined, laws were passed, anti-sexual harassment policies were developed, and today, sexual harassment is a part of almost every domestic and international conversation about discrimination and gender-based violence. The IAWJ hopes to do the same for sextortion and believes that the work done by the law firms that so generously contributed to this report is an important step in that direction.

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# EXECUTIVE SUMMARY

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This report constitutes a landscape study of legal and institutional frameworks for combating a form of corruption involving sexual exploitation that the International Association of Judges (IAWJ) has named sextortion. The research covered nine jurisdictions representative of diverse cultural and legal backgrounds: Argentina, Australia, Brazil, Canada, Kenya, Mexico, Taiwan, Uganda and the United Kingdom.

The report illustrates how sextortion manifests; examines the laws available for prosecuting it; describes the response, too often inadequate, of the criminal justice system; and highlights areas for further action.

In particular, the research undertaken in each jurisdiction sought to identify:

1. how sextortion manifests itself, for example, in government, educational and/or employment settings.
2. the existing legal framework for addressing and redressing sextortion, including the relevant statutory provisions and case law that might be used to prosecute sextortion.
3. institutional and other barriers to effective prosecution, ranging from legal gaps, to cultural and societal pressures, to capacity and resource constraints.
4. resources – tools, and organizations that could provide professional expertise, financial assistance, or institutional support for efforts to combat sextortion.

## SEXTORTION

Sextortion – as termed by the IAWJ – is the abuse of power to obtain a sexual benefit or advantage. Sextortion is a form of corruption in which sex, rather than money, is the currency of the bribe. It is not limited to certain countries or sectors, but can be found wherever those entrusted with power lack integrity and try to sexually exploit those who are vulnerable and dependent on their power.

What distinguishes sextortion from other types of sexually abusive conduct is that it has both a sexual component and a corruption component:<sup>1</sup>

- **Sexual component:** sextortion involves a request – whether implicit or explicit – to engage in any kind of unwanted sexual activity, ranging from sexual intercourse to exposing private body parts;
- **Corruption component:** the person who demands the sexual favor must occupy a position of authority, which he abuses by seeking to exact, or by accepting, a sexual favor in exchange for exercising the power entrusted to him. That is to say, the perpetrator exercises his authority for his own gain.

This corruption component has three distinct features:

- a. **Abuse of authority:** the perpetrator uses the power entrusted to him for personal benefit;
- b. **Quid pro quo or “this-for-that”:** the perpetrator demands or accepts a sexual favor in exchange for a benefit that he is empowered to withhold or confer; and
- c. **Psychological coercion:** sextortion relies on coercive pressure rather than physical violence to obtain sexual favors. The imbalance of power between the perpetrator and the victim allows the perpetrator to exert the coercive pressure.

Examples of sextortion can be found in everyday life:<sup>2</sup>the teacher who demands sexual favors from a student to obtain a passing grade; the employer who asks for sex from the employee to pay overtime; or the public official who requests sexual favors in exchange for permits, licenses, etc. They are all in breach of the trust that the law or society has conferred on them.

When more traditional forms of corruption take place, prosecutors often have hard evidence and clear anti-corruption laws under which to charge them. When the currency of the bribe is sex, rather than money, the laws are unsettled, evidence elusive, and victims reluctant to come forth – making prosecution harder. This guide hopes to be a tool in the arsenal of resources that the IAWJ and other advocates use to raise awareness and fight sextortion.

## LEGAL FRAMEWORKS

Although sextortion is an old phenomenon, none of the jurisdictions reviewed has adopted laws that use the term sextortion or that both target sexual exploitation through abuse of power (as opposed to other forms of corruption or sexual abuse) and reach the full range of settings (government, education, employment) in which it occurs. However, because sextortion occurs at the crossroads between corruption and sexual exploitation, it might be prosecuted either under laws that address corruption and abuse of power or under laws that address sexual harassment and gender-based violence.<sup>2</sup>

Many of the jurisdictions surveyed have anti-corruption laws that could be interpreted broadly enough to encompass sexual favors as the currency of the bribe. However, a third of all jurisdictions surveyed have corruption statutes that narrowly focus on financial bribes and require property gain or financial harm (or have been construed as so limited), and therefore do not encompass acts of sextortion. In addition, many are limited to public officials.

On the other hand, the researchers found that sexual harassment and gender-based violence laws can often be read to encompass precisely the kind of abuse that is involved in sextortion and usually extend their coverage to perpetrators other than public officials.

However, as these laws are designed to address forms of sexual exploitation rather than forms of corruption, they are not generally drafted with that element of sextortion in mind. As a consequence, gender-based violence laws may not contemplate situations in which the victim yields, albeit not freely or voluntarily, to the coercive power of a corrupt authority.

Indeed, some gender-based violence laws require evidence of physical force or refusal by the victim, which was deemed a significant hurdle to prosecuting sextortion. In *Australia*, Parliament recognized and took steps to address this problem when it amended section 65A of the Crimes Act to include intimidatory or coercive conduct that does not involve a threat of force. In fact, the reading speech to parliament described a sextortion scenario involving an immigrant woman threatened with loss of her livelihood unless she acceded to a demand for sexual favors.

Given the issue of financial harm in prosecuting sextortion as a corruption offense, and the issue of consent in prosecuting it as a sexual offense, in a number of jurisdictions it is the abuse of authority and breach of trust provisions that best capture the various elements of sextortion. Generally, under these provisions a person who has been entrusted with authority or trust can be prosecuted for misconduct that could include sextortion. In this sense, these provisions are not narrowly confined like many anti-corruption laws, and often contemplate the sexual abuse covered by sexual harassment and gender-based violence laws.

Research also found that professional codes of conduct and other ethical rules and regulations might be adequate for addressing sextortion through administrative remedies. For example, *Uganda's* codes of conduct and ethics for public officers and teachers have been useful in combating sextortion by public officers and teachers, who appear to be the biggest culprits of sextortion in the country.

While the limited access to or lack of relevant case law makes it difficult to determine whether these laws and regulations can be generally applied to all sextortion fact-patterns, at least 5 out of the 9 jurisdictions surveyed (i.e. *Australia, Canada, United Kingdom, Kenya and Taiwan*) have successfully prosecuted instances of sextortion under some of these statutes.

## ANTI-CORRUPTION AND ABUSE OF POWER LAWS

Anti-corruption efforts have traditionally targeted financial impropriety, such as bribery, kickbacks and embezzlement, rather than sexual impropriety. The majority of the statutes reviewed, however, could be used to prosecute sextortion either because they are written in terms broad enough to encompass bribes that take the form of non-pecuniary “advantages” or “benefits,” or because they focus on abuse of power or breach of trust without requiring a specific inducement.

**Broad language regarding “benefits” or inducements.** A number of anti-corruption provisions use language that is broad enough to encompass non-financial inducements, such as sexual favors. In *Canada*, for example, the Immigration and Refugee Protection Act, Section 129(1)(a), makes it an offense for an immigration officer or an employee of the federal government, to accept or demand a bribe or “other benefit.” Canadian courts have prosecuted offenders for sextortion under this statute by construing its language to include sexual activity.

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*Taiwan's* anti-corruption legal framework requires a bribe or “unjust enrichment”, with the latter interpreted by the Supreme Court to mean “any tangible and intangible interests that can meet one’s needs or satisfy one’s desire”, which could include sexual favors. Further, the term “benefit” in *Kenya's* Anti-Corruption and Economic Crimes Act and the language “any form of gratification for himself” in *Uganda's* Anti-Corruption Act could be similarly interpreted to include sexual favors.

**Broad language regarding abuse of authority or breach of trust.** Some Criminal Codes contain broader offenses – such as breach of trust – that do not require a specific benefit or inducement, but under which a person who has been entrusted with authority can be prosecuted for misconduct that could include sextortion. In *Canada*, Section 122 of the Criminal Code, which penalizes the breach of trust by a public officer, has had the most application in sextortion cases. Section 122 holds that every official who, in connection with the duties of his office, commits fraud or breach of trust is guilty of an indictable offense. The purpose of this provision is to prohibit, among others, the use of one’s situation of power in the public service for the promotion of private ends or to obtain directly or indirectly some benefit.

In the *United Kingdom*, if existing anti-corruption legislation is insufficient to cover an offense, the courts may exceptionally charge under the common law offense of Misconduct in Public Office, which requires that the public officer willfully misconduct himself to such a degree as to amount to abuse of the public’s trust in the office holder.

In *Brazil*, the Law on Abuse of Authority penalizes a public official who, abusing his position of authority, carries out an act harmful to the honor or dignity of a person. The breadth of this language would allow it to reach sextortion offenses that fall outside the narrower confines of anti-corruption laws that require financial harm/benefit.

In *Australia*, various tribunals that adjudicate corruption offenses have considered sextortion cases and applied the general prohibition on corrupt conduct and breach of public trust by public officials in their official capacities.

**Language requiring payment of money or some other form of “property.”** A few of the anti-corruption frameworks reviewed make property gain or financial harm an element of the corruption offense and therefore do not encompass acts of sextortion. For example, in *Argentina*, the anti-corruption and public ethics laws cannot be construed to include “sexual favors” as the currency of the bribe. While these statutes use broad language such as “benefit, favors, promises and advantages”, Argentine Courts have interpreted these terms narrowly so as not to encompass sexual bribes.

In *Brazil* and *Mexico* the language of the main anti-corruption statutes is narrowly focused on financial bribes, which requires the trading of money in exchange for the exercise of official authority.

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## SEXUAL HARASSMENT LAWS

While anti-corruption laws offer some grounds for prosecuting sextortion, sexual discrimination and harassment laws often target precisely the kind of abuse that is involved in sextortion. For example, the supervisor who abuses his authority to extort sex from employees who want to avoid being fired is engaging in both quid pro quo sexual harassment and sextortion.

The problem with reliance on sexual harassment laws, however, is that many of the sexual harassment laws reviewed are **limited to employment settings** and involve only civil or administrative penalties. In *Kenya*, sextortion cases that occur within employment relationships are prosecuted as sexual harassment under *Kenya's* Employment Act. Sexual harassment under the Act occurs when a co-worker, an employer or his representative “directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express promise of ... (ii) threat of detrimental treatment in employment; or (iii) threat about the present or future employment status of the employee.”

*Uganda's* Employment Act contains a nearly identical sexual harassment provision, which has been identified as the primary legal source for prosecuting sextortion in the workplace. Additionally, *Uganda* has a Domestic Violence Act that applies to domestic relationships between a domestic worker and an employer that would not fall under the Employment Act. Some jurisdictions have broader sexual harassment laws that extend beyond the employment setting. Under *Mexico's* Federal Criminal Code, for example, sexual harassment occurs when a person, with lustful purposes, repeatedly harasses another person of either sex “based on his hierarchical position obtained through a working, academic, domestic or any other type of relationship that implies subordination.” The remedies, however, are limited to a fine, unless the perpetrator is a public official who uses his authority to perpetrate the crime, in which case, he can also be removed from office.

In a few jurisdictions, the sexual harassment laws are not only broader, but also include **criminal penalties**. For example, in *Brazil*, the Criminal Code penalizes with up to two (2) years imprisonment sexual exploitation arising from the abuse of a dominant position “where the agent avails himself of his high-ranking status or the seniority inherent to his employment, position or function.” *Taiwan's* Sexual Harassment Prevention Act similarly criminalizes sexual harassment that occurs not only in the workplace, but also in education, training, services or other activities.

In the *United Kingdom*, harassment is both a criminal offense and a civil action under the Protection from Harassment Act 1977 (PHA), and can include sexual harassment, unwelcome sexual advances, requests for sexual favors and other verbal or physical harassment of a sexual nature. Criminal penalties include imprisonment for up to six (6) months, a fine or both; and civil remedies include damages and/or an injunction against the perpetrator.

## GENDER-BASED VIOLENCE LAWS

The sexual conduct involved in sextortion brings it within the potential reach of the many gender-based violence statutes that proscribe different types of sexual conduct. Although some of these statutes include language that may limit their usefulness in prosecuting sextortion cases, others specifically address sexual offenses by people in positions of authority. For example, as part of its offenses against morality, *Taiwan's* Criminal Code expressly criminalizes the abuse of authority to extract sexual intercourse in a range of contexts, including official, employment, educational and guardianship relationships.

In some of the jurisdictions reviewed, **defilement statutes** could be used to prosecute teachers who trade sex for grades with underage minors, and **rape laws** that recognize rape by coercion might afford redress for victims past the age of majority. For example, under *Uganda's* Criminal Code the offense of rape expressly includes the “unlawful carnal knowledge” of a woman or girl “with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act.” Sextortion involving minors can also be prosecuted under the defilement provision of the Code.

In other jurisdictions, **sexual abuse or sexual assault laws** offer possible redress for sextortion victims. Under *Argentina's* Criminal Code, sexual abuse expressly includes non-physical forms of coercion and extends to official, institutional and employment relationships. Moreover, as construed by the majority of Argentine criminal courts, the offense does not require active or physical resistance as a manifestation of the victim's non-consent.

Similarly, in *Australia*, elements of sextortion may be captured under each State and Territory's sexual assault laws. For example, under New South Wales' Crimes Act 1900, a person may be deemed not to have consented to sexual intercourse if the person has sexual intercourse because of: “intimidatory or coercive conduct, or other threat, that does not involve a threat of force,” or “the abuse of a position of authority or trust.”

However, several of the gender-based violence laws reviewed may not be suitable for **prosecuting sextortion, as the offenses require** physical force and/or a refusal by the victim. Viewed through this gender-based violence lens, a case in which a person in a position of power offers to trade that power for a sexual favor may be dismissed as “consensual” (and therefore non-violent). In *Mexico*, for example, sexual abuse provisions require evidence that the sexual activity was unwanted, which makes the victim's consent an evidentiary issue. Demonstrating the victim's lack of consent could thus be an insurmountable obstacle to prosecuting sextortion under certain rape and sexual abuse statutes.

## ETHICAL RULES AND PROFESSIONAL CODES OF CONDUCT

As an abuse of power, sextortion involves a fundamental breach of the ethical standards to which those with “entrusted power” are generally held. Some ethical rules, codes of conduct,

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or other regulations governing particular professions and organizations may proscribe the type of abusive conduct involved in sextortion.

Enforcement of these codes and rules is often through administrative bodies rather than through the courts. Although these administrative bodies may not be able to impose criminal sanctions, they may have authority to impose a suspension from duty, license revocation, or removal from office.

In some cases, ethical rules and professional codes of conduct **offer an alternative path to redress**. In *Australia*, for example, under the New South Wales Police Code of Conduct, intimate or personal relationships between an instructor and student are considered inappropriate, as the instructor/student relationship can become readily open to abuse. The NSW Police Force has applied this Code as part of investigations involving a range of misconduct, including police instructors threatening to prevent students from passing unless they performed sexual favors.

In *Uganda*, public officers and teachers are seen to be the principal perpetrators of sextortion, and Uganda's codes of conduct and ethics for public officers and teachers can be a useful tool in combating sextortion in public services and schools. The Code of Conduct and Ethics for *Uganda* Public Service, for example, prohibits a public officer from subjecting others or being subjected to "conduct of a sexual nature affecting his or her dignity, which is unwelcome, unreasonable and offensive to the recipient." Sanctions for breach of this code may include suspension, compensation for the victim, and removal from public service.

In other jurisdictions, ethical rules and professional codes of conduct may help to **fill gaps in the existing legal framework** and afford redress that would not otherwise be available. For example, in *Mexico*, where most laws appear unsuitable for prosecuting sextortion, the most notable efforts to prevent conduct involving sextortion have been carried out by administrative bodies through the enactment and implementation of codes of conduct and ethics protocols to prevent sexual harassment by public officials.

## INTERNATIONAL LAW

Although international conventions do not use the term "sextortion," some of them include provisions that are directed at precisely the type of abuse of authority for sexual benefit that characterizes sextortion. For example, under the Declaration on the Elimination of Violence against Women, (DEVAW) Article 1, 1993 (A/RES/48/104), the definition of "violence against women" encompasses the kind of psychological harm and coercive pressure that characterize sextortion. Similarly, Article 4 of the African Union Convention on Preventing and Combating Corruption defines corruption to include not only "goods of monetary value," but also other types of "benefit," "favour," or "advantage" – terms that could be construed to cover the non-monetary, sexual benefit in a sextortion case.

These provisions help to underscore that sextortion falls within the scope of conduct that the international community condemns as a form of corruption and of gender-based violence, and they may help fill the gaps in national statutes through which sextortion cases might otherwise slip.

In *Uganda*, for example, it appears that the prosecution regularly invokes international law in Ugandan human rights cases with little resistance from the judiciary. In this sense, Ugandan courts may rely on international law as an aid in the interpretation of ambiguous domestic laws to penalize and prosecute sextortion.

## SEXTORTION CASES

In most jurisdictions, sextortion cases are being brought, albeit under a different name. Thus, even without sextortion statutes, prosecutions are proceeding under a wide variety of legal theories. Some of those prosecutions are successful and result in convictions; others underscore the challenges that remain in obtaining redress for sextortion.

The following cases drew particular attention:

### **Australian Professor Demanded Sexual Favors from Foreign Female Students in Exchange for Passing Marks in his Class**

In *Australia*, the Corruption and Crime Commission of Western Australia investigated allegations that a professor, Dr. Ali, abused his position to elicit sexual favors from students in return for favorable treatment. Among other cases, an international student from China alleged that Dr. Ali told her that she would need his help to pass her subject. According to the student, Dr. Ali told her that he wanted her to satisfy him; to stay the night at his place; and to live with him, in exchange for raising her mark and giving her the examination paper and answers. The student did not meet Dr. Ali and subsequently failed the course. The Commission found that Dr. Ali engaged in “serious misconduct” under section 4(b) of the Corruption and Crime Commission Act 2003 (“CCCA”) in that he corruptly took advantage of his employment as a public officer to obtain a benefit for himself by seeking sexual favors from the student in exchange for awarding higher academic marks.

### **Argentine Police Officers Arrested a Couple for Speeding and Demanded Sexual Favors from the Driver’s Girlfriend in Exchange for their Release**

In 2013, in the City of Tucumán, *Argentina*, a young couple was returning from a nightclub when a police car stopped them. Policemen told the driver that he had been stopped for illegal speeding and took him to the police station. Simultaneously, the remaining policemen took his girlfriend in another patrol car and asked her for a sexual favor in exchange for her boyfriend’s freedom. The young woman refused to comply with the officers’ request. However, only after touching her, did they take her to the police station. The couple was released some hours later, after the young man’s father paid a bribe for their release. Some days later, the woman tried to file a complaint. However, the report had to be filed in the same police station where the couple had been arrested, and the officers on duty refused to process it. Finally the claim was brought to the Provincial Human Rights’ Secretary, and with the help of a well-known attorney, the officers involved were formally accused and prosecuted under the charges of unlawful detention, mistreatment, theft and breach of the duties of a Public Official.

### **Canadian Immigration Officer Sentenced to 18 Months in Jail for Trying to Extort Sex in Return for Approving a Woman's Refugee Application**

A young, South Korean woman had filed an application for refugee status in *Canada*. Her case was heard by Steve Ellis, an immigration officer and former Toronto city councilor. Weeks after the hearing, Ellis arranged to meet the woman in a coffee shop and demanded sexual favors in exchange for a favorable decision on her refugee application. The young woman's boyfriend secretly videotaped the meeting and took the tape to the police. Ellis was convicted of breach of trust under the Criminal Code and for violating the Immigration and Refugee Protection Act.

### **Kenyan Teachers Ask Students for Sexual Favors in Exchange for Favorable Marks**

In 2011, *Kenya's* Public Health Permanent Secretary launched a Performance Needs Assessment of Kenya's Health Training System and exposed the fact that tutors in *Kenya's* medical training colleges were demanding sex in exchange for favorable examination marks. The report also noted that some students had reported harassment by male lecturers, especially during examination time. As a result of the report, the University of Nairobi and Kenyatta University – two of the oldest institutions of higher learning – proceeded to develop a work ethics policy for lecturers.

### **Mexican Politician Requests Sexual Favors in Exchange for Party Positions**

On April 2014, Cuauhtémoc Gutiérrez de la Torre, the President of the Institutional Revolutionary Party (Partido Revolucionario Institucional – “PRI”) for the Federal District was accused of diverting public resources to fund an alleged prostitution and sexual favors network. According to media reports, Cuauhtémoc Gutiérrez de la Torre used his political position in order to request sexual favors from young women and, in exchange, he gave them a position within the Party. A criminal investigation is pending against him.

In response to this case, the Party of the Democratic Revolution (Partido de la Revolución Democrática – “PRD”) submitted a bill to the Federal District Congress proposing that an additional penalty be introduced into the Criminal Code for the Federal District, whereby public officials who harass, threaten and apply any type of economic violence against a victim in exchange for sexual favors will be penalized with imprisonment of 2 to 4 years. The local congress has not yet discussed the proposed bill.

### **In Taiwan, Public Prosecutor Coerced Witness into Sex**

Wu Jie-Ren used his position as a public prosecutor to coerce a witness, from a case he was investigating, into bed. In exchange, he promised that court documents would not be sent to her home, so her family would not learn of her involvement in the case. He was sentenced to 7.5 years under the Anti-Corruption Act and his appeal was rejected. Jie-Ren had been accused of sexual harassment towards other women twice before, but could not be prosecuted as the Sexual Harassment Prevention Act was not yet in force at the time.

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### Ugandan Pupils Are Defiled by Their Teachers

According to a 2008 study funded by the World Bank, in the previous year, 4% of upper primary school pupils in *Uganda* had been defiled by their teachers. The report shows that girls are lured into sex with their teachers in all kinds of ways, including promises of gifts and good marks. Sulaiman Madada, Bbaale County MP, was not surprised by the findings and pointed out that girls usually give in to teachers' sexual demands because they fear the consequences of refusing. Martha Muhwezi, national coordinator of the Forum for African Women Educationalists, says that, as a result of defilement, girls end up getting pregnant, dropping out of school or becoming infected with HIV.

## CHALLENGES TO PROSECUTING SEXTORTION

While some statutes may be adequate, significant barriers remain to successful prosecutions of sextortion. At the forefront is the **lack of information on sextortion and how to report it**. Sextortion victims are often not aware that the conduct is punishable – victims believe that, if they failed to resist the coercive power of authority, there was no crime because s/he “consented”. Moreover, victims commonly lack knowledge on where or how to report an allegation of sextortion. For the most part, existing complaint processes have not been clarified enough for victims to understand how to access them in connection with sextortion claims.

Another critical challenge in many of the jurisdictions surveyed is the **inadequacy of the legal frameworks**. Precisely because sextortion has elements of both corruption and sexual exploitation, it often eludes prosecution as either. On one hand, the corruption element of sextortion – which relies on authority rather than force to “coerce” sex – challenges traditional notions of physical force and lack of consent in sexual assault and rape laws and tends to undermine the seriousness with which the sexual abuse is treated. On the other hand, anti-corruption efforts usually target financial impropriety, such as bribery, kickbacks, embezzlement, and favorable business arrangements, rather than sexual impropriety. While the corruption statutes reviewed do not require evidence of physical harm, some require evidence of financial harm, as is the case in *Brazil* and *Argentina*. Moreover, traditionally under anti-corruption statutes both the payor and recipient of the bribe are seen as culpable and vulnerable to prosecution. While national laws and policies vary, under some of the statutes reviewed, such as the UK Bribery Act and the Taiwan Anti-Corruption Act, the sextortion victim may be at risk of prosecution. Under sexual harassment and gender-based violence laws, the issue of consent poses particular challenges in prosecuting sextortion cases because victims who accede to the perpetrator's request for a sexual favor may be viewed as having “consented” to the sexual conduct. For example, many rape statutes reviewed, including the Sexual Offenses Acts of the *United Kingdom* and *Kenya*, make absence of consent an express element of the sexual offense. However, under other laws, as in *Argentina* and *Australia*, there are circumstances in which the absence of resistance is not necessarily treated as evidence of consent. Further, some jurisdictions recognize that psychological coercion, threats, abuse of authority, or other forms of “coerced” consent would invalidate a sextortion victim's apparent “consent” to the sexual conduct.

While a strong legal framework is the first requirement to successfully combat sextortion, the greatest barriers to effective prosecution were found in the **inadequacies of existing institutional frameworks**, which in many cases lacked the resources and capacity to receive and prosecute sextortion complaints, protect the complainants, and provide effective redress. In at least a few instances, institutional corruption was deemed a significant hurdle to prosecuting public officials.

For victims of sextortion, the **shame and fear of stigmatization** associated with sexual offenses compound the difficulty of coming forward. When a woman or girl (or, in some cases, a boy or man) is asked for a sexual bribe rather than a monetary bribe, s/he may experience the same kind of shame that rape and other sexual violence victims experience, and s/he may fear that revealing what happened will incur the same kind of social stigma. This concern has been highlighted in *Taiwan* and *Uganda*, where abused women often do not report any incidents to avoid disgracing their families.

Even where victims might come forward, the **lack of witnesses and other evidence** is a significant barrier to successful prosecutions in many jurisdictions. In most cases, sextortion takes place in secret, where the person who seeks a sexual favor and the person from whom the favor is sought are the only witnesses. Moreover, retaliation is not uncommon against victims and witnesses who come forward, particularly where the perpetrator is a public official. In *Argentina* this has been raised as a serious concern, given that the privacy of the victim is not carefully guarded and s/he does not receive special protection against the perpetrator. *Taiwan*, on the other hand, has ameliorated this challenge through its Witness Protection Law and the Anti-Corruption Informant Rewards and Protection Regulation, which seek to protect victims and encourage whistle-blowing.

Above all, lack of awareness about sextortion silences victims and keeps them from seeking legal redress, and fosters a culture of impunity for perpetrators, many of whom believe they are doing nothing wrong. The only antidote is to change the perception(s) of the community in which the victim and perpetrator live. The way to change perceptions is through dialogue and sunshine – open dialogue where secrets and private pain have previously dwelt. This research demonstrates above all the need to start more conversations about the abuse of power in exchange for sexual benefits.

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# ARGENTINA



Reuters: Enrique Marcarian





## I. HOW DOES SEXTORTION MANIFEST ITSELF IN ARGENTINA?

### A. SEXTORTION AND LAW ENFORCEMENT

Sextortion is a problem within the police force in Argentina, not only as regards the police's relationship with the community but also within the hierarchical structure itself. As regards the latter, reports and data evidencing such occurrences and the results of any related disciplinary action are hard to come by as they are investigated and processed internally. We have, however, been able to find a few stories of cases that have been reported in the media, albeit in limited detail.

#### **Police Scandal in Tucumán**

In the City of Tucumán, in 2013, a young couple was returning from a disco when a police car stopped them. Policemen told the driver that he was stopped for illegal speeding and took him to the police station. At the same time, they took his girlfriend in another patrol car and asked her for a sexual favor in exchange for her boyfriend's freedom. The young woman refused to comply with the officers' requirement. After touching her, they took her to the police station.

The couple was released some hours later after the young man's father paid a thousand pesos bribe.

Some days later, the woman came forward and tried to file a complaint. Since the report had to be filed in the same police station where they were mistreated, the officers on duty refused to process it.

Finally the claim was brought to the Provincial Human Rights' Secretary and with the help of a well-known attorney the officers involved were formally accused and prosecuted under the charges of unlawful detention, mistreatment, theft and breach of the duties of a public official.

#### **Young woman reports her boss for requesting "sexual favours"**

The vice marshal of Neuquén's Police was charged by a young policewoman for requesting sexual favors in exchange for granting her request to transfer to another jurisdiction.

Reporting indicates that the woman was married with a small child, and therefore requested a transfer from the Province's capital district to the city of Chos Malal, 400 kilometres north of Neuquén, where her family lived.

According to her claim, during the interview with her chief in his office, he asked her to perform certain sexual favors for him in exchange for granting the transfer she was requesting. She refused to do so and fled his office in tears. A few days later she reported the incident, and the claim was processed by Neuquén's Prosecutor of Serious Offences Against People, but no further information was released to the media.

## II. HOW DOES THE ARGENTINEAN LEGAL FRAMEWORK APPLY TO SEXTORTION?

Argentina is a Federal Republic, with twenty-three autonomous provinces and a Capital District, Buenos Aires City. Therefore, three different levels of government can be found: Federal, Provincial and Municipal. Each of these levels has separate branches of government and, in turn, a range of federal, provincial and municipal laws that deal with corruption and offenses committed by public officials. However, provincial and local jurisdictions are banned from adopting criminal statutes creating new crimes within their territories and, therefore, the Federal Criminal Code – as with all Federal Codes – is applicable throughout the entire country.

The following section will explore the various laws and regulations that may offer a legal basis on which a victim of sextortion may be able to file a complaint or a lawsuit against the offender.

For the purpose of this report, we have mainly addressed federal statutes and case law. Provincial and local statutes are mentioned only where most relevant.

### A. SEXUAL ASSAULT LAWS AND CASES

Section 119 of the Argentine Criminal Code imposes imprisonment from six (6) months to four (4) years upon anyone who sexually abuses a person of either sex when the victim is under thirteen (13) years of age, or by means of violence, threats, coercive abuse or intimidation deriving from a relationship of employment, power or authority, or by taking advantage of the fact that the victim was for any cause whatsoever unable to freely consent to the sexual act.

Penalties for sexual abuse are aggravated when: (a) the abuse includes rape; (b) the abuse results in severe injury to the victim's mental or physical health; (c) the abuse is perpetrated by an ancestor, descendant, relative by affinity of direct line, a brother, legal guardian, tutor, curator, minister of any religion or by the person in charge of the victim's care or education; (d) the perpetrator is the knowing carrier of a serious sexually transmitted disease and the abuse entails risk of contagion; (e) the abuse is perpetrated by two or more individuals or with the use of weapons; (f) the perpetrator is a police agent or the member of any of the security forces; and (g) the victim is under eighteen (18) years of age and the perpetrator takes advantage of a preexisting cohabitation.

The boundaries of sexual abuse are defined by the victim's inability to freely consent to the sexual act, regardless of the nature or the causes of the victim's limitations. In this sense, sexual abuse exists whether the perpetrator causes the victim's inability to consent or simply takes advantage of a pre-existing circumstance that makes it impossible to freely consent to the sexual act.

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The Argentine Criminal Code focuses on the victim's sexual autonomy rather than the victim's physical security and therefore identifies a broad range of methods by which sexual predation may be accomplished, including both physical and non-physical forms of coercion. In fact, the criminal definition of sexual abuse specifically includes reliance on threats and on the coercive pressure arising out of an employment, institutional or professional relationship. As construed by the majority of Argentine criminal courts, Section 119 does not require active or physical resistance as a manifestation of the victim's non-consent.

In this context, sextortion could be deemed to fall—as a matter of law—within the criminal definition of sexual abuse, as one of the many forms of illegitimate non-physical coercive impositions mentioned in Section 119 of the Argentine Criminal Code. However, in order for an allegation of sextortion to be punishable under this Section, the public official must abuse his powers, position or office to such a degree that the victim's reluctance is overwhelmed by pressure and intimidation.

Therefore, the discussion on whether a specific case of sextortion falls within the boundaries of Section 119 will ultimately be of an evidentiary nature. That is, the prosecution will be required to show under the evidentiary standard of criminal procedure that the degree of coercion imposed by the public official was such as to exclude consent on the part of the victim.

## B. ANTI-CORRUPTION LAWS, ETHICAL RULES AND CASES

In Argentina, anti-corruption laws have two main sources: the Federal Criminal Code and the Public Ethics Regime.

### **Federal Criminal Code**

The Argentine Criminal Code penalizes certain crimes regarded as corruption, under a number of sections. However, the core statutory elements of all provisions do not differ much from one another.

In general, it is a crime for a public official to request, receive or accept any benefit, such as favors, promises (directly or indirectly through a third party), advantages, money or any other gift in order to:

- (i) Perform, delay or fail to do anything related to their duties.<sup>3</sup>
- (ii) Unduly exert his or her influence on a public official to perform, delay or fail to do anything related to the public official's duties.<sup>4</sup>
- (iii) Issue, pass, delay or fail to render a resolution, judgment or opinion on matters under his or her jurisdiction.<sup>5</sup>

In cases (i) and (ii) the Criminal Code provides that the public official who engages in any such conduct will be banned from assuming public office in the future and may also be subject to imprisonment from one (1) to six (6) years. If the crime was perpetrated by a member of the Judiciary or the Public Ministry, the sanction will range from two (2) to twelve (12) years in prison.

In general, a public official <sup>6</sup> means any officer or employee of the Argentine State (including all its entities), hired, appointed and/or elected to develop activities or functions on behalf or to the service of the Argentine State, at any rank. To that extent, the terms “officials”, “government officials”, “agents” and or “employees”, are considered interchangeable.

### **Public Ethics Regime**

For the purpose of this report, the “Public Ethics Regime” covers the following statutes:

- (i) The Argentine Public Ethics Act (“PEA”), enacted by Law No. 25,188, published November 1st, 1999;
- (ii) Its implementing regulation, Decree No. 164/1999;
- (iii) The Ethics Code applicable to Governmental Duty, <sup>7</sup> enacted by Decree No. 41/1999.

Additionally, each Argentine Province has the power to enact legislation related to the PEA. In some provinces, Public Ethics Acts have already been enacted, including for example the provinces of Jujuy, La Rioja, San Juan, Chaco, Río Negro, Santiago del Estero, Corrientes, Chubut and Santa Cruz.

The PEA sets forth a regime of duties, prohibitions and conflicts of interest applicable to all public officials and establishes a set of principles and conduct that they must comply with. For instance, they are prohibited from receiving any undue advantage related to the performance of their duties, as they are required to act honestly, righteously and in good faith.

Moreover, in accordance with the Federal Criminal Code, section 18 of PEA provides that it is prohibited for public officials to receive gifts, donations or any kind of gratuity while performing their governmental duties or as a result of their positions. The only exceptions to this rule are presents of courtesy or diplomatic tradition.

Finally, Decree No. 41/99 approved the Ethics Code applicable to governmental duty, and set forth the rules applicable to public officials while carrying out their governmental duty.

Certain aspects of the Ethics Code are similar to the Criminal Code provisions described above. In addition, it provides certain scenarios in which the provision of benefits is presumed to be unlawful and limited exemptions from the general prohibitions on providing benefits.

However, no record has been found of any case law in which a party has filed or won a sextortion case on the basis of these anti-corruption statutes. Despite the lack of case law, a victim could reasonably argue a sextortion case on that basis, since all three elements of sextortion (abuse of authority, quid pro quo and psychological coercion) can be found in anti-corruption statutes. That is to say, sextortion, as a sexualized form of corruption, is by definition and could be considered under Argentine law, corrupt conduct: The public official, abusing his authority, demands from his victim a certain kind of conduct as a condition to perform an act that he is, by law, obliged to do.

However, sextortion is not likely to be prosecuted under any anti-corruption or public ethics law due to the absence of a monetary component. Even if demanding a sexual favor is as corrupt as demanding a monetary bribe, Argentine Courts have applied a strict interpretation of the terms of the law and therefore do not include sexual favors under the scope of the definitions of “benefit, favors, promises and advantages”.<sup>8</sup>

This interpretation is upheld by the vast majority of legal authors but it is not undisputed. Prominent legal scholars have suggested a broader approach considering that “things that can be delivered, even if they do not have an economic value (since it is not a crime against property) satisfy the concept of gratuity [“dádivas”] (a sexual favor with a woman is a gratuity for Oderigo & Cuello Calón)”.<sup>9</sup>

Another obstacle to reliance on anti-corruption laws is that the victim who pays a bribe is at risk of being charged with co-delinquency, regardless of the circumstances. The anti-corruption laws do not address whether the victim was in any way coerced to pay the bribe. In a sextortion case, the victim accedes to the demand for a sexual favor because the perpetrator wields authority over her, and she believes she has no alternative.

However, the anti-corruption statutes make no allowance for coercion, and if a sextortion victim reports the perpetrator, there is a serious risk that she could also be charged with co-delinquency.”

Therefore, while a victim could argue a sextortion case under an anti-corruption statute, the abovementioned challenges may make prosecution unlikely.

### **Case Law**

Research showed that sextortion cases are not brought to the Judiciary for prosecution. Either due to the lack of awareness or appropriate statutes, no relevant case law was found addressing all the statutory elements of sextortion.

Conduct that constitutes sextortion would be prosecuted as sexual abuse aggravated by the position of power of the perpetrator. For instance, where police department members are involved, the claim will always be prosecuted as a more serious crime due to the authority involved and the public trust conferred on them. This is what makes the punishment more severe.

## **C. SEXUAL HARASSMENT LAWS AND CASES**

Argentina’s gender-based discrimination federal laws<sup>10</sup> and sexual harassment provincial laws<sup>11</sup> do not address sextortion or its elements jointly in one statute. However, some of these laws describe conduct that is similar to sextortion, which may be invoked by a potential victim even if only to obtain protection and not prosecution, as explained below and in the chart included in III.B.

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For example, Law No. 26,485, on the Integral Protection of Women contains various definitions and descriptions of sexual and psychological violence against women that may constitute a component of sextortion. While this statute does not provide a specific remedy for victims, it aims to protect women by different means, such as the promotion of public policies in different jurisdictions.

Section 4 of the Statute considers “violence against women to be every conduct, action or omission, that directly or indirectly, both in public and private areas, based on an unequal power relationship, affects their life, freedom, dignity, physical, psychological, sexual, economic or patrimonial integrity, as well as their personal safety. Including conduct perpetrated by the Government or its officials.”

In addition, Section 5 provides that the types of violence included in the definition cover, among others:

1. (...)
2. Psychological: (...) caused by threats, harassment, (...) or any other means that cause damage to psychological health and self-determination.
3. Sexual: any action that implies the infringement in all its forms, with or without sexual intercourse, of women’s right to voluntarily decide about her sexual and reproductive life through threats, coercion, use of force or intimidation including (...) sexual abuse and harassment. (...)”

Section 6 details the ways in which the different types of violence against women in the different areas manifest themselves, specifically including the following:

1. (...)
2. “Institutional violence against women: [an act] performed by government officials, professionals, staff members and agents of any agency, entity or public institution, that has as a purpose to delay, block or prevent women’s access to public policies and exercise of the rights that are foreseen in this law.”
3. Employment violence against women: that which discriminates in the public and private employment areas and blocks their access to employment, hiring, promotion, stability or permanence in it, (...) Also, it includes the systematic psychological harassment perpetrated on a particular worker with the purpose of achieving her exclusion from employment.”

There are a number of sexual harassment laws in different provinces of Argentina. However, only the ones included in the below Chart of Relevant Statutes could be used to prosecute a sextortion case and we have found no records that they have been used for that purpose.

## D. CONCLUSIONS

While the practice of sextortion is not new, Argentina, like most countries, has not enacted any statutes specifically penalizing it. Hence, the particular elements of this conduct can only be identified in laws that deal with other crimes, such as corruption, sexual harassment, sexual abuse, gender-based violence and domestic violence, among others.



This poses a real problem. Statutes that penalize corruption do not include “sexual favors” as the currency of the bribe, and the victim is at risk of being prosecuted for co-delinquency. On the other hand, sexual harassment and sexual abuse statutes include the sexual component but fail to address the importance of abuse of power and psychological coercion.

Notwithstanding these limitations, it is possible for a sextortion case to be prosecuted in Argentina and, as we explained in Section II, Section 119 of the Federal Criminal Code provides a helpful tool for this purpose. Naturally, since there is not a specific sextortion statute, building the case and providing the evidence to support it may not be easy, and no case law has been found to suggest that this has been done in the past.

In short, there is an important gap in Argentina’s legal system as concerns sextortion, which needs to be addressed. Meanwhile, the main thing to remember is that in Argentina a remedy may be available if one has the means, support and time to wait for a criminal trial.

### III. RESOURCES

#### A. SUPPORT AVAILABLE FOR VICTIMS

Although not focused on sextortion due to the lack of regulation, the Office for Women, created in 2009 by the Federal Supreme Court and promoted by the former Supreme Court Judge, Carmen Argibay, is a good example of public policy regarding gender-based violence and discrimination.

This Office has promoted a broad process of awareness and inclusion of a gender-based perspective in institutional development in order to achieve equality between men and women, due prosecution of crimes, education and protection of members of the Judiciary and civil society in general.

As well as this, many NGOs based in Argentina provide support and aid for victims of gender-based violence. Among others, we can mention: FEIM – Investigation and Study Foundation for women (“Fundación para el Estudio e Investigación de la Mujer”) – and AMA (Association of Self-Appointed Women against Gender-based violence – “Asociación de Mujeres Autoconvocadas contra la violencia de género”).

There is much to be done, but we believe this is a promising beginning to start debating, naming and shaming sextortion at all levels.

#### B. REFERENCES

##### Case Law

- National Criminal Court of Appeals, Section IV; in re “K.C.S. on sexual abuse” 23/04/2014.

**Books**

- Gelli, M.A. "Federal Constitution", Commented, La Ley, Buenos Aires, 2005.
- Breglia Arias - Gauna, "Criminal Code & Complementary Statutes", annotated, T. 2nd.
- D'Alessio, Andrés J. (dir.); DIVITO, Mauro A. (coord.), "Criminal Code, Annotated" T. II, 2nd ed., La Ley, Buenos Aires, 2009.
- Fontán Balestra, Carlos; Ledesma, Guillermo "Treaties on Criminal Law – Special Crimes", T. III., La Ley, Buenos Aires, 2013.

**Internet Resources**

- [www.clarin.com](http://www.clarin.com) – Newspaper.
  - [www.csjn.gov.ar/om](http://www.csjn.gov.ar/om) - Office for Women website.
  - [www.infoleg.gov.ar](http://www.infoleg.gov.ar) – Legislative Database.
  - [www.laleyonline.com.ar](http://www.laleyonline.com.ar) – Legal materials database.
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## ARGENTINA - CIVIL LAW SYSTEM

## FEDERAL LAWS

## Statute: Criminal Code, Sections 256

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Public Officials	Receive or accept a promise of (directly or indirectly through a third party) money or any other gift in order to perform, delay or fail to do anything related to his or her duties.	Imprisonment: 1 to 6 years Ban from assuming Public Office

## Statute: Criminal Code, Section 256 bis

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	Request, receive or accept a promise of (directly or through a third party) money or any other gift in order to unduly exert his or her influence on a Public Official to do, delay or omit to do anything related to the Public Official's duties	Imprisonment: 1 to 6 years Ban from assuming Public Office

## Statute: Criminal Code, Section 257

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Public Official of the judicial branch or Attorney General's office.	Request, receive or accept a promise of (directly or through a third party) money or any other gift in order to issue, pass, delay or omit to render a resolution, judgment or opinion on matters under his or her jurisdiction.	Imprisonment: 4 to 12 years Ban from assuming Public Office

**Statute: Criminal Code, Section 119**

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	Sexual abuse of a person of either sex when the victim is under thirteen (13) years of age, or by means of violence, threats, coercive abuse or intimidation deriving from a relationship of employment, power or authority, or by taking advantage of the fact that the victim was for any cause whatsoever unable to freely consent to the sexual act.	Imprisonment: 6 months to 4 years
<ul style="list-style-type: none"> <li>• Ancestors, descendants, relatives by affinity of direct line, a brother, legal guardian, tutor, curator, minister of any religion or by the person in charge of the victim's care or education;</li> <li>• Police agent or the member of any of the security forces;</li> </ul>	Sexual abuse of a person of either sex when the victim is under thirteen (13) years of age, or by means of violence, threats, coercive abuse or intimidation deriving from a relationship of employment, power or authority, or by taking advantage of the fact that the victim was for any cause whatsoever unable to freely consent to the sexual act.	Imprisonment: 8 to 20 years

**Statute: The Argentine Public Ethics Act ("PEA") Law No. 25,188 and its implementing regulation, Decree No. 164/1999**

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Public Officials	<ul style="list-style-type: none"> <li>• Receiving any undue advantage related to the performance of their duties, as they are required to act honestly, righteously and in good faith.</li> <li>• Receiving gifts, donations or any kind of gratuity while performing their governmental duties or as a result of their positions. The only exceptions to this rule are presents of courtesy or diplomatic tradition.</li> </ul>	

**Statute: The Ethics Code applicable to Governmental Duty**

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Public Officials	<ul style="list-style-type: none"> <li>• Request, accept or admit money, gifts, favours, promises, or any other advantages.</li> </ul>	Disciplinary measures or the sanctions applicable according to their position, without prejudice to corresponding civil and criminal liabilities.

## PROVINCIAL SEXUAL HARASSMENT LAWS

Statute: Sexual Harassment Law of the Province of Buenos Aires No. 12,764

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Government officials and the Province's public employees.	<p>Defined in Art. 2</p> <p>"It is understood as sexual harassment the actions of government officials and/or public employees that taking advantage of their hierarchical status or circumstances connected to their position, engage in conducts that have as a purpose any type of sexual approach unwanted by the person towards whom it is directed, request of sexual favors and any other verbal or physical conduct of a sexual nature, when one of the following situations happens:</p> <p>a. when the submission to one of those acts turns implicitly or explicitly into a term or condition for a person's employment.</p> <p>b. when the submission or rejection by the person to that conduct turns into an argument for the making of decisions in the employment or regarding the employment of that person.</p> <p>c. when that conduct has the effect or purpose of interfering in an irrational way with the development of the employment of that person or when it creates an employment environment of abuse, intimidation, hostility or offense." (Emphasis added).</p>	Disciplinary measures, suspension, severance or remission, depending on the severity of the case.



### Statute: Sexual Harassment Law of the Province of Misiones No. 1,556

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Government officials.	<p>Defined in Art. 41 (i)</p> <ul style="list-style-type: none"> <li>•Sexual Harassment is the exercise of sexual coercion, being understood as the actions of the government official, of any gender, that based on his/her position requests sexual favors in abuse of hierarchical relationship.</li> </ul> <p>Even if the quid pro quo element is not specified in the statute, it is reasonable to understand that if this element concurs in a situation defined as sexual harassment, it would be prosecuted under this statute as well. (Emphasis added).</p>	Disciplinary measures, suspension, severance or remission, depending on the severity of the case, without prejudice to corresponding civil and criminal liabilities.

### Statute: Employment Violence Law of the Province of Tucumán No. 7,232

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Employer and harasser.	<p>Defined in Art. 3</p> <ul style="list-style-type: none"> <li>•“Every action or omission that threatens dignity, physical, sexual, psychological or social integrity of the employee exercised within an employment environment by the employer, hierarchical staff or a third party directly related to it, will be considered for the effects of this law as employment violence.”</li> </ul> <p>Even if the quid pro quo element is not specified in the statute, it is reasonable to understand that if this element concurs in a situation defined as sexual harassment, it would be prosecuted under this statute as well.</p>	The employers shall be liable to make labour, material and moral compensations.

### Statute: Sexual Harassment Law of the Province of Misiones No. 1,556

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Government officials.	<p>Defined in Art. 41 (i)</p> <ul style="list-style-type: none"> <li>• Sexual Harassment is the exercise of sexual coercion, being understood as the actions of the government official, of any gender, that based on his/her position requests sexual favors in abuse of hierarchical relationship.</li> </ul> <p>Even if the quid pro quo element is not specified in the statute, it is reasonable to understand that if this element concurs in a situation defined as sexual harassment, it would be prosecuted under this statute as well. (Emphasis added).</p>	Disciplinary measures, suspension, severance or remission, depending on the severity of the case, without prejudice to corresponding civil and criminal liabilities.

### Statute: Employment Violence Law of the Province of Tucumán No. 7,232

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Employer and harasser.	<p>Defined in Art. 3</p> <ul style="list-style-type: none"> <li>• “Every action or omission that threatens dignity, physical, sexual, psychological or social integrity of the employee exercised within an employment environment by the employer, hierarchical staff or a third party directly related to it, will be considered for the effects of this law as employment violence.”</li> </ul> <p>Even if the quid pro quo element is not specified in the statute, it is reasonable to understand that if this element concurs in a situation defined as sexual harassment, it would be prosecuted under this statute as well.</p>	The employers shall be liable to make labour, material and moral compensations.

### Statute: Employment Violence Law of the Province of Entre Ríos No. 9,671

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person.	Section 2, employment violence as “every action brought in the workplace that violates the moral, physical, sexual, psychological or social integrity of the state or private workers.”	The perpetrators shall be fined. The amount will be between ten (10) and fifty (50) minimum wages (“salario mínimo vital y móvil”).

### Statute: Employment Violence Law of the Province of Chaco No. 4,863

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Public Agents.	It incorporates subsection 14 to section 22 of Law No. 2017. Sexual harassment is defined as: “the actions of the agent, of any gender, that based on the performance of his duties requests sexual favors or other verbal or physical conduct of unwanted sexual nature, taking advantage of their hierarchical relationship.”	Disciplinary measures, suspension, severance or remission, depending on the severity of the case, without prejudice to corresponding civil and criminal liabilities.

**Statute: Employment Violence Law of the City of Buenos Aires No. 1,225**

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	<ul style="list-style-type: none"> <li>Section 1 bis: Employment violence is defined as the “acts and omissions of persons or group of persons who , during the (...) employment relationship in a systematic and recurrent injury to the worker’s dignity , physical, sexual, psychological and /or social integrity, by sexual harassment , abuse , abuse of power , attacks, threats , intimidation (...), physical, psychological and/or social abuse.</li> </ul> <p>(...) particularly serious when the victim is in a particularly vulnerable position, because of their (...) hierarchical inferiority, or other similar condition.”</p>	<p>Disciplinary measures, suspension, severance or remission, depending on the severity of the case.</p> <p>If the perpetrator is a Deputy, it would be considered serious misconduct in the performance of duties.</p> <p>If the perpetrator is a person who can be put in impeachment process (“juicio politico”), it would be considered as a cause of poor performance.</p>

**Statute: Sexual Harassment Law of the Province of Santa Fe No. 11,948**

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Employers.	<ul style="list-style-type: none"> <li>It incorporates Sexual Harassment as Section 78 bis of Law No. 11948, as any conduct that sexually harass and offend the victim, no matter the consent, and the conduct is based on someone’s hierarchical position.</li> </ul>	Fine or up to five (5) days in jail.

## Statute: Sexual Harassment in the National Public Administration Decree No. 1,797/80

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Government Officials.	<p>Defined in Section 1</p> <ul style="list-style-type: none"> <li>•...sexual harassment should be understood as the actions of the government official that based on his/her position, abuses a hierarchical relationship inducing other to agree to his sexual requests, existing or not sexual intercourse.</li> </ul> <p>The phrase "inducing other to agree to his sexual requests" can be reasonably construed as coercion in order to obtain a sexual favor as a condition to not fire the public official in a lower rank (Emphasis added). Disciplinary measures, suspension, severance or remission.</p>	Disciplinary measures, suspension, severance or remission.





# AUSTRALIA



Reuters: Vivek Prakash



## I. HOW DOES SEXTORTION MANIFEST ITSELF IN AUSTRALIA?

### A. SEXTORTION IN EDUCATIONAL SETTINGS

In Australia, one place where sextortion manifests itself is in the educational setting. Evidence of this can be found in the government investigations of alleged misconduct at the Curtin University of Technology and the New South Wales Police College.<sup>12</sup>

#### **Complaints at Curtin University of Technology**

At Curtin University of Technology ("Curtin"), the Corruption and Crime Commission (the "Commission") investigated allegations that a professor, Dr. Ali, abused his position to elicit sexual favors from three students in return for favourable treatment and to cause detriment to a fourth student in June 2009. Three of the complainants were female students from China, who told strikingly similar stories about the kind of inappropriate pressure professors can bring to bear on students.

One alleged that Dr. Ali told her he could increase her mid-term examination mark of 38/100 if she could think of something to persuade him to do that. He rejected her suggestions of academic options, and the uncomfortable silences in the conversation led her to believe he wanted something sexual in nature. The second complainant alleged that Dr. Ali arranged to meet to discuss her final examination mark, which was 43/100. Dr. Ali asked her how she could convince him to change her mark: he asked her to think of something "non-academic" between him and her. This is when she believed he was asking her to do something related to sexual favors. The third alleged that Dr. Ali told her that she would need his help to pass her subject, and he wanted her to satisfy him; to stay the night at his place; and to live with him. Dr. Ali told her that if she met him again he would raise her mark and give her the examination paper and answers. If she did not meet him, she would not pass the unit. She did not meet Dr. Ali and subsequently failed the subject.

The Commission found that Dr. Ali corruptly took advantage of his employment as a public officer to obtain a benefit for himself by seeking sexual favors from three female foreign students in exchange for awarding them higher academic marks, and that this constituted "serious misconduct" under section 4(b) of the Corruption and Crime Commission Act 2003. It also constituted sextortion. As this was not a judicial proceeding, the Commission's focus was on recommendations to address the deficiencies in Curtin's system that allowed this misconduct to occur.<sup>13</sup>

#### **Complaints at the NSW Police College**

In 2002, the NSW Police Force conducted an investigation into complaints about instructors forming sexual or close personal relationships with students at the NSW Police College. The investigation involved 30 officers, from different police commands, and a range of misconduct issues, including threats to prevent a student from passing unless she performed a sexual favour.

The NSW Police Code of Conduct (the “Code of Conduct”) uses the term “professional distance” to describe the requirement that officers keep personal and professional relationships apart. Where an instructor/student relationship exists, it is considered inappropriate for other intimate and personal relationships to develop simultaneously, as the instructor/student relationship then becomes readily open to abuse. One of the forms of abuse is sextortion, and there were cases where police instructors had requested sexual favours from students in return for passing exams/assessments.

The NSW Ombudsman could not make decisions about the officers or complaint findings, but identified issues and made recommendations. The issues identified reflect some of the challenges in addressing sextortion. First, there was lack of awareness that the conduct was inappropriate. The Code of Conduct was not sufficiently clear, staff members did not receive an adequate explanation of the standard of conduct expected, and the existing guidelines were neither well-circulated nor formally acknowledged. Second, inappropriate conduct was not always taken seriously and sanctioned appropriately. The Code of Conduct was applied inconsistently, and the outcomes did not necessarily correspond with the gravity of the misconduct. For example, in one case of sextortion, no action was taken against the officer other than managerial counselling. Some actions against officers were delayed for months and, in some cases, years. The lack of consistent disciplinary action prevented the Code of Conduct from acting as a serious deterrent against misconduct.

As this illustrates, one way to address sextortion is by assuring that Codes of Conduct clearly prohibit this conduct, that people understand the standard of conduct expected, and that effective administrative remedies are available to sanction those who engage in sextortion.

## **B. SEXTORTION AND LAW ENFORCEMENT**

Despite a variety of reports indicating that sextortion is a problem within the police force in Australia, as a general observation, reports and data evidencing such occurrences and the results of any related disciplinary action are hard to come by as they are investigated and processed internally by each State’s respective Police Integrity Commission. We have, however, been able to find stories of cases that have been reported in the media, albeit in limited detail.

In 2011, a police officer in Queensland was investigated and resigned from the police force after allegedly demanding that a woman he was investigating for mail theft show him her breasts, and sexually assaulting her. He took her for a drive in a police vehicle, “removed his penis from his pants and demanded oral sex”. He later telephoned the woman he was investigating seeking phone sex and told her he had “bent a few rules” to take care of the charges against her and to ensure that she was not prosecuted.<sup>14</sup>

ABC News Australia reported that women inside the Nauru Immigration Detention Centre were regularly required to strip and exchange sexual favours with their guards so they could have access to the showers – access to which is restricted due to the island’s unreliable water supply. The Immigration Department launched an urgent investigation into the claims with an outcome expected in early 2015.<sup>15</sup>

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## C. LEGISLATIVE RECOGNITION OF SEXTORTION

In 1987, Parliament amended section 65A of the Crimes Act to address a perceived gap in the law on sexual assault, and, as the reading speech to parliament made clear, one of the specific gaps they sought to close involved sextortion:

*Where this new offence could be charged is where an immigrant woman who speaks almost no English works from home as an outworker, sewing piece-work. This provides her only income and she has dependent children. The man delivering work to her indicates that he will stop bringing work unless she submits to sexual intercourse with him. That woman submits to intercourse because she believes that, if she does not, she will be denied her only access to an earned income. She has been intimidated into submitting to sexual intercourse by a threat that her only source of income will be terminated – a threat that she could not in the circumstances be reasonably expected to resist. The question of what could not, in the circumstances, be reasonably resisted will be a question of fact for the jury.<sup>16</sup>*

Although this reflects legislative awareness of the need for more effective prosecution of sextortion, public awareness of the issue remains quite limited, and there have been few convictions under the new provision. A paper published in 2007 claims that, in the 20 years since the amendment's introduction in 1987, only two successful convictions were recorded in NSW.<sup>17</sup>

Further education and resources are needed both to educate women on their rights and also to increase awareness of the issue. The need to raise the visibility of sextortion as an issue is also evident in the lack of media coverage. While corruption by public officials is considered to be a serious issue and is covered in great detail by the mainstream media, sextortion does not receive the same level of media coverage.

## II. HOW DOES THE AUSTRALIAN LEGAL FRAMEWORK APPLY TO SEXTORTION?

Australia is a federation of six States that, together with two self-governing Territories, have their own constitutions, parliaments, governments and laws, along with a federal or "Commonwealth Government" that governs and makes laws for the country as a whole. For the purposes of this report, we have analysed the laws of New South Wales, Western Australia and the Commonwealth Government. We have also highlighted provisions in the legislation of other States or Territories, as needed, throughout this report.

The Australian legal system is a common law system, as developed in the United Kingdom. The core principle of the Australian legal system is that judges' decisions in current cases are made based on a precedent of case law, which has been previously settled.

The Australian legal system vests two types of power in the federal and State governments:

- Exclusive powers: investing the federal government with the exclusive power to make laws on matters such as trade and commerce, taxation, defence, external

- affairs, and immigration and citizenship; and
- Concurrent powers: where both tiers of government are able to enact laws. The States and Territories have independent legislative power in all matters not specifically assigned to the federal government. Each State has the power and authority to make laws managing its own affairs; however, where there is any inconsistency between federal and State or Territory law, federal law prevails. Federal law applies to the whole of Australia; however, a State law will only apply within that State's borders.

Each of the federal and State systems incorporates three separate branches of government: legislative, executive and judicial. Parliaments make the laws, the executive government administers the laws, and the judiciary independently interprets and applies them. This means that each State jurisdiction will have different laws, and will have established a separate police force, judiciary and anti-corruption agencies.

## A. ANTI-CORRUPTION LEGISLATION AND CASES

There are a number of existing State and federal laws that deal with the issue of corruption in their respective jurisdictions. However, none of the laws expressly addresses the issue of sextortion. Instead, various tribunals – which adjudicate corruption offences – have incorporated offences relating to sextortion under the general prohibition on corrupt conduct by public – and, in some instances, private – officials in their official capacities.

Each of the States and Territories of Australia has its own anti-corruption agencies, which operate under the relevant State or Territorial legislation. The first set of anti-corruption legislation in Australia was set up in New South Wales (“NSW”), being the Independent Commission against Corruption Act 1988 (NSW) (the “ICAC Act”). As provided by the ICAC Act, the Independent Commission Against Corruption of New South Wales has jurisdiction over all NSW public sector agencies (except the NSW Police Force) and employees, including government departments, local councils, members of parliament, ministers, the judiciary and the governor, and also extends its jurisdiction to those performing public official functions.

Under section 8 of the ICAC Act, the nature of corrupt conduct includes:

- (a) conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official or any public authority;
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions;
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust;

Examples of corrupt conduct could involve, among others, official misconduct (including breach of trust, oppression or extortion), bribery or blackmail. However, section 9 of the ICAC Act limits the types of conduct under section 8 that amount to corrupt conduct: the conduct must constitute or involve a criminal offence or a disciplinary offence.



In cases involving public officials, both the courts and parliamentarians have often viewed any sexual conduct (both consensual and non-consensual) as very serious and a grave misuse of their position. Such behaviour is held to be “a breach of trust” by officials, and the public frowns upon officials who have taken advantage of a person’s vulnerability to satisfy their own sexual needs. Offences are punishable by imprisonment for up to fourteen (14) years or twenty (20) years for an aggravating offence.<sup>18</sup>

This NSW model was subsequently replicated – with some variation – across all Australian States, and each State and Territory now has an independent entity with the purpose of improving the integrity of, and reducing misconduct in, the public sector.

However, the fight against corruption in Australia is not unified. There is currently no anti-corruption entity operating on a federal level. Enforcement of anti-corruption legislation is therefore dependent on individual State or Territory criminal offences.

While the legislative provisions on the nature of corrupt conduct are defined similarly, the persons to whom the legislation applies differ across the States and Territories. For example, the New South Wales legislation can apply to both public and private bodies, while the corruption legislation in other States and Territories only applies to public officials and bodies. In Tasmania, judicial officers are not included in the definition of “public authorities”.

A common exclusion from the scope of State and Territory anti-corruption tribunals is members of the police force who are investigated by their own internal affairs departments, thereby removing them from the public spotlight. This raises the problem of public awareness with respect to police actions.

## B. SEXUAL ASSAULT LEGISLATION AND CASES

In addition to anti-corruption laws, elements of the offence of sextortion may also be caught under each State and Territory’s sexual assault laws, despite the apparent consent from participants, often as aggravating factors to the offence.

The majority of criminal offences in Australia are governed by each State or Territory’s own respective Crimes Act or Criminal Code. These respective acts cover offences including (but not limited to) rape, assault, and acts of indecency and contain language regarding the question of consent.

In NSW, section 61I of the Crimes Act 1900 (NSW) (the “Crimes Act”) states that any person who has sexual intercourse with another person without their consent and who knows that they do not consent to the sexual intercourse or is unable to consent due to intoxication, incapacitation or any other reason is guilty of sexual assault, otherwise more commonly known as rape. Minors under the age of sixteen (16) are deemed unable to give consent.

Rape cases can be difficult to prove and prosecute. Prosecutors are often faced with difficulty in obtaining evidence and proving whether or not the victim consented.

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Sextortion is often engaged in willingly, though not always voluntarily, by the victim. Whether or not this represents consent is usually a difficult question for the court as this is often a battle between the testimony of the victim against that of the defendant.

A person is not deemed to have consented to sexual intercourse under section 61HA of the Crimes Act if:

- (i) the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force; or
- (ii) if the person has sexual intercourse through abuse of a position of authority or trust (such as between a teacher and student).

A person who does not offer physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

This position is in line with the common law position, which states that consent must be free and voluntary.<sup>19</sup>

Section 61HA replaced the old section 65A of the Crimes Act which introduced the concept of coercive or intimidatory conduct as a means of revoking consent. As noted earlier, the reading speech to parliament, made it clear that section 65A was amended to address the issues of consent that arise in sextortion.

Two cases that involve facts closely resembling sextortion illustrate the difficulties surrounding the issue of consent. The cases – *Michael v State of Western Australia* and *R. v Aiken* – involve perpetrators who traded exercise of their authority for sex. The only difference is that in both cases the perpetrators acted fraudulently and did not possess the authority they claimed. However, had they, in fact, been officers, their conduct would have been sextortion, and the court's reasoning is instructive for how the issue of consent might be viewed in an actual sextortion case

***Michael v State of Western Australia [2008] WASCA 66*<sup>20</sup>**

In the case of *Michael v State of Western Australia*, the defendant represented himself as a police officer and forced two prostitutes to perform sexual acts for a discounted fee on one occasion and, on another, for no fee at all. Both of the women feared that they would be charged by the police officer for illegally working as prostitutes if they did not comply with his demands.

One of the primary considerations was whether consent had been given. Section 319(2)(a) of the Criminal Code (WA) defines "consent" for the purposes of sexual offences. The trial judge directed the jury that absence of consent will be established where consent is obtained by force, threat, intimidation, deceit or any fraudulent means. On these grounds, the defendant was found guilty and sentenced to two years and 10 months' imprisonment. The sentence was upheld in the Appeal, on the basis that deceiving the claimants into believing that the appellant was a police officer included an implicit threat that if they did not perform sexual acts, they could be charged for illegal prostitution. Therefore, absence

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of consent was established on the basis that the prostitutes were induced to perform the sexual acts because of the appellant's deception and out of fear of arrest.

Had the appellant, in fact, been a police officer, this conduct would have constituted sextortion, and the victims' fear of arrest would have been justified and not a deception. This suggests that, confronted with a sextortion case, in which the officer's authority is real, the court would recognize the coercive power of that fear and find that such non-violent coercion vitiates a victim's "consent" for purposes of the sexual assault laws. Accordingly, the sexual offences law would be available to prosecute cases of sextortion.

***R v Aiken [2005] NSWCCA 328*** <sup>21</sup>

In *R v Aiken*, the accused threatened to disclose the victim's shoplifting unless she engaged in oral sex with him. The victim consented to the act under a belief that he was a security officer when, in fact, he was not.

The Crown submitted that the statement of facts recorded earlier supported a conclusion that the victim was not consenting but rather that she was acting under coercion, supporting a finding of sexual assault under the old section 61I. The Crown acknowledged that there was a "dearth of cases involving convictions for sexual assault where violence is neither used, threatened nor feared".

On appeal against the accused's conviction for sexual assault under s61I, it was concluded that the facts could not support such a conviction as the offence could only have amounted to conduct under section 65A. The threat he made was a threat to inform security that the complainant had been observed shoplifting and was hence "a non-violent threat" within the meaning of section 65A(1). It was not enough for the Crown to establish under section 61I that the victim was influenced to cooperate with the appellant by such a threat. Such a threat did not vitiate consent for the purposes of section 61I.

Therefore, on the agreed facts, it would not have been open to a jury to have convicted the appellant of the offence charged under section 61I, though it would have been an offence under section 65A.

In light of this, the Attorney General's Department's Report of the Criminal Justice Sexual Offences Taskforce recommended that s65A be repealed and that non-violent threats be encompassed within the expanded list of circumstances involving vitiated/negated consent under s 61I. Legislators have since adopted and implemented this recommendation as law in NSW, replacing s 65A with s 61HA.

This case underscores the principal challenge in trying to prosecute sextortion under sexual assault laws: unless the law and the courts recognize that a non-violent threat can vitiate the victim's consent, the kind of coercion involved in sextortion will not support a conviction. However, while some sexual assault laws in Australia, such as s61I, may not be available to prosecute sextortion, others, such as s65HA, would be available.

## C. CONCLUSIONS

While the current legislative framework adequately covers the basic scope of the offence of sextortion, we note that there are still challenges to be addressed, including the lack of public awareness of the issue; the overall lack of prosecutions; the exclusion of the police from the unified anti-corruption laws; and the secrecy that often surrounds internal police investigations.

## III. RESOURCES

### A. SUPPORT AVAILABLE FOR VICTIMS

There are no specific victim support groups for sextortion in Australia. Each state government funds and provides their state based own victim support agencies in preparation for court while not-for-profit agencies provide additional support to victims out of court.

#### **Government Support**

*Witness Assistance Service (WAS) at Office of the Director of Public Prosecutions (ODPP).*

The WAS is a specialist service within the ODPP providing assistance and support for victims of crime and vulnerable witnesses including children in ODPP prosecutions in the Local Court, District Court, Supreme Court and Children's Court. WAS Officers are professionals employed by the ODPP and are qualified in areas such as social work, and psychology.

WAS Officers can help with giving evidence at court and arranging for adjustments at the court, in consultation with the ODPP Prosecutors. WAS can also help preparing victims for giving evidence at court, including visiting the courthouse and remote witness CCTV facilities. WAS can also help arrange court support and provide court support for children and vulnerable witnesses where this is required.

#### **Non-Government Support**

*Court Support Scheme Community Restorative Centre (CRC)*

CRC is a Sydney-based agency that works with prisoners, ex-prisoners, their families and anyone else affected by the criminal justice system.

Established in 1982 the CRC's Court Support Scheme is funded by State and Federal Governments through the Legal Aid Commission. Volunteers can assist with information on court procedures, court support, referrals and contact with other services at court. The service is aimed at defendants and witness in court proceedings, victims of crime, friends and family of these groups and anyone who is affected by the NSW judicial system. Services are free and confidential.

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*The Salvation Army Sydney Court Chaplains*

Salvation Army officers are based at the Downing Centre District and Local Courts in Sydney. Court Chaplains are available to provide court support to victims, witnesses, offenders and their families.

*Victims and Witnesses of Crime Court Support (VWCCS)*

VWCCS Inc is a volunteer court support service which provides a range of court support services for both victims and witnesses. These services are provided by a group of trained volunteers at a number of courts in Sydney. The service is auspiced under Kirribilli Neighbourhood Centre and is based at The Green Room Level 1 Downing Centre Courts Sydney; Level 2 Parramatta Children's Court and Bidura Children's Court.

*Victims of Crime Assistance League (VOCAL)*

VOCAL provides support, guidance, referral, and strategies for victims of any crime including car related crime injuries, victims of road trauma, court preparation, community education and referral. Hunter VOCAL receives funding from the Attorney General's Department of NSW through Victim Services. Families, victims of crime or Crown witnesses can be provided with court preparation and court support. Court support is provided by volunteer court companions.

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## ANTI-CORRUPTION LAWS

NEW SOUTH WALES : Statute: Independent Commission Against Corruption Act 1988 (NSW) ss 3, 7, 8 & 9.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p><b>Public Official</b> <sup>22</sup> means an individual having public official functions or acting in a public official capacity.</p> <p>This includes, among others:</p> <ul style="list-style-type: none"> <li>• the Governor;</li> <li>• Ministers of the Crown;</li> <li>• legislators and their employees;</li> <li>• holders of any judicial office;</li> <li>• employees of any government sector agency;</li> <li>• members of a public authority;</li> <li>• those in the service of the Crown or of a public authority;</li> <li>• members of the NSW Police Force.</li> </ul>	<p>Defined in s 8</p> <p>(1) Any conduct of any person (whether or not a public official) that adversely affects/could adversely affect the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority,</p> <p>(2) Any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions,</p> <p>(3) Any conduct of a public official or former public official that constitutes or involves a breach of public trust,</p> <p>(5) The conduct mentioned in (1) could involve:</p> <p>(a) Official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),</p> <p>(b) Bribery,</p> <p>(g) Perverting the course of justice, . .</p> <p>(x) Matters of the same or a similar nature to any listed above, . .</p> <p><b>Exceptions</b> <sup>23</sup></p> <p>Conduct can only be corrupt if it could constitute/involve:</p> <p>1 A criminal offence,</p> <p>2 A disciplinary offence,</p> <p>3 Reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official,</p> <p>4 In the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.</p>	<p>Dealt with summarily before the Local Court.</p> <p>If the offence is indictable, the Local Court may hear and determine the proceedings if the court is satisfied that it is proper to do so and the defendant and prosecutor consent. <sup>25</sup></p> <p>S 116</p> <p>Maximum penalties for an indictable offence in the Local Court:</p> <p>1 In the case of an individual—the smaller of:</p> <p>(i) a fine of 50 penalty units (\$5,500) <sup>26</sup> or imprisonment for 2 years, or both, or,</p> <p>(ii) the maximum penalty otherwise applicable to the offence when committed by an individual</p>

## QUEENSLAND

## STATUTES: CRIME AND CORRUPTION ACT 2001(QLD) SS 9, 15, 20 AND SCHEDULE 2 CRIMINAL CODE 1899 (QLD) S 87

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p>A Public Official is: <sup>27</sup></p> <ul style="list-style-type: none"> <li>(a) the ombudsman; or</li> <li>(b) the chief executive officer of a unit of public administration, including the commissioner of police; or</li> <li>(c) a person who constitutes a corporate entity that is a unit of public administration.</li> </ul> <p><b>Public administration means:</b> <sup>28</sup></p> <ul style="list-style-type: none"> <li>(a) the Legislative Assembly, and the parliamentary service;</li> <li>(b) the Executive Council;</li> <li>(c) a department;</li> <li>(d) the police service;</li> <li>(da) a local government;</li> <li>(e) a corporate entity . . . [that] collects revenues or raises funds under the authority of an Act;</li> <li>(f) a non-corporate entity. . . that—</li> <li>(i) is funded to any extent with State moneys; or</li> <li>(ii) is financially assisted by the State;</li> <li>(g) a State court, of whatever jurisdiction, and its registry and other administrative offices; and</li> <li>(h) another entity prescribed under a regulation.</li> </ul>	<p>Defined in s 15</p> <p>Conduct that adversely affects/could adversely affect the performance of functions or the exercise of powers of:</p> <ul style="list-style-type: none"> <li>(a) A unit of public administration</li> <li>(b) A person holding an appointment; and results/could result, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that—</li> <li>(i) is not honest or is not impartial; or</li> <li>(ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or</li> <li>. . .</li> <li>(c) Would, if proved, be—</li> <li>(i) a criminal offence; or</li> <li>(ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.</li> </ul> <p>Conduct could include:</p> <ul style="list-style-type: none"> <li>(a) Abuse of public office;</li> <li>(b) Bribery, including bribery relating to an election;</li> <li>(c) Extortion;</li> <li>. . .</li> <li>(h) Perverting the course of justice; . . .</li> </ul>	<p>Dealt with before the Queensland Civil and Administrative Tribunal QCAT <sup>30</sup></p> <p>S 2191</p> <p>QCAT may order that the prescribed person—</p> <ul style="list-style-type: none"> <li>(a) Be dismissed; or</li> <li>(b) Be reduced in rank or salary level; or</li> <li>(c) Forfeit, or have deferred, a salary increment or increase to which the prescribed person would ordinarily be entitled; or</li> <li>(d) Be fined a stated amount . . .</li> </ul> <p>The QCAT may also refer the matter for investigation if it could constitute a criminal offence. <sup>31</sup></p> <p>If found guilty, the person could face imprisonment up to 7 years, and be fined at the discretion of the court. <sup>32</sup></p> <p>If the person is a Minister, could face up to 14 years imprisonment and be fined at the discretion of the court. <sup>33</sup></p>

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Exceptions <sup>29</sup> None of the following is a unit of public administration: (a)the commission; (b)the parliamentary commissioner; (c)[those who work with and serve the parliamentary commissioner]; and (d)an entity declared by an Act not to be a unit of public administration.		

## VICTORIA

## STATUTE: INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION ACT 2011 (VIC) SS 4, 6

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p><b>Public Officer</b> <sup>34</sup></p> <p>1. A person employed in any capacity or holding any office in the public sector within the meaning of section 4(1) of the PAA;</p> <p>This includes, among others:</p> <ul style="list-style-type: none"> <li>• employees in the teaching service;</li> <li>• judicial employees;</li> <li>• Ministers of the Crown and Ministerial officers;</li> <li>• electorate officers;</li> <li>• Parliamentary advisers and officers;</li> <li>• police personnel;</li> <li>• legislators;</li> <li>• Councillors; and Council staff;</li> <li>• members of the judiciary;</li> <li>• Crown Prosecutors;</li> <li>• the Governor, Lieutenant-Governor or Administrator of the State;</li> <li>• holders of any statutory or prerogative office;</li> <li>• any person in the service of the Crown or a public body;</li> <li>• any person performing a public function on behalf of the State or a public officer or public body (whether under contract or otherwise).</li> </ul>	<p>Defined in s 4</p> <p>For the purposes of this Act, “corrupt conduct” means conduct:</p> <ol style="list-style-type: none"> <li>1 That adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or</li> <li>2 Of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or</li> <li>3 Of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or</li> <li>4 . . .</li> <li>5 That could constitute a conspiracy or an attempt to engage in any conduct referred to in 1,2,3 or 4 being conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence.</li> </ol>	<p>The IBAC is an investigative body. If the facts of ‘corrupt conduct’ could be proved beyond reasonable doubt at a trial, so as to constitute an indictable offence, the IBAC must make a referral to: a prosecution body. <sup>36</sup></p>

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p>Exceptions w<sup>35</sup></p> <p>The following are not a public body or a public officer:</p> <ol style="list-style-type: none"> <li>1. the IBAC;</li> <li>2. an IBAC Officer;</li> <li>3. a Public Interest Monitor;</li> <li>4. the Office of the Special Investigations Monitor;</li> <li>5. the Special Investigations Monitor appointed under section 5 of the Major Crime (Special Investigations Monitor) Act 2004;</li> <li>6. the Victorian Inspectorate;</li> <li>7. a Victorian Inspectorate Officer within the meaning of section 3 of the Victorian Inspectorate Act 2011;</li> <li>8. a court.</li> </ol>		

## SOUTH AUSTRALIA

## STATUTES: INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012 (SA) SS 5, SCHEDULE 1

## CRIMINAL LAW CONSOLIDATION ACT 1935 (SA) S 249

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p><b>Public Officers, Public Authorities and Responsible Ministers</b> are contained in a table under Schedule 1, see: <a href="http://www5.austlii.edu.au/au/legis/sa/consol_act/icaca2012463/sch1.html">http://www5.austlii.edu.au/au/legis/sa/consol_act/icaca2012463/sch1.html</a></p>	<p>Defined in s 5</p> <p><b>“Corruption in public administration ”</b> means:</p> <ol style="list-style-type: none"> <li>1 An offence against Part 7 Division 4 (Offences relating to public officers) of the Criminal Law Consolidation Act 1935, which includes: <ol style="list-style-type: none"> <li>(i) Bribery or corruption of public officers;</li> <li>(ii) Threats or reprisals against public officers;</li> <li>(iii) Abuse of public office;</li> <li>(iv) Demanding or requiring benefit on basis of public office;</li> </ol> </li> <li>2. An offence against the Public Sector (Honesty and Accountability) Act 1995 or the Public Corporations Act 1993, or an attempt to commit such an offence;</li> <li>3. Any other offence (including an offence against Part 5 (offences of dishonesty) of the Criminal Law Consolidation Act 1935) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence; or</li> <li>4. Any of the following in relation to an offence referred to in a preceding paragraph: <ol style="list-style-type: none"> <li>(a) Aiding;</li> <li>(b) Abetting;</li> <li>(c) Counselling or procuring the commission of the offence;</li> <li>(d) Inducing, whether by threats or promises or otherwise, the commission of the offence;</li> <li>(e) Being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence; or</li> <li>(f) Conspiring with others to effect the commission of the offence.</li> </ol> </li> </ol>	<p>It is an offence for someone in public office to abuse their power. The maximum penalty for a ‘basic offence’ is 7 years.<sup>37</sup> The maximum for an ‘aggravated offence’ is 10 years.<sup>38</sup></p> <p>It is also an offence for someone in public office to demand or require a benefit on the basis of being in public office. The maximum sentence is 7 years.<sup>39</sup></p>

## WESTERN AUSTRALIA

## STATUTES: CORRUPTION AND CRIME COMMISSION ACT 2003 (WA) SS 4

## CRIMINAL CODE COMPILATION ACT 1913 (WA) S 1

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p><b>Public Officer</b> <sup>40</sup> means any person “holding office under, or employed by, the State of Western Australia, whether for remuneration or not” and includes, among others:</p> <ul style="list-style-type: none"> <li>• police officers;</li> <li>• Ministers of the Crown;</li> <li>• Parliamentary Secretary;</li> <li>• members of Parliament;</li> <li>• public service officers or employees;</li> <li>• members, officers or employees of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law.</li> </ul>	<p><b>“Misconduct”</b> is defined in s 4</p> <p>Occurs where:</p> <ol style="list-style-type: none"> <li>1: A public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment; or</li> <li>2: A public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person; or</li> <li>3: A public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment; or</li> <li>4: A public officer engages in conduct that — <ol style="list-style-type: none"> <li>(a) Adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct; or</li> <li>(b) Constitutes or involves the performance of his or her functions in a manner that is not honest or impartial; or</li> <li>(c) Constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or</li> </ol> </li> </ol> <p>...</p> <ol style="list-style-type: none"> <li>(f) A disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the Public Sector Management Act 1994 (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).</li> </ol>	<p>S 83 Criminal Code</p> <p>Any person who, without lawful authority or a reasonable excuse, acts corruptly in the performance or discharge of the functions of his office or employment, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.</p>

## TASMANIA

## STATUTE: INTEGRITY COMMISSION ACT 2009 (TAS) SS 5 AND 37

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p>Public Authorities <sup>41</sup></p> <p>This includes, among others:</p> <ul style="list-style-type: none"> <li>• the Parliament of Tasmania and its employees;</li> <li>• a State Service Agency;</li> <li>• the Police Service;</li> <li>• any person performing functions under the Governor of Tasmania Act 1982;</li> <li>• a Government Business Enterprise and its Board;</li> <li>• a State-owned company and its Board;</li> <li>• the University of Tasmania;</li> <li>• the holder of a statutory office;</li> <li>• a local authority;</li> <li>• a council-owned company.</li> </ul> <p>Exceptions <sup>42</sup></p> <ol style="list-style-type: none"> <li>1 The Governor of Tasmania;</li> <li>2 A judge of the Supreme Court;</li> <li>3 The Associate Judge of the Supreme Court;</li> <li>4 A magistrate of the Magistrates Court;</li> <li>5 A court;</li> <li>6 Members of a tribunal;</li> <li>7 Members of the Tasmanian Industrial Commission;</li> <li>8 The Integrity Commission;</li> <li>9 Any other prescribed person.</li> </ol>	<p>“Misconduct” – defined in s 4:</p> <p>(a)conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –</p> <p>(i)a breach of a code of conduct applicable to the public officer; or</p> <p>(ii)the performance of the public officer’s functions or the exercise of the public officer’s powers, in a way that is dishonest or improper; or</p> <p>...</p> <p>(v)conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer – but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament.”</p>	<p>The Commission is an investigative body and must make a report detailing and decide whether to dismiss the allegation or refer it to another body to investigate the offence. <sup>43</sup></p>



## COMMONWEALTH

## STATUTE: CRIMINAL CODE ACT 1995 (CTH) S 142.1

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p>Commonwealth public official <sup>44</sup>means:</p> <ul style="list-style-type: none"> <li>• those appointed to administer the Government of the Commonwealth;</li> <li>• Ministers;</li> <li>• Parliamentary members or Secretary;</li> <li>• Commonwealth judicial officers;</li> <li>• members of the Australian Defence Force;</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• members of the Australian Federal Police.</li> </ul>	<p>“Corrupt Benefit” – s 142.1</p> <p>A Commonwealth public official is guilty of an offence if:</p> <p>(a) the official dishonestly:</p> <p>(i) asks for a benefit for himself, herself or another person; or</p> <p>(ii) receives or obtains a benefit for himself, herself or another person; or</p> <p>(iii) agrees to receive or obtain a benefit for himself, herself or another person; and</p> <p>(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a Commonwealth public official (who may be the first-mentioned official) in the exercise of the official’s duties as a Commonwealth public official.</p>	<p>Penalty: Imprisonment for 5 years. <sup>45</sup></p>

## NEW SOUTH WALES

## STATUTE: CRIMES ACT 1900 (NSW) SS 61I, 61HA

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p>Any person</p>	<p>Any person who has sexual intercourse with another person without their consent is guilty of sexual assault, provided the person knows that the other person did not or was unable to consent.</p> <p>Consent must be free and voluntary. A person is not deemed to have consented if:</p> <p>(i) the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force; or</p> <p>(ii) if the person has sexual intercourse through abuse of a position of authority or trust (such as between a teacher and student.</p>	<p>Penalty: Imprisonment for 5 years.</p>





# BRAZIL





## I. HOW DOES SEXTORTION MANIFEST ITSELF IN BRAZIL?

One of the challenges of addressing sextortion in Brazil is that there is no specific law that identifies and penalizes the offense. The anti-corruption laws focus on monetary rather than sexual bribes. While the law related to Abuse of Authority contains broader language that might encompass acts of sextortion, no case law has been found that construes the general prohibition on corrupt conduct by public officials as applying to sextortion. The sexual harassment law addresses two key elements of sextortion in that it criminalizes sexual exploitation arising from the abuse of a dominant position. However, to the extent that sexual harassment is limited to the employment context, the law would not reach sextortion that occurs elsewhere.

Although the offense of sextortion is not commonly reported in the Brazilian media, one thing is certain: sextortion does occur in Brazil. There are a number of challenges, however, in addressing it, including: the lack of public awareness of the issue; the overall lack of prosecutions; and the secrecy that often surrounds internal police investigations. To confront these challenges, a campaign raising awareness about what sextortion is and how it can be penalized, is desirable. In addition, because there is no specific law governing the issue, and this can pose certain difficulties for effective prosecution, it is necessary to draft a bill considering sextortion.

## II. HOW DOES THE BRAZIL LEGAL FRAMEWORK APPLY TO SEXTORTION?

Brazil is a federation composed of the Federal District, states and municipalities. The Brazilian legal system is based on Civil Law tradition. The Federal Constitution, which was promulgated in 1988, is the supreme law of the country and establishes that the powers of the Union are: the Executive, the Legislative and the Judiciary.

The 26 federated states have powers to adopt their own constitutions and laws; their autonomy, however, is limited by the principles established in the Federal Constitution. Municipalities also enjoy restricted autonomy, as their legislation must follow the dictates of the constitution of the state to which they belong, as well as those of the Federal Constitution. The Federal District blends the functions of a federated state and a municipality, and its equivalent to a constitution – named the Organic Law – must also obey the terms of the Federal Constitution.

This report only analyses relevant federal laws, but highlights provisions in the legislation of states or municipalities as appropriate.

### A. ANTI-CORRUPTION LAWS

In Brazil, the principal statutes that deal with the subject of corruption are the Criminal Code, Title XI, Chapter I, and a new anti-corruption law enacted in 2013.<sup>46</sup> While the former includes a number of criminal offenses that could be used for prosecuting corruption

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involving public officials, neither the Criminal Code nor the anti-corruption law can be construed to encompass the kind of sexual bribe that characterizes sextortion.

The language of the statute is narrowly focused on financial bribes, which requires the trading of money in exchange for the exercise of official authority. Therefore, a request for sexual favors (one of the necessary elements of sextortion) is not (and cannot be deemed) included in the text of the anticorruption laws.

For this reason, Brazil's anticorruption laws are not appropriate for prosecuting sextortion.

## B. ABUSE OF AUTHORITY

Brazil's law on Abuse of Authority sets forth the civil, administrative and criminal procedures for holding public officials accountable when they act in a way that abuses their authority.<sup>47</sup> This law provides that the perpetrator of the criminal conduct must be a public official who, abusing his position of authority carries out an injurious act against the victim. Examples of these acts can be found in Articles 3 and 4 of the Law.

Sextortion could be deemed an abusive act under Section 4(h) of the Law, which states that an act harmful to the honor or dignity of a person carried out by a public official in abuse or misuse of his power constitutes an abusive act subject to civil and/or criminal sanctions under this Law.

Accordingly, it is reasonable to conclude that asking for sexual favors in exchange for the performance of duties that a public official is legally obligated to perform – in other words, sextortion – may be prosecuted in a Brazilian Court under this statute.

Depending on the office in which the complaint is filed and the severity of the crime, the Law provides a number of different remedies and sanctions, ranging from mere warnings to suspension of public functions and dismissal from public office. Additionally, the perpetrator may face prison time of up to six (6) months.

## C. SEXUAL HARASSMENT

The Criminal Code expressly establishes that sexual exploitation arising from the abuse of a dominant position is a crime.<sup>48</sup> This section defines sexual harassment as: "Constrain[ing] someone for the purpose of obtaining sexual advantage or favor, where the agent avails himself of his high-ranking status or the seniority inherent to his employment, position or function." For these purposes, "function" would include anyone performing a public function.

The Criminal Code provides that the perpetrator of this crime may be sentenced to jail time for one (1) to two (2) years.

In light of the above, sextortion could be prosecuted under the Criminal Code through a sexual harassment claim. The penalties for sexual harassment are different from the

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penalties for abuse of authority and, depending on the facts in each case, one statute may be more suitable than the other. The Law of Abuse of Authority applies directly to, conduct by a “public official” in the “exercise of the public function”; the sexual harassment law includes, but is not limited to, conduct by public officials. While abuse of authority by public officials is a central way in which sextortion manifests itself, sextortion can also be found in schools and the workplace, where teachers and supervisors sometimes abuse their position of authority to extort sexual favors. However, unless the teacher or supervisor is a government employee (as many are), the conduct would not be covered by the Law of Abuse of Authority. In those cases, the sexual harassment law offers an alternative way to reach and sanction sextortion.

## D. CONCLUSIONS

Even though there are no laws that specifically deal with sextortion, the Brazilian legal system contains statutes and administrative, civil and criminal procedures that could be used to prosecute and punish public officials involved in acts of sextortion. However, no case law could be found that applies those laws to sextortion fact patterns. Nor are there any media reports of misconduct that would fall within the definition of sextortion.

The main obstacle to reporting sextortion in Brazil appears to be the absence of information. Victims of sextortion are not likely to be aware of their rights or of the possibility of prosecuting public officials for the crime. Moreover, victims often cannot find an accessible and safe space in which to report the crime and the perpetrator.

Considering that the legal process for creating new laws in Brazil is very bureaucratic and slow, the best alternative for addressing sextortion would be to educate society about what sextortion is and how to combat it. This would help to raise awareness among the population.

## III. RESOURCES

### A. SUPPORT AVAILABLE FOR VICTIMS

The Secretariat for Women Policies of the Brazilian Presidency (Secretaria de Políticas para as Mulheres da Presidência da República -SPM-PR) was established in 2003, with the goal of promoting gender equality and public awareness against gender-based violence. The Secretariat provides counsel to the President of Brazil, in coordination with the Ministries, about public policies and campaigns for the protection of women victims.

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## BRAZIL - CIVIL LAW JURISDICTION

## ANTI-CORRUPTION LAWS

STATUTE: CRIMINAL CODE, TITLE XI, CHAPTER I, ARTICLE 312.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Public official	As defined by Article 312: To appropriate of money, value or any other movable thing, public or private, which he takes possession of due to his function, or by breaching it, for his private benefit or that of others.	Fine and/or imprisonment (2-12 years).

## ABUSE OF AUTHORITY LAWS

STATUTE: LAW NO 4,898/65, ARTICLES 4-6.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any authority that holds a public position, employment or function, of civil or military nature, even if temporarily and without pay.	Under Article 4º Abuse of authority includes: "h) an act harmful to the honor or the patrimony of a natural or legal person, when performed with abuse or misuse of power or without legal authority."	Administrative, civil and criminal penalties. Possible consequences include: warning, suspension of public functions, exoneration of the public functions, civil indemnification, and imprisonment (10 days – 6 months).

## SEXUAL HARASSMENT LAWS

STATUTE: LAW NO 4,898/65, ARTICLES 4-6.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any authority that holds a public position, employment or function, of civil or military nature, even if temporarily and without pay.	Under Article 4 <sup>o</sup> Abuse of authority includes: "h) an act harmful to the honor or the patrimony of a natural or legal person, when performed with abuse or misuse of power or without legal authority."	Administrative, civil and criminal penalties. Possible consequences include: warning, suspension of public functions, exoneration of the public functions, civil indemnification, and imprisonment (10 days – 6 months).





# CANADA



Reuters: Ben Nelms





## I. HOW DOES SEXTORTION MANIFEST ITSELF IN CANADA?

The most publicized Canadian case that, though not labeled as sextortion, is a clear example of such conduct is *R. v. Ellis* (2013). This case involved a member of the Immigration and Refugee Board who suggested to a refugee claimant that he would approve her application if she engaged in intimate relations with him. The accused was convicted under both the Criminal Code and the Immigration and Refugee Protection Act. On appeal, this case raised important questions about the relevance of social status, employment status and public attention to sentencing in sextortion cases. These sentencing questions, in addition to the reluctance of human rights tribunals to address hostile-work environment sexual harassment and the vulnerability of marginalized women to sextortion, are potential future challenges to prosecuting and preventing sextortion in the Canadian legal framework.

Although *Ellis* is not the only public official to abuse his authority to try to extort sexual favors, the publicly available Canadian case law concerning situations with the elements of sextortion is limited. This report identifies, and discusses under the applicable statutes, the full extent of the criminal and civil case law concerning sextortion committed by immigration officials,<sup>49</sup> law enforcement officials,<sup>50</sup> judges,<sup>51</sup> and teachers.<sup>52</sup>

In addition to this case law, news reports included allegations of conduct by a federal investigator, John Donaldson, which could constitute sextortion. In 2002, Donaldson was accused of sexually exploiting a woman who sought protection from her abusive husband.<sup>53</sup> The woman sued Donaldson alleging assault and battery, abuse of power and breach of duty. The woman had contacted the Immigration Department in 2001 asking for the deportation of her estranged and abusive husband who was an immigrant from Guyana. Donaldson was part of the task force that was asked to deal with the matter. The woman alleged that the two of them began a sexual relationship and that Donaldson had promised her protection from her husband. Donaldson denied the allegations, but admitted to the sexual relationship which he maintained was consensual. The Immigration Department transferred him to a desk job and ordered an investigation. We were unable to verify the outcome of the lawsuit and of the investigation.

As these examples suggest, the immigration context is one in which women may be vulnerable to sextortion. In 2013, Raymond Coles, a former Canada Post supervisor, was sentenced to four years in prison after pleading guilty to sexual assault, extortion, and impersonation. Unlike the other cases, this one involved a public employee impersonating a public official – namely an immigration officer. Under this guise, Coles threatened two Filipino women with deportation from Canada in order to extract cash and sexual favors. Coles was fired from Canada Post after the charges were brought. If Coles had, in fact, been an immigration officer, this would be a classic case of sextortion: a public official abusing his authority to extort sexual favors from women subject to that authority.



## II. HOW DOES THE CANADIAN LEGAL FRAMEWORK APPLY TO SEXTORTION?

Canada has no legislation that expressly or specifically addresses sextortion. However, there are several Canadian federal laws that deal with the elements of sextortion (corruption, abuse of authority and quid pro quo sexual coercion). There are also Canadian provincial human rights codes and police regulations that prohibit conduct that would constitute sextortion and similar behavior. Hence, sextortion is clearly prohibited in Canadian law and the prosecution of sextortion clearly falls within the Canadian legal framework.

Three Canadian federal laws in particular – sections 112 (“breach of trust by a public officer”) and 346(1) (“extortion”) of the Criminal Code and Section 129(1)(a) (“offences relating to officers”) of the Immigration and Refugee Protection Act – have been relied on by Canadian courts to prosecute offenders for sextortion.

Canadian cases in which this national legislation has been relied on include both criminal and civil case law concerning the conduct of immigration officials, law enforcement officials, judges and teachers. Additionally, there are six other sections of the Criminal Code that prosecutors and courts could reasonably rely on to deal with the elements of sextortion, but have yet to be used for prosecuting offenders for sextortion.

Within the current legal framework, sextortion and its elements can be adequately prosecuted in Canada. However, the prosecution of sextortion cases would be made easier if Canadian legislation or provincial human rights codes expressly or specifically addressed sextortion as an offense.

### A. ANTI-CORRUPTION LEGISLATION AND CASES

There is no Canadian legislation that addresses the specific statutory elements of sextortion. However, three laws have been relied upon by Canadian courts to prosecute offenders for sextortion or similar behavior: Breach of trust - Criminal Code, §122; Extortion - Criminal Code, §346(1); and the Immigration and Refugee Protection Act, §129(1)(a).

#### **Breach of Trust - Criminal Code, §122**

Section 122 of the Criminal Code, breach of trust by a public officer, has had the most application in sextortion cases. Section 122 holds that every official who, in connection with the duties of his office, commits fraud or breach of trust is guilty of an indictable offense. The purpose of section 122 is to prohibit corruption, embezzlement, conflict of interest, corrupt practices or the use of one’s situation of power in the public service for the promotion of private ends or to obtain directly or indirectly some benefit.<sup>54</sup>

Section 122 has been held to be a codification of the common law crimes of “misbehavior” and “misfeasance in public office.”<sup>55</sup>

**R. v. Ellis, 2013 ONCA 739**

The accused was a member of the Immigration and Refugee Board and was responsible for deciding refugee claims. The accused suggested to a refugee claimant that he would approve her application if she engaged in intimate relations with him.

The refugee claimant arrived in Canada from South Korea, claiming that she was afraid to return to South Korea because she had been abused by her father and threatened by gang members seeking to recover her father's debts. The appellant conducted a hearing to determine the refugee claim. At the end of the hearing, the appellant reserved his decision. As the refugee claimant left the hearing room, the appellant asked her where she worked. Eight weeks later, the appellant visited the refugee claimant at the restaurant where she worked. The appellant suggested that they should meet at Starbucks. The refugee claimant and her boyfriend decided to record this meeting at Starbucks. During this meeting, the appellant stated: *"I want to be good friends with you, and I know you've got a boyfriend, I've got a wife, so I mean, if we do things together on the side, that's okay, that's fine, but I don't want to be, you know, don't worry I'm not going to be demanding, I'm not going to ask you to move in with me or anything like that."*

The day after the Starbucks meeting, the refugee claimant's boyfriend sent the audio and video recording of this meeting to the Chair of the Immigration and Refugee Board. The appellant was subsequently suspended, and the recording was delivered to the RCMP. The case was submitted under the Canadian Criminal Code. On appeal from the Ontario Superior Court of Justice, the accused was convicted of breach of trust in connection with his office, contrary to s. 122 of the Criminal Code (R.S.C. 1985, c. C-46) and was sentenced to 18 months' imprisonment. This decision was upheld on appeal.

**R. v. Greenhalgh, 2011 BCSC 511**

The accused, Mr. Greenhalgh, was employed as a Border Services Officer ("BSO") by the Canada Border Services Agency ("CBSA").

Mr. Greenhalgh was convicted of carrying out illegal feigned strip searches of four young female travellers who were attempting to enter Canada from the United States. Mr. Greenhalgh touched three of the women in a sexual manner. The fourth woman was forced to remove her clothing but was not touched.

The victims were induced to believe that they were under suspicion of drug smuggling. In each case, Mr. Greenhalgh indicated that the victim's travelling companion or companions were also in some kind of legal trouble. Each victim was threatened with the following so-called choice: submit to an immediate strip search, or risk overnight imprisonment followed by a strip search and more severe legal consequences, including but not limited to vehicle impoundment, immigration violations and customs or immigration "difficulties" for companions of the victim. In each case, the victim concluded that she had no real choice but to comply with Mr. Greenhalgh's demands.

The case was submitted under the Canadian Criminal Code. Mr. Greenhalgh was convicted of three counts of sexual assault in relation to the women he had touched, under s. 271 of the Criminal Code. Mr. Greenhalgh was also convicted of breach of trust in connection with the duties of his office in relation to the strip searches of all four women, under s. 122 of the Criminal Code.

***R v. Ramsay, 2004 BCSC 756***

The accused was a member of the Provincial Court. Many of the incidents involved sex for money (some of which involved people who later appeared before him in his court). One of the complainants was a minor and he told her he would “let her off sentences” if she did not tell anyone of the encounters.

The case was submitted under the Canadian Criminal Code and the accused pleaded guilty to five counts of a ten-count indictment for sexual assault causing bodily harm, breach of trust by public officer and obtaining sexual services of person under the age of 18. The Crown directed a stay of proceedings on the remaining five counts. He was sentenced to seven years for sexual assault causing bodily harm, five years for breach of trust by a public officer, and five years each for three counts of obtaining sexual services of a person under the age of 18, all to be served concurrently.

**Extortion - Criminal Code, §346(1)**

Section 346 of the Criminal Code prohibits extortion generally, and is not limited to public officials. The offense of extortion is satisfied if an individual, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

***R v. Bloch-Hansen (1977), 38 C.C.C. (2d) 143 (Sask. Dist. Ct.)***

The accused was a police officer who took the complainant into custody for failure to pay a traffic fine. He then demanded that the complainant perform an act of fellatio, threatening imprisonment if she didn't comply. She refused and he took her home. He was charged with extortion under the Criminal Code.

The case was submitted under the Canadian Criminal Code and the accused was acquitted. Since the complainant thought she would be incarcerated in any case, he was aware his words would have little effect on her and would not induce her to have sex with him if she was not otherwise inclined. Therefore, there was reasonable doubt that the officer's words constituted a “threat” or “menace” within the meaning of the Criminal Code.

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### **Immigration and Refugee Protection Act, §129(1)(a)**

Section 129(1)(a) of the Immigration and Refugee Protection Act ("IRPA") holds that immigration officers or employees of the federal government are prohibited from both accepting or agreeing to accept a bribe or benefit in respect of a matter under the IRPA. The provision makes it an offense for an officer or an employee of the Government of Canada to accept or agree to accept a bribe or other benefit, in respect of any matter under the IRPA.

<sup>56</sup> This was one of the statutes under which Mr. Ellis was convicted in the case of *R. v. Ellis*, 2013 ONCA 739.

### ***R. v. MacInnis, 1991 Carswell Nfld 184***

The accused was a former immigration officer, who held the post of Second Secretary of Immigration in Guyana. He had granted applications for temporary entry to Canada in exchange for sexual favors from women in Guyana.

After a brief sexual relationship with two women in Guyana, the accused granted both women Canadian Visitor Visas. The women were not good candidates for temporary entry into Canada as visitors. Subsequently, the accused issued Visitor Visas to relatives of the women.

The accused also granted a Visitor Visa to another woman with whom he had been having a romantic relationship, for the purpose of accompanying him on a vacation to Canada without properly assessing her Application.

The case was submitted under Canada's Immigration Act and the accused was convicted of 11 counts of a breach of Section 97(1) (a) of the Immigration Act, R.S.C. 1985, c. 1-2. He was sentenced to 6 months concurrent on two of the counts and to 3 months concurrent on each of the other 9 counts, consecutive to the 6-month sentences.

## **B. SEXUAL ASSAULT LEGISLATION AND CASES**

In addition to anti-corruption laws, elements of the offense of sextortion may also be caught under the following sexual assault laws:

### **Criminal Code, §153**

Section 153 has limited application with regard to sexual exploitation as it only governs victims between 16 and 18 years of age and victims with a mental or physical disability. Section 153(1) makes it an offense for a person who is in a position of trust or authority towards a young person to sexually interfere with, or invite sexual touching from, the young person. Section 153 (1) creates a similar offense with respect to individuals with disabilities. Section 153 is not specific to public officials. It also does not rely on a quid pro quo exchange.

***R v. Careen, 2013 BCCA 535***

The accused was a teacher, who was convicted of sexual exploitation. It was alleged that he sent the student messages relating to their sexual relations and gave her good marks in exchange for sexual favors.

The case was submitted under the Canadian Criminal Code. At trial, the accused was convicted of sexual exploitation. This decision was appealed to the Supreme Court of British Columbia. Finally the appeal from conviction was dismissed.

***R v. Lawson (2001), 49 W.C.B. (2d) 540 (Ont. Sup. Ct. J.)***

The accused was the Supervisor of Police Escort Bureau and was responsible for the care, control, safety and security of all prisoners escorted by the police service. He kissed a 19-year-old prisoner, touched her breast and had her perform fellatio on him. He permitted her to travel without handcuffs, bought her cigarettes and gave her other preferential treatment. He pleaded guilty to breach of trust by a public officer.

The case was submitted under the Canadian Criminal Code. The accused was sentenced to 16 months' imprisonment to be served in the community. He was subjected to a curfew for the first 12 months of the sentence and was to perform 240 hours of community service.

***Otter v. MacDougall, 2006 BCSC 1536***

The plaintiff was an inmate of the Lower Mainland Regional Correctional Centre, known as Oakalla, in the early 1980's. At that time, the defendant, Roderick MacDougall, was a Corrections Officer employed by the Crown. The plaintiff claimed that Mr. MacDougall sexually assaulted him. He allegedly told the plaintiff that if he wanted to go "somewhere special" to an "easier place like a camp", he wanted the plaintiff to "do a few things for him" like fellatio and if he refused he would send him to the west wing, which was a bad place. Other inmates claimed that they submitted to oral sex in exchange for a transfer to a correctional camp.

The case was submitted under the Canadian Criminal Code. Given all of the evidence that contradicted the plaintiff's evidence about the facts surrounding the sexual assault, as well as the other contradictory evidence relevant to the plaintiff's credibility, it was found that the plaintiff's evidence was inherently unreliable. While it is possible that the sexual assault took place, the plaintiff failed to prove this on a "clear and cogent" balance of probabilities.

***Gates v. MacDougall, 2006 BCSC 1919***

The plaintiff was an inmate of the Fraser Regional Correctional Centre in 1991 and 1992. At that time, the defendant, Roderick MacDougall, was a Corrections Officer employed by the Crown. The plaintiff claimed that Mr. MacDougall sexually assaulted him. Mr. MacDougall told Mr. Gates that he could get him out of the SHU, get him his job back and even get him to a correctional camp. While Mr. Gates was not released from the SHU right away, he was

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given the job of cleaner in the SHU, which was a privilege. When he got back to the regular population, he was given his cleaning job back. This was also a privilege. Because of this job, he was one of about ten inmates with a pass to get around the institution.

The case was submitted under the Canadian Criminal Code. Mr. Gates proved, with clear and cogent evidence, that he was sexually assaulted by Mr. MacDougall on several occasions, and that these assaults took place sometime after late July 1991 and before May 14, 1992, during the time Mr. Gates was incarcerated at Fraser Regional Correctional Centre. Mr. Gates is entitled to an award for general and aggravated damages in the amount of \$45,000, and an award for future counseling in the amount of \$5,500. He is also entitled to punitive damages against Mr. MacDougall in the amount of \$10,000.

### **Provincial Law**

Canada is a Federal State, composed by ten provinces and three territories. Every Canadian province has a human rights code or act (referred to as “code”), each of which is based on a similar set of prohibited grounds of discrimination. The degree to which each code captures sextortion, however, varies by statutory instrument and, in some cases, is informed by an accompanying policy document.

The most direct approach to addressing sextortion is found in the human rights codes of Manitoba <sup>57</sup>, Ontario <sup>58</sup>, Nova Scotia <sup>59</sup>, Newfoundland <sup>60</sup> and the Yukon <sup>61</sup>. In those jurisdictions, the codes specifically prohibit sexual solicitation by a person in a position of power, which is typically captured under the term ‘sexual harassment’.

Ontario offers a model example. Subsection 7(3) of the Ontario Human Rights Code provides that every person has a right to be free from sexual solicitation or advances by a person in a position to confer, grant or deny a benefit or advancement. The provision requires that the person making the advance knows or ought reasonably to know that the behavior is unwelcome, and it goes on to also prohibit a reprisal or threat of reprisal due to a rejection of a sexual solicitation or advance.

Canada’s other provinces address sextortion indirectly, through sexual harassment, sexual solicitation or harassment generally. The Quebec and Prince Edward Island codes, however, do not even provide language through which sextortion could be addressed.

In general, Canadian provinces also have specific legislation that prohibits behaviour similar to sextortion from law enforcement officials. For example, most provinces have legislation to prohibit police from engaging in corrupt practices, which is defined by legislation to include either, or both, of the following characterizations:

- (i) when a police officer uses his or her position for personal or private advantage; and
- (ii) when a police officer directly or indirectly solicits or receives a benefit or advantage that might affect the proper performance of his or her duties.

The former is found within British Columbia<sup>62</sup>, Alberta<sup>63</sup>, Saskatchewan<sup>64</sup>, Ontario<sup>65</sup>, New Brunswick<sup>66</sup>, Nova Scotia<sup>67</sup>, PEI<sup>68</sup> and the territories<sup>69</sup> while the latter is typically found in conflict of interest provisions in Quebec<sup>70</sup>, New Brunswick<sup>71</sup> and PEI.<sup>72</sup>

The penalties for breaching these codes are grounded in disciplinary measures, ranging from warnings to suspensions without pay to dismissals.<sup>73</sup> Ontario is one of the only provinces that imposes a maximum fine of up to \$2,000 and/or imprisonment for up to one year.<sup>74</sup>

Most of the codes, however, do not provide recourse for an affected party nor do they yield quasi-criminal or criminal consequences. In many jurisdictions, even if the language of corrupt practice is too narrow to be used for disciplining sextortion, there are broader provisions addressing discreditable conduct, typically surrounding a police officer acting in a manner that is likely to bring the reputation of the police agency into disrepute.<sup>75</sup>

### ***G. (B.) v. British Columbia, 2003 BCSC 1890***

Eleven plaintiffs were incarcerated as children at different times at a rehabilitation facility for young offenders between 1955 and 1972. Plaintiffs brought action against provincial Crown, alleging that they were subjected to historical physical and sexual abuse by staff members and other inmate boys. They alleged they were sexually assaulted and in exchange offered cookies, cakes, cigarettes and promises to talk to fellow staff to help move them through the steps required to obtain release.

The civil case raised the following causes of action: 1. Employer vicarious liability for staff physical and sexual abuse; 2. Negligent supervision and care of the plaintiffs from the alleged assaults, including those from other inmates; 3. Breach of statutory non-delegable duty of care for the safety of the children at Brannan Lake School; 4. Breach of Crown fiduciary duty of care for the children at Brannan Lake School.

The plaintiffs failed to prove on a balance of probabilities that they were physically and sexually assaulted. Collaboration and infected process (including media notoriety) among the plaintiffs was pervasive.

## **F. CONCLUSIONS**

An extensive literature review to identify barriers and future challenges related to Canada's prosecution and prevention of sextortion has yielded the following three key issues that should be considered at the federal, provincial and/or municipal levels of government:

### **Non-recognition of certain forms of sexual harassment**

The most common discussion of the elements of sextortion in Canadian literature occurs in the context of sexual harassment.<sup>76</sup> Professor Fay Faraday of Osgoode Hall Law School provides a helpful overview of the literature when she distinguishes two types of sexual harassment: hostile-environment harassment, which "involves continued verbal, physical, or psychological harassment—leering, unwanted touching, comments about a woman's sexuality—which undermines a woman's job performance, threatens her position in the

workforce, and causes physical and emotional harm,” and quid pro quo harassment, which “occurs when unwanted sexual interaction is made the condition of hiring, continuing in a job, or getting a promotion.”<sup>77</sup> Faraday notes that Canadian provincial human rights tribunals have been reluctant to recognize hostile-environment harassment, despite women in Canada being more likely to experience hostile-environment harassment than quid pro quo harassment.<sup>78</sup>

### **Biases of law enforcement officials against marginalized women**

The research of Ray Kuszelewski and Dianne L. Martin discusses the vulnerability of sex workers to sextortion by police officers in Toronto. Their research reveals that sextortion of sex workers can go unreported or underreported because of biases in receiving their complaints or feeling they do not deserve protection.<sup>79</sup> Kuszelewski and Martin observe that, because of these biases, marginalized women, like sex workers, often lack “even minimal protection” from law enforcement officials.<sup>80</sup> Thus, marginalized women may be even more likely to be victims of sextortion than other women.

### **Sentencing**

Sextortion cases that involve people in public office or with other public authority are likely to attract significant publicity and attention, which may be relevant to sentencing in criminal matters. Such was the case in the aforementioned *R. v. Ellis*, where the Ontario Court of Appeal’s majority and dissenting opinions differed in their consideration of the negative publicity or loss of standing experienced by Ellis during sentencing. This disagreement in *Ellis* may stem from confusion from lower courts on how to interpret the Supreme Court of Canada’s decision in *R. v. Pham*,<sup>81</sup> where the Court’s decision allowed for collateral consequences to be considered during sentencing.<sup>82</sup>

## **III. RESOURCES**

### **A. SUPPORT AVAILABLE FOR VICTIMS**

We did not identify any organizations that explicitly exist to address sextortion or provide victim assistance services to sextortion victims. However, a number of organizations work to combat sexual assault and exploitation and offer services to vulnerable women in this regard. One of the most prominent of these organizations is the Canadian Association of Elizabeth Fry Societies (CAEFS),<sup>83</sup> which advocates on behalf of female inmates who came forward with “sex for drugs” allegations. In the aforementioned case involving the Grand Valley Institution for Women, CAEFS provided information about the incidents of sextortion to authorities and advocated an independent review of the incidents.

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## CANADA - COMMON LAW

## ANTI-CORRUPTION LAWS

## STATUTE: CRIMINAL CODE, S.122

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person who holds a public office, or is elected or appointed to discharge a public duty	A personal benefit, either directly or indirectly. There does not have to be any real prejudice or loss to the public or the government because of an accused's conduct. The benefit received does not have to be tangible. To limit the offense to tangible benefits would excessively narrow the scope of section 122. There are intangible benefits that clearly come within the ambit of criminal conduct.	Maximum prison sentence of five years.

## STATUTE: CRIMINAL CODE, S.346(1)

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any individual.	The extortion can be done with regard to the intent to obtain "anything".	Penalties depend on the nature of the offense.

## STATUTE: CRIMINAL CODE, S.426(1)

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
An agent formally acting on behalf of a principal (e.g. financial investment advisor acting on behalf of clients). This is not specific to public officials, but may apply to agents acting on behalf of a government entity.	Directly or indirectly, corruptly demand, accept, offer or agree to accept from any person, for themselves or another person, any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favor or disfavor to any person with relation to the affairs or business of the agent's principal.	Maximum prison sentence of five years.

## STATUTE: IMMIGRATION AND REFUGEE PROTECTION ACT, S.129(1)(A)

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Immigration officers or employees of the federal government.	A bribe or other benefit, in respect of any matter under the IRPA.	A maximum fine of \$50,000 or to maximum sentence of not more than five years, or to both. A summary conviction can result in a maximum fine of \$10,000 or to maximum sentence of six months, or to both.

## SEXUAL ASSAULT LAWS

## STATUTE: CRIMINAL CODE, S.153 AND 153(1)

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person who is in a position of trust or authority.	Section 153 has limited application with regard to sexual exploitation as it only governs victims between 16 and 18 years of age and victims with a mental or physical disability. Section 153(1) makes it an offense for a person who is in a position of trust or authority towards a young person to sexually interfere with, or invite sexual touching from, the young person. Section 153 (1) creates a similar offense with respect to individuals with disabilities.	



# KENYA





## I. HOW DOES SEXTORTION MANIFEST ITSELF IN KENYA?

Sextortion is inescapably present in Kenya. It is particularly rife in schools and places of employment, with most publicized cases taking place in institutions of higher learning and secondary schools. While the media has reported several instances of sextortion, these have rarely been brought to justice for a number of reasons, including fear of social stigma.

### A. SEXTORTION IN EDUCATIONAL SETTINGS

The media has reported on tutors in learning institutions who offer favorable marks to their students in exchange for sexual favors.<sup>84</sup> It is such a pervasive practice in Kenya, that sometimes even the students offer such favors with the expectation that they will get good grades.

An example of sextortion in the educational setting was documented in a report commissioned by Kenya's Public Health Permanent Secretary. In 2011, the Permanent Secretary launched a Performance Needs Assessment of Kenya's Health Training System, which exposed the fact that tutors in Kenya's medical training colleges were demanding sex in exchange for favorable examination marks.<sup>85</sup>

As a result of this report, the University of Nairobi and Kenyatta University – two of the oldest institutions of higher learning – proceeded to develop a work ethics policy for lecturers. In "Work Ethics for Lecturers: An example of Nairobi and Kenyatta Universities", the authors detail the incidences where students, especially female students, were coerced to exchange sexual favors for grades.<sup>86</sup>

In recognition of this menace to society and higher institutions of learning, artists wrote a play on it entitled "Sugar Levels" and staged it at the Kenya National Theatre in October 2013.<sup>87</sup>

### B. SEXTORTION IN THE WORKPLACE

The sextortion crisis in the educational sector in turn has trickled over to the employment sector,<sup>88</sup> where graduates continue to rely on sexual favors for employment, promotion and other benefits.

Evidence of sextortion in the workplace can be found in the recent government investigations into alleged sexual harassment by Francis Munyua, a Juja Member of Parliament.<sup>89</sup> Susan Wambui, claiming to be Munyua's former secretary, has accused him of sexual harassment and of making death threats against her. Among other allegations, Wambui claims that Munyua fired her via text message after she declined to have sex with him.

Complying with Munyua's sexual demands in effect became a condition of keeping her job, making Wambui a victim of attempted sextortion.

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## II. HOW DOES KENYA'S LEGAL FRAMEWORK APPLY TO SEXTORTION?

The Kenyan Legal System is based on English Common Law. The Kenyan Constitution was enacted in August 2010 and is the supreme law of the land. The Constitution incorporates international instruments that Kenya has ratified to form part of its laws. This includes international conventions and treaties. The Government is divided into three functions: the executive function, legislative function and judicial function.

The major sources of law in Kenya are the Constitution, Acts of Parliament and subsidiary legislation made thereunder; the substance of the common law, doctrines of equity, English Statutes of general application, and procedure and practice observed in courts in England until 12 August 1897; African Customary Law; and International Conventions and treaties that Kenya has ratified.

Kenya does not have legislation that specifically addresses sextortion. However, other pieces of legislation may be used to prosecute cases that have elements of sextortion. These include: (i) the Anti-Corruption and Economic Crimes Act; (ii) the Sexual Offences Act; and (iii) the Employment Act, 2007. In general, courts tend to prosecute cases involving the elements of sextortion under the Sexual Offences Act.

### A. ANTI-CORRUPTION LAWS AND CASES

The Anti-Corruption and Economic Crimes Act defines corruption to include abuse of office.<sup>90</sup> Under the Act, a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offense<sup>91</sup> and such person is liable to a fine not exceeding one million shillings, or to imprisonment for a term of ten years, or to both.<sup>92</sup>

The Act defines 'benefit' to mean "any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage." The term 'benefit' is thus not strictly defined and can be broadly interpreted to include 'sexual benefit'. In this sense, the Act can therefore be used to prosecute a person who uses his power or office to confer a sexual benefit on himself. For example, the Act can be used to prosecute a person who uses his power to demand sex from his victims during their employment.

### B. SEXUAL HARASSMENT, RAPE AND DEFILEMENT LAWS AND CASES

#### **Sexual Offences Act**

Currently, the Sexual Offences Act is the only law that provides for sexual offenses and, together with the Penal Code, can be used to prosecute sexual offenses.

Under the Sexual Offences Act, any person, who being in a position of authority, or holding a public office, persistently makes any sexual advances or requests, which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offense of sexual harassment and

can be liable to imprisonment for a term of no less than three years or to a fine, or to both.<sup>93</sup> Moreover, in a charge of sexual harassment the prosecution may have to prove that “the submission or rejection by the person to whom advances or requests are made is intended to be used as basis of employment or of a decision relevant to the career of the alleged victim or of a service due to a member of the public in the case of a public officer.” The Sexual Offences Act includes other provisions that, depending on the facts in a given case, might be used to prosecute sextortion. Section 24(1)-(5) focuses specifically on sexual offenses relating to position of authority and persons in position of trust. A number of provisions criminalize the taking advantage of a position of authority or trust to have sexual intercourse or commit any other sexual offense under the Sexual Offences Act, which does not amount to rape or defilement. The possible perpetrators under this section include, among others, law enforcement officers, teachers or school employees, manager or staff of a hospital, and superintendent or manager of a jail, remand home or children’s or any institution of custody. This offense is penalized with imprisonment for a term of not less than ten years.

The rape and defilement provisions of the Sexual Offences Act are not tailored to sextortion, but also might apply to certain cases. Section 3 of the Sexual Offences Act states that a person commits rape if “(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs...” and “(c) the consent is obtained by force or by means of threats or intimidation of any kind.” The recognition that “threats or intimidation of any kind” can vitiate the victim’s consent opens the door to using this provision to prosecute cases of sextortion in which no force or threat of force is used to obtain the victim’s compliance with the sexual demand. If the victim is a child, consent is not even an issue. Under the Sexual Offences Act, a person commits defilement if s/he performs an act that causes penetration with a child.

The greatest challenge in applying the Sexual Offences Act to cases of sextortion is that victims of sextortion may be deemed to have consented under the standards of the Act. Indeed, most of the sexual offenses defined in the Act are based on the use of force or coercion, which must be proven ‘beyond reasonable doubt’ and puts victims in the position of having to prove that there was coercion in obtaining their consent. The lack of physical evidence of sextortion would likely cast reasonable doubt as to whether coercion was in fact involved.

Moreover, a perpetrator may argue as a defense that the victim consented. The only time consent is not a defense – even if given – is when the victim is a child. However, the same is vacated if it is proven that the child led the offender to believe that he or she was an adult.

### **Employment Act of 2007**

The Employment Act of 2007 similarly prohibits sexual harassment,<sup>94</sup> but is confined to the employment context. In this sense, the Employment Act may also be used to curb sextortion through its prohibition on sexual harassment in the workplace.

Sexual harassment of an employee occurs under this Act when an employer or a representative of that employer or a co-worker “directly or indirectly requests that employee

for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express promise of ... (ii) threat of detrimental treatment in employment; or (iii) threat about the present or future employment status of the employee.”<sup>95</sup> Under the Act, the perpetrator may be penalized with a fine or imprisonment of up to three months.

Moreover, under the Act employers with more than 20 employees must issue a policy statement on sexual harassment,<sup>96</sup> which must include a procedure for reporting or lodging complaints on sexual harassment.<sup>97</sup>

In Kenya, most prosecutions involving the corruption and sexual components of sextortion are found within the realm of employment law and are based on sexual harassment claims.

### ***P O v Board of Trustees, A F & 2 Others***

The Claimant in this case brought an action against the respondents for wrongful termination of employment and sexual harassment by the 2nd Respondent who was the Executive Chairman/Manager of the organization for which the claimant was working.<sup>98</sup> She alleged that the 2nd Respondent made sexual innuendos to the Claimant when the two of them were in Cape Town. She did not respond to him. The 2nd Respondent later questioned why the Claimant had rebuffed his proposal for a romantic lunch. He clenched his fists and started hitting the Claimant. The 2nd Respondent then went ahead to book a hotel room for himself and the Claimant to share, which led to the Claimant spending the night on the hotel room floor.

Complying with the Manager’s sexual demands in effect became a condition of keeping her job, making the Claimant a victim of attempted sextortion. The Court awarded the Claimant damages for sexual harassment, unfair and wrongful termination of employment, to the tune of Kshs. 3,000,000.

## **C. CONCLUSIONS**

Sextortion is a serious problem in Kenya. While some laws, if interpreted broadly enough, could be used to prosecute sextortion, the current legal framework on the whole is inadequate.

Currently, the offense can likely be tried under certain provisions of the Sexual Offenses Act. However, offenses such as rape and defilement often require physical proof of coercion in the form of doctors’ reports, which would likely be hard to provide, as the coercion experienced by sextortion victims is not of a physical nature. A perpetrator would therefore be able to argue that the victim consented and – because consent is a defence to rape – would probably be acquitted. Even where it is proven that the consent was present but obtained through coercion, coercion would be difficult to prove to the standards of criminal cases.

Moreover, under the Kenyan legal system, the burden of proof in criminal cases lies with the prosecution; the offense must be proven beyond a reasonable doubt if the prosecution is to obtain a conviction. In instances of sextortion, if the prosecution is unable to prove coercion by the accused, the case is bound to collapse.

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In addition to the shortcomings of the legal framework, prosecution of sextortion faces many challenges in Kenya. For example, victims are reluctant to come forward and report the offense, because of the social stigma they would have to endure. Additionally, in most cases – especially in the employment sector – the very real risk of employment loss means that sextortion victims are sometimes willing to tolerate the abuse in order to keep their jobs.

The lack of witnesses is another challenge. Sextortion usually takes place in secret and in most cases only the wrongdoer and the victim are the ones aware of its existence. However, if there were witnesses, it is unlikely that they would come forward to testify since they may feel threatened by the position of authority held by the perpetrator.

Finally, a very important obstacle to prosecuting sextortion is the limited or lack of access to information on sextortion and how to denounce it. Therefore, a key first step to improving the legal and institutional framework in Kenya must include raising public awareness and educating Kenyan society about what sextortion is and where victims can report it.

### III. RESOURCES

#### A. REFERENCES

##### Legislation

- Employment Act, 2007 Laws of Kenya.
- The Anti- Corruption and Economic Crimes Act, Chapter 65 Laws of Kenya.
- Sexual Offences Act, Chapter 62A Laws of Kenya.

##### Case Law

- M W M v M F S Industrial Court Cause no. 268 of 2013 Industrial Court Cause No. 268 of 2013.
- P O v board of Trustees, A F & 2 Others Industrial Court Cause No. 927 of 2010.

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## KENYA - COMMON LAW JURISDICTION

## ANTI-CORRUPTION LAWS

STATUTE: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, PREAMBLE, SECTIONS 2, PART V SECTIONS 39, 46, 48

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
An agent	<p>As defined by Section 39:</p> <p>(1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent —</p> <p>(a) doing or not doing something in relation to the affairs or business of the agent's principal;</p> <p>(b) showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent's principal.</p> <p>(...)</p> <p>(3) A person is guilty of an offence if the person —</p> <p>(a) corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or</p> <p>(b) corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.</p> <p>As defined by Section 46:</p> <p>"who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence."</p>	<p>(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and</p> <p>(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.</p>
Any person	<p>As defined by Section 46:</p> <p>"who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence."</p>	<p>(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and</p> <p>(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.</p>

## SEXUAL OFFENCES LAWS

STATUTE: SEXUAL OFFENSES ACT; SECTIONS 3, 6, 8 AND 24.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	<p>As defined in Section 3:</p> <p>commits the offense termed rape if -</p> <p>(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;</p> <p>(b) the other person does not consent to the penetration; or</p> <p>(c) the consent is obtained by force or by means of threats or intimidation of any kind.</p> <p>(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.</p>	Imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
Any person	<p>As defined in Section 6:</p> <p>Who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act with -</p> <p>(a) the person compelling, inducing or causing the other person to engage in the act;</p> <p>(b) a third person;</p> <p>(c) that other person himself or herself; or</p> <p>(d) an object, including any part of the body of an animal, in circumstances where that other person -</p> <p>(i) would otherwise not have committed or allowed the indecent act; or</p> <p>(ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances referred to in section 43</p>	Imprisonment for a term which shall not be less than five years.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	As defined in Section 8:  who commits an act which causes penetration with a child is guilty of an offence termed defilement.	(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
The superintendent or manager of a jail, remand home or children's or any institution or any other place of custody	As defined by Section 24:  (1) takes advantage of his or her official position and induces or seduces any inmate or inhabitant of such jail or institution, remand home, place or institution to have sexual intercourse with him or her, such sexual intercourse not amounting to the offence of rape or defilement shall be guilty of a sexual offence relating to a position of authority	Imprisonment for a term of not less than ten years.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Law enforcement officer	<p>As defined by Section 24:</p> <p>(2) takes advantage of his or her position and has sexual intercourse or commits any other sexual offence under this Act -</p> <p>(a) within the limits of the station to which he or she is appointed; or</p> <p>b) in the premises of any station house whether or not situated in the station to which he or she is appointed; or</p> <p>(c) on a person in his or her custody or in the custody of a law enforcement officer subordinate to him or her, commits an offence of abuse of position of authority</p>	Imprisonment for a term of not less than ten years.
Manager of any hospital or staff of a hospital	<p>As defined by Section 24:</p> <p>(3) takes advantage of his or her position and has sexual intercourse with or commits any other sexual offence under this Act with any patient in the hospital, such sexual intercourse not amounting to the offence of rape or defilement shall be guilty of an offence of abuse of position of authority</p>	Imprisonment for a term of not less than ten years.
The head-teacher, teacher or employee in a primary or secondary school or special institution of learning whether formal or informal	<p>As defined by Section 24:</p> <p>(4) takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of authority.</p>	Imprisonment for a term of not less than ten years.



Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person in a position of trust	<p>As defined by Section 24:</p> <p>(5) takes advantage of his or her position and induces or seduces a person in their care to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of trust</p>	Imprisonment for a term of not less than ten years.

#### STATUTE: EMPLOYMENT ACT OF 2007; SECTION 6

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Anyone who is an employer or a representative of that employer or a co-worker	<p>As stated in Section 6.</p> <p>(1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—</p> <p>(a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—</p> <p>(i) promise of preferential treatment in employment;</p> <p>(ii) threat of detrimental treatment in employment; or</p> <p>(iii) threat about the present or future employment status of the employee;</p> <p>(b) uses language whether written or spoken of a sexual nature;</p> <p>(c) uses visual material of a sexual nature; or</p> <p>(d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.</p>	Fine and/or imprisonment

	<p>(2) An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.</p> <p>(3) The policy statement required under subsection (2) may contain any term the employer considers appropriate for the purposes of this section and shall contain—</p> <p>(a) the definition of sexual harassment as specified in subsection (1);</p> <p>(b) a statement—</p> <p>(i) that every employee is entitled to employment that is free of sexual harassment;</p> <p>(ii) that the employer shall take steps to ensure that no employee is subjected to sexual harassment;</p> <p>(iii) that the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment;</p> <p>(iv) explaining how complaints of sexual harassment may be brought to the attention of the employer; and</p> <p>(v) that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.</p> <p>(4) An employer shall bring to the attention of each person under the employer's direction the policy statement required under subsection</p>	
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# MEXICO





## I. HOW DOES SEXTORTION MANIFEST ITSELF IN MEXICO?

### A. SEXTORTION INVOLVING PUBLIC OFFICIALS

In Mexico, sextortion appears to manifest itself predominantly in the political sector and among public officials. Evidence of this can be found in the government investigation into an alleged sexual favors network involving the Institutional Revolutionary Party of Mexico.

#### **Cuahtémoc Gutierrez (PRI) sex network**

On April 2014, Cuahtémoc Gutiérrez de la Torre, the President of the Institutional Revolutionary Party (Partido Revolucionario Institucional – “PRI”)<sup>99</sup> for the Federal District was accused of the alleged diversion of public resources to fund a prostitution and sexual favors network. Moreover, according to media investigations, Cuahtémoc Gutiérrez de la Torre used his position in order to request sexual favors from young women and in exchange he gave them a position within the Party. That *quid pro quo* exchange would be sextortion.

Notwithstanding the evidence against him (videos, declarations and relevant information provided in social media), Cuahtémoc Gutierrez was exonerated of any administrative responsibility by the Electoral Institute of the Federal District due to lack of evidence. Moreover, although a criminal investigation is opened against him, no criminal responsibility has been determined.

### B. LEGISLATIVE RECOGNITION OF SEXTORTION

The Federal Congress and most of the local congresses have tried to strengthen sexual harassment regulations in different ways. In 2007, the Federal Congress passed a gender-based violence law titled the General Law for Women’s Access to a Life Free of Violence, (“Ley General de Acceso de las Mujeres a una Vida Libre de Violencia,” hereinafter “LGAM”) for the purpose of coordinating efforts between the Federation, the States and the Federal District<sup>100</sup> in order to prevent, punish and eradicate violence against women.

Under the LGAM “sexual violence” is defined as an act of violence against a woman that degrades or damages the body and/or her sexuality and therefore threatens her liberty, dignity and physical integrity,<sup>101</sup> Section 10 regulates sexual conduct in the workplace and in educational institutions and prohibits any conduct by a person that in light of his work or academic relationship with the victim, regardless of hierarchy, abuses his power and affects the self-esteem, health, integrity, liberty and security of the victim.

Moreover, Sections 18 to 20 set forth parameters and general principles for the States to regulate and penalize ‘institutional violence’, whereby public officials discriminate against women or create hurdles for them to enjoy their human rights or deny them access to the relevant administrative and judicial bodies for preventing, investigating and prosecuting all types of violence.

The Federal Congress issued the LGAM for the purpose of coordinating government efforts to prevent and penalize violence against women, not to create an independent cause of action or impose any penalties for such violence. For this reason, the LGAM would not be applicable for prosecuting a sextortion case in Mexico, although it could be used to support the imposition of administrative sanctions based on labor and administrative legislation.

Notwithstanding these limitations, the LGAM is an important step towards increasing prosecution of sextortion in Mexico. Through legislative recognition it has created a general awareness of the pervasive existence of sexual harassment and violence against women and has led most federal entities and government agencies to implement internal codes of conduct that prohibit their public officials from engaging in such conduct. In turn, these internal codes of conduct can lead to labor and administrative penalties against the perpetrator.

Further, the LGAM has also led all States to adopt local legislation that implements the general provisions set forth therein. In turn, these amendments to the Federal Criminal Code, the local criminal codes and other local amendments to implement the LGAM have triggered other bills in federal and local Congresses.

Most recently, in April 2014, as a result of the “Cuauhtémoc Gutierrez (PRI) sex network” case, the Party of the Democratic Revolution (Partido de la Revolución Democrática – “PRD”), submitted a bill to the Federal District Congress proposing that an additional penalty be introduced into the Criminal Code for the Federal District. The Bill proposes to sanction public officials who harass, threaten and apply any type of economic violence against a victim in exchange for sexual favors.

The bill proposes penalties for public officials who incur in such conduct that range from 2 to 4 years in prison. Likewise, the bill proposes that public officials be removed from office and that, in the event that the case goes public through the media, the authority be empowered to initiate an investigation without the need for the victim to bring the claim forth.

The Federal District Congress has not yet discussed the bill.

## **II. HOW DOES MEXICO’S LEGAL FRAMEWORK APPLY TO SEXTORTION?**

Mexico is a federation composed by 31 free and sovereign states, which form a union that exercises a degree of jurisdiction over the Federal District and other territories. The constitution establishes three levels of government: the federal Union, the state governments and the municipal governments.

Under the Mexican constitution, all constituent states of the federation must have a republican form of government composed of three branches: the executive, the legislative and the judiciary. The Federal District is a special political division that belongs to the federation as a whole and not to a particular state, and as such, has more limited local rule than the nation’s states.

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However, the Mexican legal system is based on a Constitutional system. This means, Mexico's legal system is governed by a Supremacy Clause, which establishes that the Federal Constitution, the international treaties subscribed by the Federal Congress and the federal-secondary laws are the supreme law of the nation. Therefore, local legislation cannot be contrary to the Federal Constitution and although each State has the power to legislate locally, there are matters that are reserved by the Federal Constitution.

While Mexican legislation does not expressly contemplate sextortion, the Mexican Federal Congress and local congresses have enacted and amended legislation that could serve to prosecute and penalize sextortion, for example under sexual harassment, sexual abuse or abuse of authority laws. Under these statutes, sextortion would be treated as an offense, an administrative infraction, or improper conduct in a work relationship.

However, to date, no relevant case has been resolved where sextortion – involving all three elements – has been prosecuted by a Mexican court. Likewise, there is no relevant precedent or criteria issued by the Supreme Court of Justice where a similar offense has been prosecuted. Therefore, no relevant precedent or case law can be provided to determine the likelihood of success of a sextortion claim under Mexican legislation.

The most notable efforts to prevent offenses such as sextortion have been carried out by administrative bodies through the enactment and implementation of codes of conduct and protocols to avoid sexual harassment involving public officials.

Given the similarity between all the local legislation and the federal legislation, the following sections will cover only Federal laws and the laws of the Federal District, although some local legislation may be referenced if relevant.

## A. SEXUAL HARASSMENT LAWS

### Federal Criminal Code

The Federal Criminal Code penalizes sexual harassment,<sup>102</sup> which could be used to prosecute instances of sextortion. In particular, Section 259 Bis of the Federal Criminal Code penalizes “any person who, with lustful purposes, repeatedly harassed a person of either sex, based on his hierarchical position obtained through a working, academic, domestic or any other type of relationship that implies subordination.”

The penalty for sexual harassment is a fine. However, such provision states that the offense will only be penalized when the victim suffers an injury or damage. Additionally, the criminal authority will only prosecute the offense at the victim's request. If the perpetrator is a public official and uses means and circumstances obtained by his position, he can also be removed from office.

While the Federal Criminal Code does not include the *quid pro quo* element, sextortion may fall within the statutory elements of sexual harassment. A critical challenge to prosecuting sextortion under this law, however, is that the offense implicitly involves a refusal or rejection by the victim of the criminal conduct (sexual harassment) of the perpetrator. Thus, in a



sextortion case, a solid criminal defense to a sexual harassment claim could be that the victim agreed to engage in the unwanted sexual activity. However, it may be plausible that the victim, during the criminal-prosecution procedure, could also argue that the consent *per se* was a result of the psycho-emotional pressure resulting from the need to obtain the benefit.<sup>103</sup>

Moreover, even though the law does not require the authority to prove: (i) physical injury and/or (ii) physical coercion in order to prosecute, lack of evidence thereto may further help the perpetrator's defense.

To date, the Supreme Court of Justice has not resolved a sexual harassment case where sextortion has been punished in a criminal procedure. Likewise, very few cases<sup>104</sup> of sexual harassment have gone all the way to the Supreme Court or other federal courts and most of them concern employment matters.

### **Federal Labor Code**

Section 3 Bis of the Federal Labor Code<sup>105</sup> describes two forms of sexual harassment: (i) as a conduct by which any person who in abuse of power and of his or her hierarchical position within the labor environment, expresses him or herself by verbal and/or physical conducts that harass the victim or (ii) as a form of violence by which, without the element of subordination and although it is carried out in one or more events, there is an abuse of power leading the victim to be defenceless and putting him or her at risk.

This definition of sexual harassment encompasses a broader range of discriminatory conduct than the abuse of power to extort sexual favors from an employee in exchange for a job, promotion, favorable review, overtime, or other work-related benefit. However, to the extent such sextortion attempts harass the victim or lead the victim to feel defenseless and at risk of losing the work-related benefit, they would fall within the language of the sexual harassment law, even though that law does not address – and is not limited to – situations that include the *quid pro quo* element of sextortion.

Remedies for sexual harassment include termination of the working relationship and fines. According to section 47, the employer shall terminate, without further responsibilities, the employee working relationship if the employee engages in any sexual harassment act. Likewise, section 51 of the Code states that the employee can terminate the working relationship if the employer engages in any sexual harassment act without further responsibilities on his or her part.

Subsection VI of section 994 also states that any employer who perpetrates, tolerates and/or allows sexual harassment acts against any employee, can and will be sanctioned with a fine that ranges from 250 to 5000 times the minimum wage.

Finally, on July 2013, the Second Collegiate Federal Court of Tamaulipas recognized that in accordance with section 1 of the Mexican Constitution, all labor cases that imply sexual harassment should be resolved in terms of section 7 of the Convention Belém do Pará

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(Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Woman), which clearly states that all members of the Convention should prevent, punish and eradicate violence and apply, with due diligence, investigation procedures and imposition of penalties on violence against women.

### **Criminal Code for the Federal District**

Under the title of 'sexual harassment', the Criminal Code for the Federal District prohibits an offense that could most comprehensively encompass sextortion. Section 179 of the Code states that anyone who requests a sexual favor for himself or a third party or engages in any type of sexual conduct that is unwanted by the victim, which causes damage or psychological or emotional suffering that harms the victim's dignity, shall be imprisoned from 1 to 3 years.<sup>106</sup>

The scope of this offense is not limited to any particular context. In fact, the Code notes that the penalties will be increased when there is any form of hierarchical or subordinated relationship between the victim and perpetrator resulting, for example, from an employment, academic or domestic relationship.

Further, if the perpetrator is a public official and uses the means and circumstances obtained by his position, he can be removed from office and disqualified for the same period of time he is sanctioned for.

### **Other State Criminal Codes**

All local criminal codes contain provisions that prohibit sexual harassment and sexual abuse, which are similarly broad and could be used to prosecute sextortion. However, it is worth noting that not all local criminal codes penalize the *quid pro quo* requirement specifically.

## **B. SEXUAL ABUSE LAWS**

### **Federal Criminal Code**

In addition to sexual harassment, the Federal Criminal Code also penalizes sexual abuse.<sup>107</sup> In particular, Article 260 defines the crime as performing a forced sexual act on a person, which does not include intercourse. Sexual abuse is penalized with six to ten years' imprisonment and a fine of up to 200 days' minimum salary.

The elements of this criminal offense differ from sextortion in that (i) they do not include an authority-subordinated position, and (ii) they require evidence that the sexual activity was unwanted, which makes the victim's consent an evidentiary issue. While the former is likely not an impediment to prosecution, the latter probably is. As in cases of sexual harassment brought under the Criminal Code, demonstrating lack of consent by the victim could be an insurmountable obstacle.

Moreover, no relevant precedent or case law could be identified where sexual abuse was used to prosecute sextortion.

### **Criminal Code for the Federal District**

Like the Federal Criminal Code, Article 176 of the Criminal Code of the Federal District regulates sexual abuse. Such article clearly states that sexual abuse occurs when any person who, without the consent of the victim and without engaging in intercourse, inflicts on the victim any type of sexual act, forces the victim to witness the act or forces the victim to do so. While this provision could also provide grounds for prosecuting sextortion, such criminal offense poses the same consent problems previously identified.

### **Other State Criminal Codes**

All local criminal codes contain provisions that prohibit sexual abuse, which are similar in breadth to the Federal legislation and the Criminal Code for the Federal District. Therefore, they could be used to prosecute sextortion. However, it is worth noting that not all local criminal codes penalize the *quid pro quo* requirement specifically.

## **C. ANTI-CORRUPTION LAWS AND CASES<sup>108</sup>**

In Mexico, there are no dedicated anti-corruption laws. The Federal Criminal Code and local criminal codes make it an offense for public servants to receive bribes and, therefore, are the laws under which a criminal prosecution for corruption would be brought. For example, Section 223 of the Federal Criminal Code prohibits all public servants from using and/or deploying money and assets from the government for a personal benefit; and Section 224 penalizes anyone who as a result of his position, job or commission at public service increments his or her patrimony or acquires any type of property and cannot demonstrate that such increment and/or acquisition was legitimate. However, as is evident from their language, these laws only sanction economic or financial bribery and would not be applicable to sextortion cases, where sex rather than money is the currency of the bribe.

While only criminal laws are used to prosecute and penalize offenses in Mexico, administrative laws, such as the Federal Law of Administrative Accountabilities for Public Servants ("FLAAPS"), can be used to impose a range of administrative penalties, including removal of a public official who engages in the prohibited conduct.

The FLAAPS requires public officials to behave professionally and properly at their job, commission or office treating all persons with whom they interact with respect, diligence, impartiality and righteousness.<sup>109</sup> Furthermore, it prohibits public officials from, in general, abusing their position, including against their subordinates.

Under this law, instances of sextortion could be treated as administrative infractions. Breaches to the FLAAPS may result in public or private warnings, suspension of duty or removal from office and debarment from 1 up to 20 years depending on the circumstances of the case and damage caused to the victim.

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This law applies to all federal and Federal District public officials and those who hold a position within the federal and the Federal District administration and judiciary power. Likewise, it can be applied to local governors, congressmen and judges. However, this law cannot be applied to other public figures or private individuals.

## D. PREVENTION PROTOCOLS AND CODES OF CONDUCT

The National Institute for Women was established with the sole purpose of promoting equality between men and women, by proposing guidelines, objectives and a course of action to the Federal Administration. The National Institute developed a Program for Institutional Culture whereby it stated as a goal for the Federal Public Administration to establish mechanisms to prevent, deal with and penalize cases of sexual harassment and develop the procedures necessary to denounce and end these cases.

Likewise, in 2009, the Institute developed an Intervention Protocol for sexual harassment cases including both the international and national legal framework under which public officials of every level (federal and local) must prevent, deal with and penalize sexual harassment cases. In 2011, 205 internal protocols were implemented by the Federal Government, which establish general guidelines to prevent and deal with sexual harassment cases.

During 2008, 25,728 cases of sexual harassment involving public officials were reported; however, a formal claim was submitted for only 7,796 cases.<sup>110</sup>

Finally, public officials are also subject to the Code of Conduct of every governmental body. Most codes of conduct oblige public officials to avoid sexual harassment and any type of discrimination against colleagues and subordinates. Such codes set forth guidelines and protocols to prevent and report sexual harassment cases.

For example, most of them include (i) a description of what constitutes sexual harassment, (ii) the ways someone can detect sexual harassment and how to report it, (iii) possible effects of suffering sexual harassment, (iv) prevention mechanisms and (v) criminal and labor law provisions applicable to sexual harassment.

## E. REPARATIONS

The Mexican Constitution states that in every single criminal procedure where the perpetrator is proven guilty, the victim has the right to reparations.<sup>111</sup> Likewise, articles 29 to 39 of the Federal Criminal Code recognize such right and set forth the applicable rules.

Reparations will be quantified in money by imposing a fine that should compensate for material and moral damages, including payment for recovery treatments for the victim. For offenses against the normal psychosexual development of individuals (such as sexual harassment), payment of psychotherapy is included. Thus, a victim of sextortion whose criminal case is successfully prosecuted may be entitled to reparations.

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Reparations may also be available in civil actions. The Federal Civil Code provides that moral damages shall be paid to those individuals that have suffered an action against their feelings, beliefs, dignity, honor, reputation, privacy, their body or against their image. A moral damage is deemed to have occurred whenever the liberty, physical or psychological integrity of the victim has suffered. The perpetrator - whether a public official or not - who has caused such damage, must pay the victim a cash compensation.

The compensation amount will be determined by a civil judge taking into consideration the right injured, the degree of responsibility, the economic situation of the person who has caused such moral damage, and the victim as well as any other relevant circumstances. However, such civil action would imply starting a separate and specific civil procedure and cannot be started and/or claimed as a result of what was resolved in the criminal procedure.

## F. CONCLUSIONS

The current legislative framework in Mexico does not adequately cover the offense of sextortion. While Local and Federal Congresses have made a great effort to penalize conduct that affects the normal psychosexual development of individuals, no such laws actually prevent, regulate and penalize sextortion. In this sense, legislation will be needed if prosecution of such conduct is to be properly enforced in Mexico.

While sextortion could potentially be prosecuted under the pre-existing offenses of sexual harassment and sexual abuse, the issue of consent presents a substantial hurdle to overcome. Moreover, without relevant case law available, it is hard to estimate any likelihood of success.

There are also a number of practical barriers to prosecuting sextortion in Mexico.

The following have been identified as the most significant:

- **Lack of awareness:** sextortion occurs frequently in Mexico, but it is not a well-known offense. Victims face it frequently but authorities and society in general do not seem to be aware of it, or at least not as an illegal conduct. Raising public awareness of such conduct is needed in order to strengthen prevention.
  - **Lack of reporting:** In Mexico, the shame and stigma that affects the victim impairs her ability to bring forth a claim, which will in turn affect whether the crime is prosecuted at all. All criminal laws in Mexico require that the victim denounce the conduct in order for the authority to act.
  - **Inadequate penalties:** When the conduct has been allegedly committed by a public official, penalties include suspension and removal from office. However, neither penalty (when only prosecuting in terms of administrative laws and not criminal ones) will guarantee any type of reparation for the victim.
  - **Transparency:** Most cases of sextortion/sexual harassment are widely publicized by the media, but never result in courts penalizing the perpetrator, let alone offering reparations
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to the victims. This is due to the lack of transparency of the judiciary and improper political reasons such as “political protection”, threats and intimidation of the victims, corruption and bribery.

• **Corruption:** corruption is not only a facilitator for sextortion but a barrier to prosecuting it. Most Mexican cases will not succeed in court for improper political reasons. Therefore, to prosecute sextortion in Mexico, fighting corruption (especially that related to procedural violations) and not just sextortion, is a major challenge.

### III. RESOURCES

#### A. REFERENCES

##### Legislation

- Political Constitution of the United Mexican States.
- General Law for Woman Accessing a Life Free of Violence
- Criminal Federal Code
- Criminal Code for the Federal District and other local criminal codes.
- Civil Federal Code
- Federal Law of Administrative Accountabilities for Public Servants.

##### Articles

- Comisión Nacional de los Derechos Humanos – México. Cuarta Visitaduría General. Programa de Asuntos de la Mujer y de Igualdad entre Mujeres y Hombres. Legislación Penal de las Entidades Federativas que tipifican el Acoso Sexual como delito. México. 2013.
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- <http://aristeguinoticias.com/tag/cuauhtemoc-gutierrez/>

## MEXICO - CIVIL LAW JURISDICTION

## SEXUAL HARASSMENT LAWS

## FEDERAL LAWS

## STATUTE: FEDERAL CRIMINAL CODE, ARTICLES 259 BIS

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person including Public Servants.	Defined by Article 259 Bis as follows: "Any person who, with lustful purposes, repeatedly harasses a person of either sex, based on his hierarchical position obtained through a working, academic, domestic or any other type of relationship that implies subordination. If the Perpetrator was a public servant and commits the conduct on abusing his position, he will be removed of his position. Sexual harassment would only be punishable if it causes an injury or damage"	40-day fine (calculated over minimum wage)  When public official: removal of office.  Damage compensation (Cash fine)

## FEDERAL DISTRICT LAWS

## STATUTE: CRIMINAL CODE OF THE FEDERAL DISTRICT, ARTICLE 179.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person including Public Servants.	Defined by Article 179 as follows:  "Any person who requests a sexual favor for himself or for a third party or engages in any type of sexual conduct that is unwanted by the victim, which causes damage or psychological or emotional suffering that harms the victim's dignity, shall be imprisoned from 1 to 3 years. When there is a subordinated relationship between the victim and the Perpetrator from labor, educational, domestic or any other kind of relationship, the prison sanction will increase by two thirds.	1 to 3 years of prison. If a Public Servant did the conduct, the sanction will increase two thirds.  When public official: removal of office and disqualification.  Damage compensation (Cash fine)

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
	If the Perpetrator was a Public Servant and based on his hierarchical position commits the conduct, additional to the aforementioned sanction, he will be removed from office and will be disqualified to have a similar job for the same years as he was imprisoned for”	

## SEXUAL ABUSE LAWS

### FEDERAL LAWS

STATUTE: FEDERAL CRIMINAL CODE, ARTICLE 260.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person including Public Servants.	<p>Defined by Article 260 as follows:</p> <p>“Any person who, without the consent of the victim and without engaging in intercourse, inflicts on the victim any other type of sexual act, forces the victim to witness the act or forces the victim to do so.</p> <p>Sexual acts are any obscene body touching or any other which implicitly implies a sexual act or orders the victim to respect them. Likewise, sexual acts include forcing a victim to witness an act or force the victim to exhibit his or her body. If the act implied violence, prison sanction would increase by half”</p>	<p>6 to 10 years in prison and a fine of up to 200 days’ minimum salary. If the act implied violence, prison sanction would increase by half.</p> <p>Damage compensation (Cash fine)</p>



## FEDERAL DISTRICT LAWS

## STATUTE: CRIMINAL CODE OF THE FEDERAL DISTRICT, ARTICLE 176.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person including Public Servants.	<p>Defined by Article 176 as follows:</p> <p>“Any person who, without the consent of the victim and without engaging in intercourse, inflicts on the victim any other type of sexual act, forces the victim to witness the act or force the victim to do so. If violence is used, the prison sanction will increase by half.”</p>	<p>1 to 6 years in prison and a fine of up to 200 days’ minimum salary. If the act implied violence, prison sanction would increase by half.</p> <p>If the act implied violence, prison sanction would increase by half. Likewise, if the victim was a person who didn’t have the capacity to understand the act or could not resist it; prison sanction will be 2 to 7 years.</p> <p>Damage compensation (Cash fine)</p>

## ANTI-CORRUPTION LAWS

## FEDERAL LAWS

## STATUTE: FEDERAL LAW OF ADMINISTRATIVE ACCOUNTABILITIES FOR PUBLIC SERVANTS, ARTICLE 8.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Federal and Federal District Public Servants (within all the government agencies), Congressmen and Judges.	<p>Defined in article 8 as follows:</p> <p>“All Public Servants will have the following obligations:</p> <p>I. Fulfill the services he was hired for and avoid engaging in any act that implies an abuse or an improper exercise of his job or commission (...)</p> <p>VI. Behave properly in his job or commission, treating with respect, diligence, impartiality and integrity all people he relates with (...)”</p>	<p>Public or private warnings, suspension of duty or removal from office and debarment from 1 up to 20 years depending on the circumstances of the case such as the damage he could inflict on the victim for his conduct.</p>

## FEDERAL LAWS

## STATUTE: FEDERAL CRIMINAL CODE, ARTICLES 223 AND 224.

Who Can Be Charged?	What Conduct Could Encompass Sextortion?	What Remedies Are Available?
All Public Servants	Defined in article 223 of the Federal Criminal Code as follows: "All public servants that uses and/or deploys money and/or assets from the government for a personal benefit, promoting his image, uses public funds would be sanctioned."	Imprisonment from 3 months to 14 years depending on the amount that was misused.  A fine that ranges from 30 to 1,5000 times the minimum wage.  If the implied resources were federal contributions for public safety matters, both sanctions could be increased by a third.
All Public Servants	Defined in article 224 of the Federal Criminal Code as follows: "Anyone who as a result of his position, job or commission at public service increments his or her patrimony or acquires any type of property and cannot demonstrate that such increment and/or acquisition was legitimate, will be sanctioned"	Decommission of such assets. Imprisonment from 3 months to 14 years.  A fine that ranges from 30 to 1,500 times the minimum wage.



# TAIWAN

A low-angle, upward-looking shot of a large red hot air balloon. The balloon's envelope is a vibrant red with a dark red horizontal band. A network of white ropes connects the basket to the top of the balloon. In the center, a person wearing a dark shirt and a hat is visible inside the wicker basket, reaching up towards the burner. A large, bright orange and yellow flame is erupting from the burner, illuminating the scene. The basket has a green fabric cover on one side. The background is a clear blue sky.

Reuters: Nicky Loh



## I. HOW DOES SEXTORTION MANIFEST ITSELF IN TAIWAN?

### A. SEXTORTION AND PUBLIC OFFICIALS

In Taiwan, there have been several news stories involving sextortion and the abuse of power by public officials or those holding power in public services. These include the successful prosecution of a judge who forced a witness into sex in return for not sending documents to her home address, and the arrest of the deputy director-general of the Taiwan Railway Administration in relation to a “sex-for-tenders” scandal. These and other instances of sextortion have raised the profile of the issue in the public eye, although apparently no prosecutions or arrests were made.

Despite a variety of reports indicating that sextortion is a problem within law enforcement in Taiwan, as a general observation, reports and data evidencing such occurrences and the results of any related disciplinary action are hard to come by, as there is no consolidated database where case law across the country can be retrieved. Moreover, case law is generally considered a secondary source of law in Taiwan,<sup>112</sup> and some cases only lay down the decisions made and applicable laws and regulations. The names of the parties and the facts of the cases are not always disclosed.

We have, however, been able to find stories of cases that have been reported in the media, albeit in limited detail.

#### ***Sex for Visas Scandal - 1997***

Chief U.S. representative for Taiwan, James Wood, while protesting his dismissal from office, alleged that there was a sex for visas scandal at the American Institute in Taiwan in 1997. Women who were seeking visas were allegedly forced to have sex with an office employee in order to prevent their visa requests from being denied.<sup>113</sup>

The FBI was allegedly involved in investigations regarding this, but there has been little else in the news regarding the outcome or whether anyone was prosecuted.

#### ***Extortion of Sexual Favors by a Police Informant - 2002***

A news article reported on various instances of police misconduct in Taiwan, including a case where a police informant allegedly extorted sexual favors from a prostitute.<sup>114</sup> No additional details were available.

### B. SEXTORTION IN EDUCATIONAL SETTINGS

Another place where sextortion manifests itself in Taiwan is in the educational setting. Evidence of this can be found, for example, in a complaint of alleged misconduct at National Taiwan University.

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Annie Lu, a 27-year-old graduate student alleged that she was flunked out of a doctoral program at the National Taiwan University because she refused the sexual advances of Huang Ming-Chou, a business professor and the Chairman of her academic review committee.<sup>115-116</sup> The sexual harassment allegations were denied by Huang Ming-Chou who instead claimed that he had received a phone call from another university professor, Winston Wang, who he accused of having an affair with the student and trying to influence his decision while he was reviewing the student's Ph.D. candidacy.<sup>116</sup>

Although this caused quite a scandal at the time (in particular, because Winston Wang was the heir and eldest son of the founder of the Formosa Plastics Group, one of the biggest conglomerates in Taiwan), no actual criminal charges were brought against any parties involved.

## II. HOW DOES THE TAIWANESE LEGAL FRAMEWORK APPLY TO SEXTORTION?

Taiwan is a civil law jurisdiction. Taiwan's Constitution, which became effective in 1946 and was most recently revised in 2004, guarantees certain individual human rights and freedoms, lays down fundamental national policies and establishes a balanced division of power between central and local governments through a centralized system of government with five branches: Executive Yuan, Judicial Yuan, Legislative Yuan, Control Yuan and Examination Yuan.

Taiwan has extensive legislative provisions covering corruption, sexual offenses and sexual harassment, which relate to the core elements of sextortion. Bribery provisions relate not only to financial bribery, but also to bribery in kind, such as catering for sexual favors, which constitutes sextortion. In addition, there are specific provisions, such as Article 228 of the Criminal Code, which criminalize the abuse of authority in exchange for sexual favors.

### A. ANTI-CORRUPTION LEGISLATION AND CASES

In Taiwan, the principal anti-corruption provisions are contained in the following legislation: (1) the Anti-Corruption Act; (2) the Criminal Code; and (3) the Organic Statute for Anti-Corruption Administration. However, none of these laws expressly addresses the issue of sextortion. Instead, tribunals that adjudicate corruption offenses have interpreted bribery provisions broadly enough to relate not only to financial bribery, but also to bribery in kind involving for example sexual favors.

The Anti-Corruption Act and the Criminal Code can be applied extraterritorially, and officials are subject to the Anti-Corruption Act whether they receive bribes within or outside Taiwan. However, the statutes have no jurisdiction over the bribing of local officials outside of Taiwan. Taiwan has implemented a number of institutional and legislative reforms that could lead to the more effective prosecution of sextortion. To strengthen its anti-corruption efforts, for example, the Taiwanese government amended the Anti-Corruption Act and established the Agency Against Corruption (AAC). The AAC was designed to streamline the government's

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power and available resources in relation to corruption-related investigations. A Special Investigation Division was also set up by the Supreme Court Prosecutors' Office to oversee corruption investigations involving the president, vice-presidents, heads of the five yuans, ministers and military officials holding the rank of general and above.

While inroads have been made into combating corruption in Taiwan, significant political and practical barriers remain. It has been suggested that the government has not done more to fight corruption, including sextortion, due to the fear that its chances of winning future political elections will be affected, and the possible public relations disaster should any arrested suspects implicate other high-ranking accomplices or partners. Without political motivation, it is unlikely that adequate human and budgetary resources will be assigned to combating corruption or that anti-corruption laws will be enforced impartially by anti-corruption agencies.<sup>117</sup>

Moreover, this perceived corruption of the police force<sup>118</sup> and the court system (where 36 per cent of people surveyed in 2013 by the NGO Transparency International in Taiwan admitted that they had paid off someone in the judiciary),<sup>119</sup> together with high-profile scandals involving senior judges,<sup>120</sup> discourages victims from reporting or whistle-blowing. There are also questions over the impartiality of the court system in Taiwan, in particular given recent acquittals or lighter than expected sentencing of public figures on corruption charges.<sup>121</sup>

Evidentiary challenges could also be significant in prosecuting sextortion cases under anti-corruption statutes. It may sometimes be difficult to link the sexual act itself with the corruption or quid pro quo exchange. And, where a prior relationship exists, it might be difficult to determine whether the act was performed as a normal part of the relationship, or if it was specifically for a corrupt intent in exchange for a benefit of some kind.

Lastly, even if a prosecution were successful, there remains the problem of how to sentence justly. It may be difficult to quantify a bribe when it involves a sexual act, which may in turn pose a challenge in sextortion cases. Also, as yet, the judiciary has not drawn a clear line in its definition of the relationship between a public official's unlawful gains and official duties. This results in judges having conflicting opinions when dealing with bribery and corruption cases, which results in ambiguity on whether offenders' actions are crimes or not, as the answer may depend on which judge is sitting at the time.<sup>122</sup>

### **Anti-Corruption Act**

The Anti-Corruption Act (the "ACA"), enacted in 1963 and recently amended in November 2011, is the principal piece of legislation governing anti-bribery practices in Taiwan. The ACA prohibits anyone from bribing or unjustly enriching officials in public office. Any persons found to be providing or receiving bribes may be charged with criminal liability.<sup>123</sup>

Pursuant to Article 4(1)(5) of the ACA and Article 5(1)(3) of the ACA, "it is a criminal offense for a public official to demand, agree to accept or accept a bribe or other unjust enrichment for the performance of a relevant function or activity, regardless of whether or not the public official violates his duty." Corruption is punishable by a maximum of three years in prison



and/or a fine of up to NT\$500,000 for anyone who offers bribes or gifts to government officials, even if the latter do not breach their official duties.

However, the current legal framework penalizing bribery does not provide an explicit definition for “bribe” or “unjust enrichment”. The absence of any statutory definition thus requires judicial interpretation, which is determined on an *ad hoc* basis with no *de minimis* threshold.

In general, judges adhere to the definitions found in precedents provided by the Supreme Court, which construe a bribe as “money or any property that has monetary value” and unjust enrichment as “any tangible and intangible interests that can meet one’s needs or satisfy one’s desire.” While the exchange of sexual favors in a sextortion case would not constitute a financial “bribe” under these definitions, it might be considered “unjust enrichment” for purposes of the ACA.

While case law is difficult to come by, one case has been identified that involves facts closely resembling sextortion:

#### ***Taiwanese Public Prosecutor Coerced Witness into Sex – 2012***<sup>124</sup>

Wu Jie-Ren used his position as a public prosecutor to coerce a witness from a 2006 case that he was investigating into bed, in exchange for the promise that court documents would not be sent to the witness’s home in view of her family. He was sentenced to 7.5 years under the ACA, and his appeal was rejected.

Jie-Ren had also been accused of sexual harassment towards other women twice before, but could not be prosecuted as the Sexual Harassment Prevention Act was not yet in force at the time.

#### **The Criminal Code - Bribery**

The Criminal Code, enacted in 1935, also contains anti-corruption provisions. In practice, however, criminal court judges have applied the ACA rather than the Criminal Code when deciding cases related to corruption, because the ACA was specifically enacted for the purpose of addressing corruption-related issues and thus takes precedence over general laws such as the Criminal Code.

Under the Criminal Code, a corruption offense occurs, among other instances, when “a public official or an arbitrator demands, agrees to accept, or accepts a bribe or other improper benefit for an official act”.<sup>125</sup> Only the bribery of a “public official” – as defined in the Criminal Code – will carry criminal penalties.<sup>126</sup>

As noted above, the Criminal Code does not provide an explicit definition for “improper benefit” and, therefore, courts are required to interpret its meaning on a case-by-case basis. Whilst we are not aware of any cases that have interpreted “improper benefit” as including a sexual favor, the plain meaning of the language may be broad enough to encompass such an interpretation.

### **The Organic Statute for Anti-Corruption Administration and the Agency Against Corruption**

In 2011, the Legislative Yuan passed the Organic Statute for Anti-Corruption Administration (OSAA), which treats as a criminal offense the “attempt to bribe or the acceptance of a bribe by a government official.” The nine-article Act also established the AAC, which will be responsible for formulating, promoting, and coordinating Taiwan’s anti-corruption policies; investigating and prosecuting corruption cases; and supervising the ethics divisions of government agencies.

## **B. ABUSE OF AUTHORITY**

In addition to bribery, the Criminal Code stipulates the offense of abuse of authority. Article 228 expressly penalizes any person who “take[s] advantage of his authority over another person who is subject to his supervision, assistance, caring because of family, guardian, tutor, educational, training, benefactor, official, or occupational relationship or a relationship of similar nature to have sexual intercourse with such other person.”

A blog commentator recently reported on a mainland China case in which a professor extorted sexual favors from female students and stated that if the case had taken place in Taiwan, the crime could have been prosecuted under Article 228 of the Taiwanese Criminal Code.<sup>127</sup> In discussing the application of Article 228, the commentator further noted that, even though the female student did not refuse to have sexual intercourse, her consent was not given willingly but only because to refuse would jeopardize her academic future. This suggests that Article 228 could apply squarely to sextortion cases.

## **C. SEXUAL HARASSMENT LEGISLATION**

In addition to anti-corruption laws, most elements of the offense of sextortion may also be caught under the Act of Gender Equality in Employment and the Sexual Harassment Prevention Act, which criminalize sexual harassment.

The Act of Gender Equality in Employment only addresses sexual harassment in the workplace and expressly prohibits an employer from making “a sexual request toward an employee or an applicant ... as an exchange for the establishment, continuance, modification of a labor contract or as a condition to his or her placement, assignment, compensation, evaluation, promotion, demotion, award and discipline.”<sup>128</sup> The penalties for sexual harassment in the workplace are imprisonment for up to two years or fines of NT\$100,000.

<sup>129</sup>

To address a perceived gap in the law on sexual harassment, Taiwan enacted the Sexual Harassment Prevention Act, which also criminalizes conduct involved in sextortion but extends beyond the workplace. For this reason, the Sexual Harassment Prevention Act may prove better at capturing sextortion cases, as it covers sexual harassment in “education, training, services, plans or activities.” Sexual harassment under this Act expressly includes situations in which “a person’s obedience to or rejection of another’s sexual advances

becomes a condition of obtaining, losing or reducing their rights and interests in work, education, training, services, plans or activities.”<sup>130</sup>

Notwithstanding the increased awareness of sexual harassment and the improved legal mechanisms to address it, women’s groups maintain that the judiciary continues to be dismissive of sexual harassment complaints.<sup>131</sup>

## D. RAPE AND SEXUAL ASSAULT LEGISLATION

Under the Criminal Code, rape is defined to include “sexual intercourse with a male or female by threats, violence, intimidation, inducing hypnosis, or other means against the will of such person.” Moreover, sexual assault occurs when a person “commit[s] an obscene act against a male or female against their will through the use of violence, threats, intimidation, or hypnosis.”

There is no requirement for the victim to press charges of rape for the prosecutor to charge the perpetrator with rape. Those convicted of rape face not less than five years’ imprisonment, with courts delivering sentences of five to ten years on average. Sexual assault is penalized with imprisonment of up to five years.

The Ministry of Health and Welfare estimated that as of July 2013 there were 8,029 reports filed for rape or sexual assault, but only 1,282 persons had been indicted and 1,297 persons convicted. Further, it has been estimated by the Ministry Of Justice (MOJ) that the average prosecution rate for rape and sexual assault between 2008 and 2013 was roughly 50 percent, with average conviction rates of prosecutions at approximately 90 percent.<sup>132</sup>

While rape and sexual assault laws might provide a useful tool for prosecuting sextortion in Taiwan, information on their interpretation and application by courts is scarce because trials are not open to the public without the victim’s consent. Moreover, proving some of the elements of the offenses under gender-based violence laws can constitute a significant challenge in sextortion cases. For example, it may be difficult to demonstrate that the sexual acts were not consensual or that a sexual act has actually taken place.

Another barrier to prosecution is the strong degree of social stigma attached to these crimes against women. Many women are deterred from reporting the crime due to fears of being shamed based on conservative attitudes towards honor. Abused women often do not report any incidents to the police due to social pressure not to disgrace their families.<sup>133</sup> The Ministry of Interior estimates that the total number of sexual assaults is actually ten times higher than the number reported to police.<sup>134</sup>

Further, traditional patriarchal thinking in Taiwanese society still affects the handling and understanding of crimes against women, despite advocacy by women’s groups. While some headway has been made, for example, by establishing automatic prosecution of sexual assault without the need for the victim to report it, the Taiwan Coalition Against Violence has found that the police only accept a low number of cases, and conviction rates for sexual offenses are low in comparison to ordinary crimes.<sup>135</sup>

## E. ETHICAL RULES AND CODES OF CONDUCT

In 2011, the OSAA established the Agency Against Corruption (AAC) under the MOJ to be responsible for formulating, promoting, and coordinating Taiwan's anti-corruption policies; investigating and prosecuting corruption cases; and supervising the ethics divisions of government agencies.<sup>136</sup> In this capacity, the AAC has issued ethical guidelines for employees that fall within the Civil Servants Act, namely: civil servants; military servicemen; public school teachers; and public health workers.

While the constitution of the AAC was a historic and positive step for Taiwan in tackling corruption and sextortion, there have been reports that the agency lacks the manpower necessary to investigate thoroughly cases throughout Taiwan.<sup>137</sup> In addition, investigators of the AAC do not have the status of judicial police and are not independent. The agency does not have authority to prosecute ministerial-level officials<sup>138</sup> which means that once an investigation has begun, the work of the investigators may be restricted and interfered with by superior agencies. In some cases, the investigators may even face retribution.

In this sense, the status and duties of the AAC need to be clarified, or its investigative powers will remain compromised. In order to be effective, watchdog agencies such as the AAC should have overarching authority. Multiple agencies with unclear jurisdictional boundaries will be ineffective in preventing and investigating corruption offenses, particularly of those in public power.

## F. CONCLUSIONS

While the current legislative framework would appear to be rather favorable for criminalizing sextortion, the best legal course to pursue in bringing a sextortion claim remains unclear due to the lack of freely available case law.

We also note that there are still challenges to be addressed, including the lack of political will; the perceived corruption of the police force and the court system; the procedural and evidentiary hurdles to prosecution; and the social stigma and fear surrounding victims.

It has been suggested that the Taiwanese government lacks political motivation due to a concern that holding large anti-corruption campaigns will jeopardise its chances of winning political elections. In addition, with a history of politicians reaching high-ranking positions through the acceptance of bribes to fund themselves and their parties, such as in the high-profile corruption case of the former president, Chen Shui-Bian and various corruption scandals involving the close aides of the current president Ma Ying-Jeou<sup>139</sup>, it is unlikely that politicians will seek to implement anti-corruption policies that could implicate them or their colleagues.<sup>140</sup>

This perceived corruption of the police force and the court system also discourages possible victims from reporting the crime. This is compounded by the strong degree of social stigma related to crimes against women and victims' fear of disgracing their families.

Another distinct challenge of prosecuting cases under gender-based violence laws in Taiwan is the difficulty in determining whether the sexual act took place, whether the sexual acts were consensual, and whether the act is linked to the victim receiving a benefit in exchange.

### III. RESOURCES

#### A. SUPPORT AVAILABLE FOR VICTIMS

The Legislative Yuan passed the Witness Protection Law in 2000, in order to offer protection for witnesses who testify in criminal cases that involve crimes such as money-laundering, fraud or bribery involving public officials. This legislation ensures that the identity of the witness is kept anonymous.

Additionally, the Anti-Corruption Informant Rewards and Protection Regulation encourages whistle-blowers to report any corrupt activities by providing compensation, protection and confidentiality for those reporting acts of corruption. The rewards are classed in seven different categories and the amounts (ranging from NT\$300,000 to NT\$10million) are proportional to the severity of sentence the convicted person receives.<sup>141</sup>

Lastly, Taipei Women's Rescue Foundation (TWRF) is an agency that offers support to women. Further information on their work can be found on their website:  
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## TAIWAN - CIVIL LAW JURISDICTION

## ANTI-CORRUPTION LAWS

## FEDERAL LAWS

STATUTE: CRIMINAL CODE OF TAIWAN ; <sup>142</sup> ARTICLES 121, 123, 131.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p>Any Public Official/Arbitrator.</p> <p>Public Official <sup>143</sup>means:</p> <ul style="list-style-type: none"> <li>• "people who serve the agencies of the Taiwan government or local autonomy so as to be provided with legal functions, or people who engage in public affairs in accordance with laws so as to be provided with legal functions"; or</li> <li>• "people who are authorized by the agencies of the Taiwan government or local autonomy in accordance with law for engaging in the public affairs within the authority of the consignor."</li> </ul>	<p>Defined in Art. 121</p> <ul style="list-style-type: none"> <li>• To demand, agree to accept, or accept a bribe or other improper benefits for an official act.</li> </ul>	<p>Imprisonment: Up to 7 years</p> <p>Fine: Up to NT\$5,000</p> <p>Others: A benefit received through the commission of the offence shall be confiscated; if the whole or a part of such a benefit cannot be confiscated, the value thereof shall be collected from the offender.</p>
<p>Any person in anticipation of being a public official or an arbitrator.</p>	<p>Defined in Art. 123</p> <p>To demand, agree to accept, or accept a bribe or other improper benefits for an official act and perform such act after becoming a public official or arbitrator.</p>	<p>Imprisonment: Up to 7 years</p> <p>Fine: Up to NT\$5,000</p> <p>Others: A benefit received through the commission of the offence shall be confiscated; if the whole or a part of such a benefit cannot be confiscated, the value thereof shall be collected from the offender.</p>

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any Public Official.	Defined in Art. 131 To directly or indirectly seek to gain illegal benefits from a function under his control or supervision for himself or others and gain benefits.	Imprisonment: 1 to 7 years Fine: Up to NT\$70,000 Others: A benefit received through the commission of the offence shall be confiscated; if the whole or part of such benefit cannot be confiscated the value thereof shall be collected from the offender.
Any person	Defined in Art. 228 To take advantage of his authority over another person who is subject to his supervision, assistance, caring because of family, guardian, tutor, educational, training, benefactor, official, or occupational relationship or a relationship of similar nature to have sexual intercourse with such other person. An attempt to commit the act specified in the preceding paragraph.	Imprisonment: 6 months to 5 years

**STATUTE: ANTI-CORRUPTION ACT; <sup>144</sup> ARTICLES 5 & 11.**

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	Defined in Art. 5(3) To demand, take or promise to take bribes or other unlawful profits by an act that belongs to the official duties.	Imprisonment: Minimum of 7 years  Fine: Up to NT\$60 million
Any person (bribe-giver)	Defined in Art. 11 To tender a bribe or other unjust valuables, promise to give anything of value or give anything of value to a public officer in return for that person's performing his or her official duties.	Imprisonment: Up to 3 years  Fine: Up to NT\$500,000  Others: detention



## RAPE AND SEXUAL ASSAULT LAWS

STATUTE: CRIMINAL CODE OF TAIWAN; <sup>145</sup> ARTICLES 221, 224 AND 228.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	Defined in Art. 221 To have sexual intercourse with a male or female by threats, violence, intimidation, inducing hypnosis, or other means against the will of such person. An attempt to commit the act specified in the preceding paragraph.	Imprisonment: 3 to 10 years
Any person	Defined in Art. 224 To commit an obscene act against a male or female against their will through the use of violence, threats, intimidation, or hypnosis.	Imprisonment: 6 months to 5 years

## SEXUAL HARASSMENT LAWS

STATUTE: ACT OF GENDER EQUALITY IN EMPLOYMENT; <sup>146</sup> ARTICLES 12 & 13.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Employer and harasser	Article 12 Sexual harassment shall mean one of the following circumstances: 1. In the course of an employee executing his or her duties, any one makes a sexual request, uses verbal or physical conduct of a sexual nature or with an intent of gender discrimination, causes him or her a hostile, intimidating and offensive working environment leading to infringe on or interfere with his or her personal dignity, physical liberty or affects his or her job performance.	The employers and the harassers shall be jointly and severally liable to make compensations. However, the employers are not liable for the damages if they can prove that they have complied with the Act of Gender Equality in Employment and provide all preventive measures required, and they have exercised necessary care in preventing damage from occurring but they still happen. If compensations cannot be obtained by the injured parties pursuant to the stipulations of the preceding paragraph, the court may, on their application, taking into consideration the financial conditions of the employers and the injured parties, order the employers to compensate for a part or the whole of the damage.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
	<p>2. An employer explicitly or implicitly makes a sexual request toward an employee or an applicant, uses verbal or physical conduct of a sexual nature or with an intent of gender discrimination as an exchange for the establishment, continuance, modification of a labour contract or as a condition to his or her placement, assignment, compensation, evaluation, promotion, demotion, award and discipline.</p> <p>Article 13</p> <p>Employers shall prevent and correct sexual harassment from occurrence.</p>	The employers who have made compensations have rights of recourse against the harassers.

**STATUTE: SEXUAL HARASSMENT PREVENTION ACT; <sup>147</sup> ARTICLE 2.**

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	<p>Article 2</p> <p>Sexual harassment in the Act refers to the sexual statements or sexual behaviour violating another person's wishes and also to the following situations:</p> <p>A. If a person's obedience to or rejection of another's sexual advances become a condition of obtaining, losing or reducing their rights and interests in work, education, training, services, plans or activities.</p>	<p>Sexual harasser</p> <p>Fine: NT\$10,000 to NT\$100,000</p> <p>In relation to a person who is in charge of education, training, medical treatment, public affairs, business affairs, employment, or other relevant fields, and uses his or her power, influence or opportunity to sexually harass another person: a heavier fine, up to 50% extra, should be imposed on the person.</p>







# UGANDA





## I. HOW DOES SEXTORTION MANIFEST ITSELF IN UGANDA?

In Uganda, sextortion is mostly prevalent in schools and in government. However, there are very few cases of sextortion reported in the media and even fewer are prosecuted. This speaks to the lack of awareness of the crime and the fear and stigma inflicted on victims who report the crime or seek help.

### A. SEXTORTION IN EDUCATIONAL SETTINGS

Teachers are reportedly the major perpetrators of sexual abuse, including sextortion, in Uganda. A 2012 study commissioned by the Ugandan Ministry of Education and Sports (MoES) shows that some 77.7% of primary school children and 82% of secondary school students reported having experienced some form of sexual abuse at school.<sup>148</sup>

According to another study funded by the World Bank,<sup>149</sup> and as confirmed by Martha Muhwezi, national coordinator of the Forum for African Women Educationalists, girls are lured into sex with their teachers in all kinds of ways, including promises of gifts and good marks in class. Sulaiman Madada, Member of Parliament for Bbaale County – who was not surprised by the findings – further noted that girls usually give in to teachers' sexual demands because they fear the consequences of refusing.

One of the devastating repercussions of such abuse in the educational setting is that it unequivocally leads to a host of other social problems. The MoES study, for example, revealed that when teachers force girls into sex, their concentration level in school diminishes, some drop out of school, and some become pregnant and are forced into early marriages.<sup>150</sup> Moreover, these children face an increased risk of contracting sexually transmitted diseases, including HIV and AIDS.

Further evidence of the pervasive presence of sextortion in schools can be found, for example, in a complaint of alleged sextortion at Butuuza Primary School.

#### **Kabale Parents Demand Dismissal of Teacher for Sexual Harassment**

In 2011, the Butuuza Primary School, located in the Kabale District, was under pressure to dismiss teachers accused of sexually harassing their pupils. Among other allegations, the Butuuza Primary School management committee claimed that teacher Simpson Twimukye regularly preyed on girls in the school, demanding sex for favors.<sup>151</sup> Twimukye was apparently caught red-handed, threatening girls who refused to submit to his demands.

Parents of the threatened girls appealed to the headmaster of the school for help. When they received none, they removed their children from the school. The alleged crimes are listed in a two-page letter sent by the school management committee to the Kabale District Education Officer, the Chief Administrative Officer, the Secretary for Education and the local leaders in Kamuganguzi.

The Kabale Inspector of Schools, said that she had investigated the case against Twijukye but that there was no evidence of sexual assault. The Inspector stated that reports from students that alleged he had publicly fondled their breasts could not be ascertained and he could thus only be charged with making inappropriate sexual comments to the girls. This shows the challenge victims face in demonstrating that sextortion has taken place.

The Inspector recommended that disciplinary action be taken, whereby Twijukye would be posted to another school and monitored for sexual predation. The school management committee protested that this course of action was not sufficient and cautioned that sending Twijukye to another school would only open up more girls to his alleged abuse. No further information was publicly available on this matter.

## B. SEXTORTION AND PUBLIC OFFICIALS

While it is well known that sextortion is prevalent among Ugandan public officials who abuse their position of authority, newspapers do not report much on individuals in government positions. The dearth of reporting on this issue may be in part because media outlets in Uganda, as in many African countries, generally tend to be small and dependent on public funding. It is therefore questionable whether any of these media outlets can play the significant role of being the watchdogs of society in the form of advocating for public accountability; and whether it is even plausible to strengthen their role in this regard considering their existence in an environment where they can easily be manipulated by powerful forces in the government.

There are a few stories that, despite the often painfully obvious gaps in reporting, have managed to surface in certain newspapers. The most recent and reported instance being the case of Ugandan military officers abusing their power over vulnerable women in the villages of Somalia.

### **Ugandan Military Officers Suspended over Investigation into Sextortion in Somalia**

Uganda has suspended 15 of its senior military commanders over their conduct in Somalia including allegations of sexual exploitation.<sup>152</sup> The suspension comes in the wake of a damning report by Human Rights Watch (HRW), which accused troops with the internationally funded African Union Mission to Somalia (AMISOM) of preying on vulnerable women and girls.<sup>153</sup>

The HRW report quoted several women as saying that they had gone to the AMISOM camp seeking medicine for their sick babies, but were then forced to have sex. The vulnerable women largely came from camps in the capital Mogadishu, having fled rural Somalia during a devastating famine in 2011.

African Union chief, Nkosazana Dlamini-Zuma, ordered an investigation into the allegations, and the probe was due to be completed by November 30, 2014. No further information was publicly available on this matter.

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### **Uganda ambassador in sex scandal**

An example of sextortion by a public official in the workplace took place in 2006, when Uganda's Ambassador to Australia, Dr. James Lukabyo, became embroiled in a sexual harassment scandal. Lukabyo's former personal assistant, Melanie Schrattenholz, accused Dr. Lukabyo of sexual harassment, discrimination and illegal dismissal before the Australian authorities.<sup>154</sup> Among other allegations, the widowed mother of three claimed that on several occasions the diplomat made sexual advances and forced upon her unwanted sexual touching.

When Schrattenholz finally refused Lukabyo's attempts to kiss her and turned down his invitations to work at his home, Lukabyo withheld her pay and wrote a memo warning Schrattenholz against absenteeism from work. Schrattenholz denies that she was often absent from work as alleged by Lukabyo. He fired her shortly after she consulted her lawyer over the way that the ambassador had continued to treat her.

Complying with Lukabyo's sexual demands in effect became a condition of keeping her job, making Schrattenholz a victim of sextortion.

## **II. HOW DOES THE UGANDAN LEGAL FRAMEWORK APPLY TO SEXTORTION?**

Uganda is an independent Republic within the British Commonwealth situated in East Africa. The 1995 Constitution is the supreme law in Uganda and established Uganda as a republic with an executive, legislative, and judicial branch. Given that Uganda was a British colony, the current Ugandan legal system consists of a mix of Ugandan statutory law, English common law, customary law and doctrines of equity.

The Government of Uganda, through local statutes, national policy and in partnership with both local private and international organizations has been attempting to fight conduct such as sextortion. While the term 'sextortion' is not commonly used in Uganda and the offense is absent from the legislation, sextortion is indirectly prohibited and can be prosecuted under national laws as a form of sexual harassment, as gender-based violence and as certain forms of corruption.

However, it is difficult to determine the exact application of these laws to sextortion, as there appear to be almost no cases relating to sextortion and very few relating to gender-based violence that are reported and prosecuted by the Ugandan court system. In this sense, the cases referred to in this section do not address sextortion directly, but illustrate the types of gender-based violence and corruption cases that get prosecuted in Uganda.

Moreover, practical considerations might make it very difficult to secure a conviction for sextortion in Uganda. Cases involving gender-based violence often require lack of consent (e.g., under rape laws) and a great deal of evidence, which, with poor resources and inadequate hospital and police training, often means cases go unprosecuted and perpetrators go unpunished.



Furthermore, the remedies are often inadequate – petty fines and light sentences being the most prevalent justice available – and are hardly enough to be a deterrent or to encourage a physically and mentally traumatized victim of sextortion to speak up, especially considering the social stigma attached to such accusations.

## A. ANTI-CORRUPTION AND ABUSE OF AUTHORITY LAWS AND CASES

### **The Anti-Corruption Act of 2009**

Section 2 of the Anti-Corruption Act of 2009 (“ACA”) deals with the offense of corruption, defined as “the solicitation or acceptance, directly or indirectly, by a public official, of any goods of monetary value, or benefits, such as a gift, favour, promise, advantage or any other form of gratification for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.” A person convicted of corruption is liable to a term of imprisonment not exceeding ten years or a fine or both.

There is no case law in Uganda that construes the terms “benefits” as either including or excluding sexual favors. However, the plain meaning of any “form of gratification for himself” would most likely encompass a sexual favor. Therefore, for the purpose of this research, a sexual favor can be regarded as a “benefit” under the ACA.

Moreover, the ACA contemplates corruption in the private sector, which includes the “solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for any other person, for him or her to act, or refrain from acting, in breach of his or her duties.”

Lastly, section 11 of the ACA contemplates the offense of abuse of authority and provides that “a person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points (approximately USD1295) or both.”

### **The Penal Code Act 1950**

Criminal responsibility for corruption is found in both the Penal Code and the ACA. Those guilty of bribing public officials, diversion of public funds, influence peddling, or nepotism will be liable on conviction to a term not exceeding ten years. The Penal Code regulates corruption in both the public and private sector.

The ACA and the Penal Code can be used cumulatively or separately to prosecute corruption. While the ACA repealed various sections of the Penal Code when it came into force, under Ugandan law when a statute is repealed and all or some of its provisions are at

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the same time re-enacted, the re-enactment is considered a reaffirmation of the old law and a neutralization of the repeal. In this sense, the provisions of the repealed Act (in this case the Penal Code) that are thus re-enacted (in this instance under the ACA) continue in force without interruption.<sup>155</sup>

### **The Code of Conduct and Ethics for Uganda Public Service**

In addition to the ACA, the Code of Conduct and Ethics for Uganda Public Service regulates the conduct of public officials in Uganda. A public official, in Uganda, who gains an undue advantage whilst acting in the exercise of his or her official duties would be in breach of the Code. The term “undue advantage” is relatively broad and may be interpreted to include “sexual favours”, if received under the exercise of official duty.

The remedies under the Code for a breach in the exercise of an official’s duties would be those available under the respective civil or criminal laws under which the charge is brought. For example, if the ‘undue advantage’ is sexual intercourse this may evoke a criminal rape charge - under The Penal Code Act 1950 Cap 120 - for which the most severe punishment is death.

## **B. SEXUAL HARASSMENT LAWS AND CASES**

In Uganda, sexual harassment is especially prevalent in employment and educational institutions. According to the Ugo News website<sup>156</sup>, research carried out in 2013 in 1500 companies, 1000 secondary and primary schools, 10 Universities, 200 health centers, 100 churches, 50 mosques and 50 financial institutions showed the situation in which Ugandan women are working and the day-to-day challenges they face at their place of work: “99 percent of house girls are sexually abused by men in their bedrooms when their wives are away for work or when they are sick after delivery or both.”<sup>157</sup> The research also showed that 90 percent of these women were victims of what was commonly referred to as rape or sexual harassment by those in authority. Many of these cases could amount to sextortion and be prosecuted as such, if direct legal recourse were available.

Notably, Uganda does not have a consolidated law to deal with sexual harassment. Therefore, one either has to rely on different statutes that directly address the issue or present the circumstances to fit the elements under the law. In particular, the following statutes penalize sexual harassment and could be used to prosecute sextortion.

### **The Employment Act of 2006 & the Employment Regulations of 2012**

The Employment Act prohibits sexual harassment, but is confined to the employment context. Under Section 7(1), sexual harassment of an employee occurs under this Act when an employer or a representative of that employer or a co-worker “makes a request for sexual intercourse, sexual contact or any other form of sexual activity that contains (a) an implied or express promise of preferential treatment in employment; (b) an implied or express threat of detrimental treatment; or (c) an implied or express threat about the present or future employment status of that employee.”

The Employment Regulations elaborately treat the issue of sexual harassment in employment and set forth the requirements that employers need to meet, procedures and mechanisms for dealing with sexual harassment complaints, and committees to handle issues of sexual harassment. For instance, Regulation 3(1) requires that “An employer with more than 25 employees should have a written sexual harassment policy that shall include a notice that sexual harassment at the workplace is unlawful, a statement that it is unlawful to retaliate against an employee for filing a complaint or for co-operating in an investigation of a sexual harassment complaint, a description and examples of sexual harassment, a description of the process for filing sexual harassment complaints and education and training programmes on sexual harassment for all employees on a regular basis.”

Because sexual harassment is defined quite broadly to encompass all types of sexual harassment, including those that make sexual advances a pre-requisite to job security or promotion, the abovementioned Acts would allow for the prosecution of sextortion in the workplace. This is of paramount importance where there is no other direct way to prosecute sextortion.

### ***Court of Appeal 2003, Attorney General v. Florence Baliraine***

A trial court held that a supervisor was guilty of sexual harassment and unlawful termination of employment for regularly demanding sexual favors with his employee and then firing her upon her return from the one day of leave. The employee was terminated because she had allegedly failed to trace a personal fax message to the employer’s wife.

The Court of Appeal dismissed the appeal and upheld the findings of the trial court.

### **Domestic Violence Act of 2010 (“DVA”)**

While domestic violence generally falls outside the definition of sextortion, the Domestic Violence Act is important in instances where there is a domestic relationship that becomes a sexual relationship between a domestic worker and an employer, as that relationship would not necessarily fall under the Employment Act 2006. <sup>158</sup>

Furthermore, because these relationships tend to be informal – that is to say, without any documentation – employment may be difficult to prove; hence the DVA would be a better alternative to prosecute sextortion in these instances.

Domestic relationships are defined under Section 3 as (i) family relationships, (ii) those similar to family relationships or, (iii) those in a domestic setting, including employment as a domestic servant and other employment.

Related to this, Section 2 of the DVA defines domestic violence as an act or omission that harms, injures or endangers the health, life or wellbeing, whether mental or physical. It includes causing (i) physical abuse, (ii) sexual abuse, or (iii) emotional, verbal and physiological abuse. It also penalizes harms or injuries caused to a victim with a view towards coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security.

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As provided in Section 4(2), offenders under this statute are liable, upon conviction, to pay a fine not exceeding 48 currency points (approximately USD370) or imprisonment not exceeding two years or both.

### C. RAPE AND SEXUAL ABUSE LAWS AND CASES

Gender-based violence is still rampant in Uganda, despite the fact that the 1995 Constitution of Uganda emphasizes the principle of equality and prohibits discrimination of all forms, including those based on sex.<sup>159</sup> The Constitution also protects the rights of women,<sup>160</sup> mandating the state to accord women full and equal dignity of the person with men, and provides a very strong platform for gender mainstreaming in all sectors.

Sexual and gender-based violence is even more problematic during armed conflict and in displaced settings, where civilian women and children, who are often targeted for abuse, comprise the greatest numbers and are the most vulnerable to exploitation, violence and abuse simply by virtue of their sex, age and status in society.<sup>161</sup> However, the magnitude of the problem of sexual gender-based violence extends beyond war and conflict situations. Assistant Commissioner of Uganda Police, Christine Alalo said that in 2008 the Children and Women's Protection Unit was elevated to a full department and that, in a day, a police station addresses about 10 cases of gender-based violence.<sup>162</sup>

Among others, the difficulty of securing a conviction due to insufficient evidence is a key challenge to prosecuting rape and sexual abuse cases. These cases often require a great deal of evidence but, with poor resources and inadequate hospital and police training, evidence is often unavailable, and many cases go unprosecuted and perpetrators unpunished.

#### **Criminal Code, Chapter XIV cap 120 – Offences Against Morality**

Section 123 of the Criminal Code defines rape as “instances where a person has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act.” Upon conviction, the offender could be sentenced to death. This definition implies that a case in which consent is obtained by means of intimidation, or where the perpetrator uses or abuses his authority to force a woman to have sexual intercourse, would be prosecuted under Ugandan law as rape. Hence, the criminal code would apply in cases where the act of sextortion falls under a sexual crime.

In addition, Section 128 states that: “where any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanour and is liable to imprisonment for one year. Or any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years.”

Finally, Section 129 criminalizes defilement, which is defined as the act of having sex with a girl under the age of 18.<sup>163</sup> Hence, sextortion cases involving teachers and underage pupils could also be prosecuted as defilement under the criminal code. An example of this was found in a recent case before the Court of Appeal of Uganda.

***Court of Appeal, Attorney General v. Charles Kinyera***

In 2014, the Court of Appeal upheld the conviction of Charles Kinyera, the former headmaster of Gwengdiya Primary School, on the grounds that he shamelessly defiled a pupil he was supposed to protect. Wilfred Komakech testified for the prosecution that: “he opened the headmaster’s office, to fetch more crates of soda only to find his boss, the head teacher, wriggling on top of a 13-year-old schoolgirl”. On the basis of Komakech’s testimony and a medical examination, the former headmaster was sentenced to 13 years in prison for defilement. Although additional facts are not available, if the schoolgirl understood that her academic success depended on yielding to the teacher’s sexual advances, then this was a case of sextortion.

## D. ETHICAL RULES AND CODES OF CONDUCT

Under the codes of ethics for public officers and teachers, sextortion cases are penalized and punishments tend to be severe as they include criminal or civil prosecution. In light of this, these codes are quite useful in countries – such as Uganda – where public officers and teachers are perceived to be the biggest culprits.

**The Code of Conduct and Ethics for Uganda Public Service (“CCEUPS”)**

The CCEUPS is subsidiary legislation under the Public Service Statute that governs the conduct of persons under the public service of Uganda.

Clause 4.4 (i) of the CCEUPS prohibits public officers from engaging in acts that amount to sexual harassment. Clause 2 defines sexual harassment as conduct that affects the dignity of women and men, which is unwelcome, irritating, unreasonable and offensive to the recipient. Such conduct may be explicit, verbal, non-verbal or implicit and may create an intimidating, hostile or humiliating working environment for the recipient.

According to Clause 4.4 (iv), such cases can be reported to the government department responsible for investigating civil and criminal offenses. The remedies shall be prescribed under the civil and criminal statutes, for instance, the Penal Code Act cap 120 and the Anti-Corruption Act of 2009. This code of conduct treats such actions as amounting to a violation of human rights.

**The Code of Conduct and Ethics for Ugandan Teachers (“CCEUT”)**

Part V of the CCEUT relates to the Teacher’s Personal Conduct and states that the teacher must observe the laws of Uganda, particularly in matters of sex, marriage and parenthood,

and shall at all times set a good example for the children. Additionally, Part VI, states that the Head Teacher shall not conceal any act of misconduct committed by a member of his or her staff or by any child/learner of the school whether committed within or outside the school.

## E. CONCLUSIONS

Numerous barriers and challenges seem to face the prosecution and reduction of sextortion and other forms of gender-based violence in Uganda. Most of these obstacles are centered on the fact that the role of women in society has still not progressed to that of an equal but rather that of a commodity. This often results in a conflict between the law and cultural practices, where the law alone is not enough to 'fix' this perception –it will take an entire village, which is the ethos of many African cultures and rings particularly true in the case of sextortion.

The barriers faced are intrinsically linked with lack of awareness, legislative development and implementation, transparency (particularly in the media), and resources.

**Awareness.** The research provided in this report reveals that sextortion occurs when people leverage their position of power to exploit others who usually occupy a lesser position in society. The reason this occurs is because many people are not cognizant of their rights under the laws that exist to protect them. There is often a fear amongst victims that their refusal to submit to sextortion will mean a loss of opportunity whether it be for a visa, a job or a grade. This rationale often leads to a backlash from the community, who do not understand that mental coercion is just as powerful as physical coercion.

**Legislation.** In addition to a general lack of awareness of sextortion, there is currently no statute in Uganda that specifically addresses sextortion, which forces the prosecution to rely on either prohibited sexual acts or anti-corruption laws, which do not entirely match the conduct. While these laws could be used to prosecute certain types of sextortion, their limitations in scope and application make them insufficient for addressing the various forms and settings in which sextortion manifests. In this sense, adjustments need to be made to the legal and institutional frameworks so that sextortion can be properly prosecuted and victims can receive the support they need. In particular, national and international laws need to explicitly contemplate sextortion and adopt measures for effective implementation and victim protection.

Among the critical statutory and institutional changes needed, the following should be highlighted:

- **Burden of proof.** The burden of proof for any gender-based violence offense is often placed upon the victim who has to prove that she has been victimized, and this can be difficult with little or no physical evidence. According to an article on the Uganda Radio Network website,<sup>164</sup> the lack of physical evidence of sexual harassment is one of the main reasons for the failed prosecution of the offense in Uganda, as securing a conviction in the absence of physical evidence and witnesses is hardly attainable. In 2011, the perpetrator conviction rate was estimated at 6.6 percent according to

the annual police crime report. Legislators need to amend the law to appreciate the emotional and physical difficulties of having to obtain physical evidence after any type of gender-based violence.

- **Penalties.** Another challenge to combatting sextortion is the absurdly low penalties for perpetrators engaged in offenses involving extortion and sexual crimes. This leads to distrust in the protection of the law and those who make and implement it. As indicated, some statutes regarding extortion prescribe punishments of fines as low as USD \$47. These fines are not a deterrent to the other members of the community and, as a result, such offenses are recurrent in society. The courts have a crucial role to play in ensuring that maximum penalties are handed down to all perpetrators –the seriousness of the crime should not be undermined by light sentences.

**Policies.** A recent study<sup>165</sup> found gaps in human rights laws and policies in Uganda – addressing these gaps could help guarantee that human rights are upheld. For example, the procedure to enforce constitutional provisions in Uganda’s courts is inflexible, expensive and takes a long time to complete, making it difficult to prosecute cases and to improve the system. Culture and traditions hold back enforcement of human rights laws.

**Accountability.** According to Monica Nogara,<sup>166</sup> in previous years the media in Uganda has been able to win some important victories to advance public accountability. These successes, however, have been consistently challenged by the changes in regime and thus policies. Contributing factors include the emergence of laws that restrict freedom of the press and other instruments, such as media licensing requirements and government control over advertising revenue, that are frequently used to limit media freedom and independence and thus encourage a culture of self-censorship. This is especially dangerous in a country where the media has the most crucial role in combating corruption and injustice, and can be extremely detrimental to a society. The media needs to promote advocacy and campaigns against sextortion rather than protect politicians. This could lead to more cases being reported by the media and, through exposure on an international stage, create an obligation on those in power to identify and prosecute perpetrators.

**Resources.** Even if a survivor has the courage to overcome the stigmatisation around sexual violence and is prepared to report the crime, obstacles arise immediately. The survivor may have to travel long distances to reach the police post to report the crime. Additionally, police posts lack equipment and facilities, and staff are poorly trained.<sup>167</sup> Government will need to be lobbied to ensure that resources are created in order to provide enough police stations in each region within close proximity to victims. Another important resource would be the training of the police force and hospital staff, as well as the implementation of adequate facilities and the necessary tools to collect evidence and offer victims mental, emotional and physical support. This will inevitably require proper training of the police and hospital staff as well as strict implementation of any given guidelines and codes of conduct provided. As difficult and frustrating as some of these challenges might seem; they are not insurmountable. There is much work that needs to be done by the community in order to shift the blame from victim to perpetrator, and the following steps can be taken to ensure this:

- broader recognition of sextortion;
-

- awareness raising, especially in communities where sextortion is prevalent; and
- laws that directly prosecute sextortion need to be implemented and legislated.

The changing definition of the true meaning of ethical conduct remains an overriding challenge – how does society prosecute those who do not even believe they are committing a crime? Women are often bartered as commodities and their children a by-product thereof. The attitude is that, therefore, they can be used and abused by those who have the right or ability to own them. The men who can afford to misuse them are often those with high esteem in society, those who can essentially afford any woman- these are the politicians, officers of the court, the civil servants who are tasked with their protection and as a consequence have power. Power many are free to abuse (with or without laws or courts) because they are in reality above the law. How is this resolved? How can these attitudes be changed? How do we align legislated ethics and centuries-old cultural practices? These are difficult questions that many may not currently have the answers to, but in spite of that, remain positive that with the correct legislation, adherence to policies, implementation of laws, and wide-spread education to change cultural attitudes, this may someday be achieved.

### III. RESOURCES

#### A. SUPPORT AVAILABLE FOR VICTIMS

Uganda's Gender-Based Violence Programmes, both institutional and specific are in place: e.g., the National Gender Machinery; the National Gender Policy; the 1999 National Action Plan on Women that aims to achieve equal opportunities and set priority areas of woman's empowerment; the 1993 Decentralization Policy that includes a number of gender responsive aspects for action at National and Local Government levels; and the Social Development Sector Plan, etc.

Other mechanisms to address gender-based violence include: the Uganda Human Rights Commission; the Police Family Section; Probation and Social Welfare offices; and the presence of free media/press to make gender-based violence matters known to the public.<sup>168</sup>

*Non-Governmental Organizations that can assist victims include:*

- Forum for African Women Educationalists;
- Human Rights Watch;
- The Human Rights and Equal Opportunity Commission (HREOC);
- Uganda Human Rights Commission;
- Uganda Women's Network; and
- African Network on the Prevention and Protection against Child Abuse and Neglect Uganda.



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## UGANDA - CIVIL LAW JURISDICTION

## ANTI-CORRUPTION LAWS

STATUTE: THE ANTI-CORRUPTION ACT 2009; PART I, SECTION 2 AND 11

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
<p>A public official.</p> <p>Any other person</p>	<p>Section 2 defines the offense of corruption as: “the solicitation or acceptance, directly or indirectly, by a public official, of any goods of monetary value, or benefits, such as a gift, favour, promise, advantage or any other form of gratification for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.”</p> <p>Section 11 contemplates the offense of abuse of authority and provides that: “a person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence.</p> <p>Corruption in the private sector includes: “solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for any other person, for him or her to act, or refrain from acting, in breach of his or her duties.”</p>	<p>Under Part III, Section 26 remedies include: imprisonment not exceeding 10 years or a fine not exceeding 240 currency points (USD1850) or both.</p>

### STATUTE: THE CODE OF CONDUCT AND ETHICS FOR UGANDAN TEACHERS ("CCEUT")PART V AND VI

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
The Teacher	Part V states that the teacher must observe the laws of Uganda, particularly in matters of sex, marriage and parenthood, and shall at all times set a good example for the children.	Cases are penalized and punishments tend to be severe as they include criminal or civil prosecution
The Headmaster	Part VI states that the Head Teacher shall not conceal any act of misconduct committed by a member of his or her staff or by any child/learner of the school whether committed within or outside the school.	Cases are penalized and punishments tend to be severe as they include criminal or civil prosecution.

### STATUTE: THE CODE OF CONDUCT AND ETHICS FOR UGANDA PUBLIC SERVICE; CLAUSES 2 AND 4.4

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
A public official	<p>Clause 4.4 (i) of the CCEUPS prohibits public officers from engaging in acts that amount to sexual harassment, which is defined in Clause 2 as conduct that affects the dignity of women and men, which is unwelcome, irritating, unreasonable and offensive to the recipient. Such conduct may be explicit, verbal, non-verbal or implicit and creates an intimidating, hostile or humiliating working environment for the recipient.</p> <p>The operative phrases are: "acting in the exercise of his or her official duties" and "an undue advantage."</p>	Remedies under the respective civil or criminal laws that the act has been brought under, for example, if brought under rape in Penal Code Act cap 120, the punishment is death.

## SEXUAL HARASSMENT LAWS

### STATUTE: THE EMPLOYMENT ACT 2006; PART II, SECTION 7

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
The employer or a representative of the employer responsible for the act.	Under Section 7(1), sexual harassment of an employee occurs when an employer or a representative of that employer or a co-worker: "makes a request for sexual intercourse, sexual contact or any other form of sexual activity that contains (a) an implied or express promise of preferential treatment in employment; (b) an implied or express threat of detrimental treatment; or (c) an implied or express threat about the present or future employment status of that employee."	Institution of civil or criminal proceedings against the perpetrator by the labour officer before the industrial courts. OR A discretionary amount of compensation to the victim.

### STATUTE: THE EMPLOYMENT (SEXUAL HARASSMENT) REGULATIONS OF 2012; PART I, SECTION 1

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
An employer with more than 25 employees.	Under Section 1: "shall adopt a written policy against sexual harassment which shall include the following: a. a notice to employees that sexual harassment at the workplace is unlawful; b. a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for co-operating in an investigation of a sexual harassment complaint; c. a description and examples of sexual harassment; d. a statement of the consequences for employers who are found to have committed sexual harassment; e. a description of the process for filing sexual harassment complaints and the addresses and telephone numbers of the person to whom complaints should be made; f. education and training programmes on sexual harassment for all employees on a regular basis; and g. additional training for the committee on sexual harassment, supervisory and managerial employees."	Contravention of the requirements under the Regulations attracts a fine not exceeding six currency points (approximately USD47) or imprisonment not exceeding three months or both.

## STATUTE: DOMESTIC VIOLENCE ACT OF 2010;PART I SECTION 2 AND PART II SECTION 4

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
A person with a family relationship to the victim or in a domestic setting with the victim for example in the instance of an employer of a domestic servant.	Section 2 of the DVA defines domestic violence as an act or omission that harms, injures or endangers the health, life or wellbeing, whether mental or physical. It includes causing (i) physical abuse, (ii) sexual abuse, or (iii) emotional, verbal and physiological abuse. It also penalizes harms or injuries caused to a victim with a view towards coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security. Section 4 of the DVA prohibits the act of domestic violence.	A protection order for the victim, under Section 11 and 12. A fine not exceeding 48 currency points (approximately USD370) or imprisonment not exceeding two years or both.

## RAPE AND SEXUAL ASSAULTS LAWS

## STATUTE: PENAL CODE ACT 1950 ; CAP 120.

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any person	Under Section 123: “who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act.”	The highest sentence for rape is the death sentence.
Any person	Under Section 128: (1) “who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years, with or without corporal punishment.” (3) “who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanour.	Indecent assault can amount to up to 14 years of imprisonment.  Insulting modesty can amount to up to 1 year of imprisonment.
Any person	Under Section 129: “who unlawfully has sexual intercourse with a girl under the age of eighteen years.”	The highest sentence for defilement is the death sentence.





# UNITED KINGDOM

A photograph of a modern yellow building with a grid of windows, standing next to a traditional red brick building. The text 'UNITED KINGDOM' is overlaid at the top.

Reuters: Luke McGregor





## I. HOW DOES SEXTORTION MANIFEST ITSELF IN THE UNITED KINGDOM?

A variety of reports indicate that sextortion is common within the police force in the United Kingdom. However, as a general observation, reports and data evidencing such occurrences and any related disciplinary action are hard to come by. No information has been found relating to specific examples of sextortion committed by members of the UK government, the armed forces or those holding other public office positions.

In 2012, more than 50 cases in four years had been reported involving police officers who were either found to have abused their position to rape, sexually assault or harass women or were investigated over such claims. As a response to this, the Independent Police Complaints Commission ("IPCC") and the Association of Chief Police Officers ("ACPO") conducted investigations and jointly produced a publicly available report entitled "The abuse of police powers to perpetrate sexual violence (September 2012)" <sup>169</sup>(the "Report"), which addressed the issue of police officers and police staff abusing their powers to sexually exploit or abuse residents. The report includes case study examples and identifies key themes and issues.

The Guardian Newspaper reported that it had analyzed data available, including court cases and misconduct proceedings, in an attempt to estimate the scale of sexual corruption within the police. Their research suggests that many officers are never formally charged and confirmed that perpetrators are dealt with through the police force's own internal disciplinary procedures, which means that public access to such data is very limited.

Further, in the United Kingdom, cases tried in the lower criminal court, the Crown Court, are not publicly reported due to time and cost restraints. However, a survey of news reports yielded an example of a Crown Court case involving a public official who has been prosecuted for various offenses that arguably constitute sextortion.

PC Stephen Mitchell of Northumbria Police <sup>170</sup>was charged with twenty-six offenses relating to vulnerable women he met while on duty as a Police officer over a period of seven years. He was accused of abusing his position to demand sexual favors from women in return for helping with their problems, such as getting charges dropped, access to bail and providing money for drugs. He was found guilty by a majority verdict (10:2) of two counts of rape, three indecent assaults and six counts of misconduct in public office and sentenced to life imprisonment and must serve a minimum of seven years in prison.

## II. HOW DOES THE ENGLISH LEGAL FRAMEWORK APPLY TO SEXTORTION?

Laws are classified into criminal law and civil law. Criminal law is concerned with offenses against society at large and is prosecuted by the State with the aims of punishment and deterrence. Civil law is concerned with disputes between private parties, for example, consumer and supplier, employer and employee. The injured party sues for damages or injunction.

The four principal sources of English law are legislation (the most common source of new laws or of law reform), common law, European Union law and the European Convention on Human Rights. There is no single series of documents that contains the whole of the law of the United Kingdom.

The principal legislature is the UK Parliament, which is based in London. This is the only body that has the power to pass primary legislation that applies in all four countries. The UK Parliament consists of the House of Commons and the House of Lords.

The legal system of England and Wales is based on common law one, therefore reported decisions of the senior appellate courts form a binding source of law for future decisions. Currently there is no legislation in the United Kingdom that specifically addresses all of the statutory elements of sextortion. However, the following laws are most commonly relied upon by the English courts to prosecute offenders for behavior that is indicative of abuse of power for the purposes of extorting sexual favors: Misconduct or Misfeasance in Public Office (common law offense); Sexual Offences Act 2003 (statutory offense); Bribery Act 2010 (statutory offense); Protection from Harassment Act 1977 (statutory offense); Theft Act 1968 (statutory offense).

### A. MISCONDUCT / MISFEASANCE IN PUBLIC OFFICE

Misconduct (or Misfeasance) in Public Office is a common law offense, triable only on indictment and carries the maximum penalty of life imprisonment. It is an offense rarely charged and it is recommended that it should only be used exceptionally. In summary, a charge of misconduct in public office fills a gap, where either there is no relevant statutory offense, or where sentencing powers for the relevant statutory offense are insufficient to reflect the gravity of the misconduct.

The offense has a high threshold of liability which is context sensitive, requiring deliberate or subjectively reckless conduct without a reasonable excuse or justification.

A recent definition of the offense is found in Attorney General's Reference (No.3 of 2003) <sup>171</sup> and contains four key elements:

- a public officer acting as such;
- willfully neglects to perform his duty and/or willfully misconducts himself;
- to such a degree as to amount to abuse of the public's trust in the office holder; and
- without reasonable excuse or justification.

Importantly, no specific sexual element is required for this offense to be committed. For example in *R. v Bowden*<sup>172</sup>, the Court of Appeal held that a middle manager in a local authority housing maintenance department was guilty of misconduct in public office when he authorized repair work for his friends, over and above what was normally required.

### **What is a “public officer”?**

Case law has accepted the following as holding public office:

Coroner; Constable; Accountant in the office of the Paymaster General; Justice of the Peace; Executive or ministerial officer; Mayor or burgess; Overseer of the poor; Army officer; County Court registrar (district judge); Police officer; Council maintenance officer; Local councilor; Member of the Independent Monitoring Board for prisons.

CPS Guidance<sup>173</sup> suggests that a person may fall within the meaning of public officer “when one or more of the following characteristics applies to the role or function that they exercise with respect to the public at large: judicial or quasi-judicial, regulatory, punitive, coercive, investigative, representative of the public at large, and/or responsibility for public funds.”

Moreover, the misconduct, or failure to act when action is required, must occur when the public officer is performing the functions of his office, and there must be a direct link between the misconduct, abuse of power or failure to act, and the public duty.

### **What is meant by “willful misconduct”?**

In Attorney General’s Reference (No.3 of 2003)<sup>174</sup> the court approved the definition of “willful” as “deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not”. This is now subject to the test of recklessness in *Van Colle v Chief Constable of Hertfordshire*.<sup>175</sup>

### **What is meant by “abuse of the public’s trust”?**

The public officer’s behavior must be serious enough to amount to an abuse of the public’s trust.

According to the CPS Guidance, the offense should only be charged where the sentencing powers available for more specific statutory offenses are insufficient. For example, a constable who commits an assault while on duty should normally be charged with the appropriate assault offense under the Offences against the Person Act 1861.

According to the CPS Guidance, a charge of misconduct in public office should only be considered where:

- (i) there is no suitable statutory offense for a piece of serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offense);
- (ii) there was serious misconduct or a deliberate failure to perform a duty owed to the

- public, with serious potential or actual consequences for the public;
- (iii) the facts are so serious that the court's sentencing powers would otherwise be inadequate.

## B. SEXUAL OFFENCES

The Sexual Offences Act 2003 (SOA) covers a range of non-consensual offenses including rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent, as well as offenses involving an abuse of a position of trust towards a child.

A person will be considered unlikely to have willingly consented to sex if they were unconscious, drugged, abducted, subject to threats or fear of serious harm, or incapable of giving consent because of learning disability or mental disorder. Consent is irrelevant in cases involving children.

Rape cases (for adults) can be difficult to prove because the evidence is frequently limited to the victim's word against the defendant's, with the major issue being whether or not the victim consented.

As occurrences of sextortion are often conducted with the consent of the victim, such behavior would not always be caught by the SOA. Consent is defined by law as "a person consents if he or she agrees by choice to the sexual activity and has the freedom and capacity to make that choice".<sup>176</sup> The courts would need to consider whether the victim agreed to sexual activity because they were subject to threats, but this is often very difficult to prove. In *R v Nicholas Paul Stone*<sup>177</sup>, for example, the defendant was convicted of one count of misconduct in a judicial or public office but acquitted of rape on the basis that sexual intercourse was consensual.

In cases involving public officials, however, in determining whether or not an act was consensual, the courts have often viewed any sexual conduct as very serious and a grave misuse of their position. The courts have held such behavior to be "a breach of trust" and have taken a dim view of officials who have taken advantage of a person's vulnerability to satisfy their own sexual needs. However, the case law reviewed does not suggest that the courts have taken a hard line when administering justice against those who abuse their power. The courts could likely do more to punish individuals concerned, which may have a deterrent effect.

CPS Guidelines state that in deciding whether it is in the public interest to prosecute a person under the SOA, prosecutors should have regard to (amongst other things) whether there is any element of exploitation, coercion, threat, deception, grooming or manipulation as between the parties.<sup>178</sup>

The offenses of rape and assault by penetration are indictable only (i.e. triable in the Crown Court) and carry a maximum penalty of life imprisonment. The offense of sexual assault can be heard in either the magistrates' court or the Crown Court (Either Way Offence) and carries the statutory maximum penalty in the magistrates' court or ten (10) years imprisonment in the Crown Court.

## C. ANTI-CORRUPTION STATUTES

The Bribery Act 2010 (Bribery Act) was created to replace the existing law in the UK, a complicated and confusing combination of statutory and common law offenses that was the result of piecemeal development over more than 100 years. The Bribery Act covers all forms of bribery but there is a clear focus on commercial bribery. Two general offenses were created; that of (i) bribing another person (active bribery) (§1) and (ii) being bribed (passive bribery) (§2), as well as a more discrete offense of bribing a foreign public official (§6).

The Bribery Act applies equally to individuals in the public service of the Crown and to other individuals (§16) but not to Crown bodies and carries a maximum penalty of ten (10) years' imprisonment or an unlimited fine for all the offenses for individuals.

The offense of bribing, i.e. to offer, promise or give a "financial or other advantage" for the purpose of bringing about an improper performance of a function or activity, in our view, allows for the potential for a victim of sextortion to be caught by the law. The drafting of the legislation does not provide for any exceptions (such as duress or vulnerability of victim) and although no case law on point could be found, this is an area of the law that should be addressed to avoid the potential for miscarriage of justice.

Section 2 of the Bribery Act makes the act of being bribed an offense; it is illegal to request, agree to or receive a financial or other advantage for the purpose of bringing about an improper performance of a function or activity or to request, agree to or receive a reward for having done so.

*"Financial or other advantage" is not defined and we are not aware of any cases that have tested this concept post the introduction of legislation in 2011. Under the earlier common law offence of bribery, this condition was previously known as "any undue reward" and the courts' interpretation of such criterion included money, other goods and services and even sexual services.*

*"Improper performance" involves breach of an expectation of good faith or impartiality or breach of a position of trust. The test of whether an activity has been performed improperly is what a reasonable person in the UK would expect in relation to the activity. Intention to bring about improper performance is a key condition of the offense.*

A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favor. Prosecution will be favored where those involved in bribery are in positions of authority or trust and take advantage of that position, and a conviction for bribery is likely to attract a significant sentence.<sup>179</sup>

## D. SEXUAL HARASSMENT STATUTE AND CASES

Harassment is both a criminal offense and a civil action under the Protection from Harassment Act 1977 (PHA). Harassment is not specifically defined in the PHA but it has been held to include repeated attempts to impose unwanted communications and contact upon a victim in a manner that could be expected to cause distress or fear in any reasonable person. A victim must experience at least two incidents by the same person or group of people to constitute harassment.

The courts will look at whether most people or a reasonable person would think the behavior in question amounts to harassment. Harassment can include sexual harassment, unwelcome sexual advances, requests for sexual favors and other verbal or physical harassment of a sexual nature. In the case of *PC John Forrester of Merseyside Police* referred to below, the defendant was charged under this statute. We therefore included this within the scope of laws applicable to sextortion as it is not outside the remit of possibility that a perpetrator of sextortion, i.e. a police officer, could repeatedly request sexual favors from a victim in return for letting the victim off a suspected offense. Victims may submit to repeated requests for sexual favors on the basis that they feel they owe the policeman and that policeman has a continued hold over them. The application of this statute would of course depend on the facts.

Prosecution requires proof of harassment. In addition, there must be evidence to prove the conduct was targeted at an individual, was calculated to alarm or cause him/her distress, and was oppressive and unreasonable.

A person guilty of the criminal offense of harassment is liable on summary conviction to imprisonment for a term not exceeding six months, a fine or both. Civil remedies include damages and/or an injunction against the perpetrator.

### ***PC John Forrester of Merseyside Police***<sup>180</sup>

PC John Forrester was tried at Liverpool Crown Court on 24 February 2011. He was charged with two offenses of misconduct in public office, one for engaging in sexual activity with a member of the public in 2008, and one for harassing and attempting to have sexual contact with another member of the public in 2009. The offenses are alleged to have occurred at the complainants' homes, while PC Forrester was on duty.

He was jailed for 15 months for misconduct in a public office and given a nominal £1 fine for accessing police data without permission (Misuse of the Police National Computer).

It is clear that existing legislation in the United Kingdom fails to adequately address sextortion. As outlined above, urgent steps should be taken to amend the existing legislation to include sextortion as a stand-alone crime.

Transparency is a huge barrier. Research shows that the scale of the problem is largely hidden; official statistics are rarely available and few details are released about internal and external disciplinary action relating to cases involving sextortion.

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The IPCC and ACPO highlighted that their Report was a first step in understanding the scale and nature of the problem and the way forward, but they acknowledged that more work needs to be done. Both ACPO and the IPCC have stated that they are committed to doing more to achieve a solution.

## E. CONCLUSIONS

There are a number of laws existing in the United Kingdom that deal with unwanted sexual advances, but none that expressly addresses sextortion. The laws that do exist have the potential to fail victims of sextortion. For example, most offenses under the Sexual Offences Act 2003 ("SOA") rely typically on the absence of consent of the victim. Occurrences of sextortion may thus fall outside the remit of the SOA due in part to the fact sextortion is usually conducted with the consent of the victim (notwithstanding they may be of vulnerable disposition or acting under duress).

Notwithstanding this, research shows that the courts will rely on the existing legislation as much as possible to prosecute offenders for abusing power for the purposes of extorting sexual favors. Where the existing legislation is insufficient, the courts will then charge under the common law offense of Misconduct in Public Office. Misconduct in Public Office has been used for prosecuting offenders where the behavior has amounted to sextortion. However, it is understood that the courts will only invoke the offense of Misconduct in Public Office in exceptional circumstances where existing legislation is insufficient.

In the United Kingdom, occurrences involving breach of trust and abuse of power amongst those in positions of authority are not uncommon<sup>181</sup> and examples of such occurrences can be found throughout history. So whilst the label sextortion may be relatively new, the underlying act is not, which evidences a significant lacuna in our legislation.

In recognition of the inadequacy of the current legislation in dealing with sextortion, we believe this should be addressed by either (i) amending the existing legislation to include sextortion as a stand-alone crime or, alternatively, (ii) changing the common law offense of Misconduct in Public Office into a statutory offense, which would be a deterrent to potential perpetrators and provide more certainty for victims when seeking legal redress.

## III. Resources

### A. SUPPORT AVAILABLE FOR VICTIMS

UK based charities such as Victim Support<sup>182</sup> and Citizens Advice Bureau<sup>183</sup> may have experience dealing with victims of sextortion (i.e. they may receive complaints related to sextortion or provide support to the victims), however we have not identified Non-Governmental Organizations or charities that exist specifically for this purpose. In the last 40 years, attitudes have changed significantly towards domestic violence. Society used to turn a blind eye to domestic violence; it was seen as a "private matter"



to be dealt with “behind closed doors”. The establishment of charities such as Refuge in the 1970s significantly raised awareness of the issue, conducting campaigns and advocating for improvements to domestic violence policy and practice. This led to the implementation of legislation to meet the needs of abused women and children.

Sextortion is a hidden problem, similar to the issue of domestic violence in past years. We therefore believe that a dedicated charity should be set up in the UK to campaign and raise awareness of the issue.

## B. REFERENCES

### Case Law

- Re [2004] EWCA Crim 868; [2005] Q.B. 73.
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### News Reports

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- <http://www.dailymail.co.uk/news/article-2181504/John-Forrester-Policeman-labelled-sex-predator-jailed-Liverpool.html>
- <http://www.bbc.co.uk/news/uk-england-merseyside-15578887>

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- [www.victimsupport.co.uk](http://www.victimsupport.co.uk)
- <http://www.citizensadvice.org.uk>



## ANTI-CORRUPTION LAWS

### MISCONDUCT OR MISFEASANCE IN PUBLIC OFFICE

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Public Officials, such as: <ul style="list-style-type: none"><li>• Coroner;</li><li>• Constable;</li><li>• Accountant in the office of the Paymaster General;</li><li>• Justice of the Peace;</li><li>• Executive or ministerial officer;</li><li>• Mayor or burgess; Overseer of the poor; Army officer;</li><li>• County Court registrar (district judge);</li><li>• Police officer;</li><li>• Council maintenance officer;</li><li>• Local councillor;</li><li>• Member of the Independent Monitoring Board for prisons.</li></ul>	<p>No specific sexual element is required.</p> <p>It is enough for the Public Official to willfully neglect to perform his duty, to such a degree as to amount the abuse of public's trust in the office holder, without reasonable excuse or justification.</p> <p>Element of exploitation, coercion, threat, deception, grooming or manipulation as between the parties will be strong evidence.</p>	Maximum penalty of life imprisonment.

## STATUTES: STATUTE: BRIBERY ACT 2010

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Individuals or corporates in the public or private industry	To offer, promise or give a “financial or other advantage” for the purpose of bringing about an improper performance of a function or activity.	Maximum penalty of 10 years’ imprisonment or an unlimited fine

## SEXUAL OFFENCES LAW

## STATUTE: SEXUAL OFFENCES ACT

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any individual, the scope is not limited to Public Official.	Non-consensual offenses, including rape, assault by penetration. Sexual assault and causing a person to engage in sexual activity without consent.	Penalties depend on the nature of the offense, ranging from 10 years imprisonment to life imprisonment.

## STATUTE: PROTECTION FROM HARASSMENT ACT 1977

Who can be charged?	What conduct could encompass sextortion?	What remedies are available?
Any individual	A course of conduct which amounts to harassment of another.	Imprisonment for a term not exceeding six months, a fine or both. Civil remedies include damages and/or an injunction against the perpetrator.



# INTERNATIONAL LAW





The research conducted for this report focused on the domestic legal framework available in each jurisdiction to prosecute sextortion. To the extent, however, that there are gaps in domestic laws, it is important to consider whether international law might help to fill them. Like domestic laws, international conventions do not use the term “sextortion,” but they include provisions that cover the conduct that constitutes sextortion.

The status of international law in domestic courts is a matter of domestic law within each country. In addition, different countries are parties to different international conventions. However, even if international law is not binding on a domestic court, it may be useful to show that the international community has defined corruption and gender-based violence in terms that are broad enough to include the type of abuse of authority for personal sexual benefit that characterizes sextortion. In particular, international norms condemn corruption in any form and do not restrict it to financial benefits or things that have monetary value, as some domestic laws do. They also condemn sexual harassment wherever it may occur, and not just in the workplace or educational settings. This broader approach to corruption and gender-based violence would capture virtually all forms of sextortion.

The chart below identifies international conventions that contain provisions that could encompass sextortion and, for each, indicates whether the countries covered by this report are parties to it. Following the chart is information about the status of those conventions in the different countries.



	ARGENTINA	AUSTRALIA	BRAZIL
United Nations Convention on the Elimination of all Forms of Discrimination Against Women as well as the Optional Protocol of this Convention	●	●	●
Inter-American Convention on the Prevention Punishment and Eradication of Violence against Women (Convention of Belém do Pará)	●		●
Agreement on Labor Cooperation in North America			
Convention of the International Labor Organization (No. 111)	●	●	●
Convention No. 169 on Indigenous and Tribal Peoples	●		●
Convention on the Rights of Persons with Disabilities and its Optional Protocol	●	●	●
United Nations Convention against Corruption	●	●	●
United Nations Convention against Transnational Organized Crime	●	●	●
African Union Convention on Preventing and Combating Corruption			
Southern African Development Community Protocol against Corruption			
Southern African Development community Protocol on Gender and Development			
Protocol to the Banjul Charter on the Rights of Women in Africa			
Inter-American Convention Against Corruption	●		●
International Covenant on Civil and Political Rights	●	●	●
International Covenant on Economic, Social and Cultural Rights	●	●	●
American Convention on Human Rights	●		●

CANADA	KENYA	MEXICO	TAIWAN	UGANDA	UNITED KINGDOM
●		●		●	●
		●			
●		●			
●	●	●		●	●
		●			
		●		●	●
●	●	●	●	●	●
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	●			●	
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	●			●	
●		●			
●	●	●		●	●
●	●	●		●	●
		●			

## ARGENTINA

Section 75, subsection 22, of the Argentine National Constitution establishes that all International treaties have superior hierarchy to domestic laws. This Section also grants constitutional hierarchy to certain international human rights treaties, such as: the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, among others.

Some of the international treaties ratified by Argentina contain some of the constitutive elements of sextortion. For example, in Treaties that address the subject matter of corruption, the solicitation or acceptance by government officials of non-monetary benefits is covered. Furthermore, in conventions that address the issue of gender-based violence, the definitions of sexual abuse and gender-based violence contain terms that may apply to sextortion.

## KENYA

Under the Kenyan Constitution, any treaty or convention ratified by Kenya forms a part of the law of Kenya. The provisions of such treaties and conventions are therefore enforceable in Kenya as part of domestic laws.

At the date of this report, Kenya has ratified several international treaties and conventions whose provisions can be construed and interpreted as part of Kenyan law. However, it is notable that there is no person who has been charged or convicted under an offence that is defined only in these treaties and conventions. They are always read together with the provisions of domestic laws when being enforced.

## MEXICO

Originally, according to articles 1 and 133 of the Mexican Constitution, international treaties and conventions subscribed and ratified by the Mexican Congress are placed in the same hierarchy as the federal laws under the Constitution.

However, in 2011 the Mexican Constitution underwent a major amendment in order to recognize and fully guarantee human rights. As a result of such amendment, in 2013 the Supreme Court of Justice debated<sup>184</sup> whether, in order to provide broader protection of human rights to all individuals, international treaties should have the same hierarchy as the Constitution.

In a 10 to 1 vote, the Supreme Court resolved that the Mexican Constitution and international treaties have the same hierarchy level only when the Constitution does not specifically provide a restriction against the application of the treaty.

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## TAIWAN

The status of Taiwan under international law is uncertain, as it is unclear whether Taiwan satisfies two of the characteristics needed for a legitimate state under Article 1 of the 1933 Montevideo Convention: “government” and “capacity to enter into relations with other states”. No country in the world formally recognizes Taiwan as a separate state, and Taiwan is not a member of the United Nations. However, Taiwan has voluntarily amended its statutes in a move to reflect the expected international standards for corruption.

On the whole, international treaties in Taiwan are self-executing in nature and are applied directly through the domestic court. In cases where they are not self-executing, they are executed by the Legislative via the Executive within 30 days and then become domestic law. This area is governed by the Regulations Governing the Process of Treaties and Agreements. It should be noted that Taiwan’s Constitution does not expressly stipulate a hierarchy between international and domestic law. However, the Grand Justice of the Judicial Yuan in Interpretation No. 329 has mentioned that if a treaty has been passed by domestic legislation procedures, it holds the same status as a law. Accordingly, an international treaty will hold the same status as any domestic law and any conflicts could, in theory, be resolved by applying rules that resolve the conflict between laws (e.g., *lex specialis derogat generali* or *lex posterior derogat priori*).

## UGANDA

The application of international law in Uganda was changed by the promulgation of the 1995 Constitution, which provides in Chapter Four for the protection of fundamental and other human rights and freedoms. Notably, the reliance on international law has primarily been in respect of human rights and constitutional issues.

The 1995 Constitution of Uganda provides for the respect of international law and treaty obligations<sup>185</sup> and empowers the Uganda Human Rights Commission to monitor the Government’s compliance with international treaty convention obligations on human rights.<sup>186</sup>

There are, however, some challenges regarding the use of international law in local courts, as neither the Constitutional nor the Supreme Court is empowered to refer to international treaties to which Uganda is a party when interpreting the Constitution.<sup>187</sup> The lack of explicit provision in the Constitution means that international law is adopted or referred to sparingly. This was most clearly expressed in *Paul Ssemwogerere & 5 Other v. Attorney General* where the Constitutional Court stated: “The International Human Rights Conventions mentioned in the petition are not part of the Constitution of the Republic of Uganda. Therefore, a provision of an Act of Parliament cannot be interpreted against them.”<sup>188</sup> In more recent years, however, it seems the Supreme Court has started to incorporate international law in domestic judgments more frequently, as was the case in *Susan Kigula & 416 Others* whereby the court declared that it would invoke international human rights law to arrive at its decision regarding the death penalty.

However, the courts may also consider the application of East African Community Law - as was the case in *Jacob Oulanyah v Attorney General* - where the Constitutional Court applied provisions of the East African Community Treaty to make its decision.

The courts have wide discretion in the interpretation of provisions of the 1995 Uganda Constitution if it evokes human rights instruments to which Uganda is a party. This is enshrined in Article 50 of the Ugandan Constitution, which provides the courts with: "the authority to provide relief or redress in respect of breaches of fundamental rights and freedoms." In his ruling *Egonda Ntende J.* relied on case law from Canada and drew inference from the interpretation of the Canadian Charter of Rights.

The Constitutional Court has also relied on Article 137 of the Constitution to adopt international rights and norms into its rulings, which states that an Act of Parliament or any other law or anything in or done under the authority of any law that is inconsistent with the Constitution, may be challenged. In *Charles Onyango Obbo & Andrew Mujuni Mwenda v. A.G.* Constitutional Appeal No.2 of 2002 the Justices of the Supreme Court had recourse to various international human rights instruments to which Uganda is a party. The Justices utilized an article (of the African Charter on Human People's Rights) provided by the African Commission. Additionally, the Justices relied on the International Convention Civil and Political Rights ("ICCPR"), as well as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, illustrating the willingness of Ugandan courts to use international human rights law to assist where domestic law is limited.

Furthermore, The Convention on the Elimination of Discrimination against Women ("CEDAW") was referred to by *Mpagi – Bahigeine J.A.* in his obiter dicta during his call for Parliament to align local law with the internationally adopted laws concerning human rights in order to avoid the inconsistency between local and international law. This was, in his opinion, what would assist in ensuring that equality based laws are not merely an illusion but a reality. He then continued to comment that where Parliament procrastinates, the courts of law, being the bulwark of equity, would not hesitate to fill the void when called upon to do so or whenever the occasion arises.

In *Susan Kigula & 416 Others*, both the Constitutional Court and the Supreme Court relied on international human rights instruments (such as the European Convention on Human Rights, the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights) alongside Article 24 of the Ugandan Constitution, therefore ensuring that local and international laws were used harmoniously and not in conflict.

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# ENDNOTES



















