***HARMFUL DISCLOSURE OF PORNOGRAPHY***

Harmful disclosure of pornography (generally referred to as “revenge pornography”) is the sharing of sexual related materials of a person without his or her consent, which falls within the definition of pornography as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007)(“the 2007-Act”), with the purpose of causing harm to a person. In some instances the material are accompanied by personal information about a subject, including his or her full names, address and links to such a person's social media profiles. The offence applies to online material (uploading of images on the internet, sharing by text and e-mail) or offline material (such as making available photos or other images or descriptions). The proposed offence of harmful disclosure of pornography, aims to address similar situations as provided for in legislation of the United Kingdom (Criminal Justice and Courts Act, 2015) and Canada (Protecting Canadians from Online Crime Act S.C. 2014), which aim to protect persons from disclosure of private sexual material without their consent.

It is intended to include an amendment to the 2007-Act in the Cybercrimes and Cybersecurity Bill so as to introduce a new section 10A in that Act dealing with the harmful disclosure of pornography. The proposed new section 10A aims to criminalise various acts relating to such harmful disclosure. The proposed new subsection (1) will provide that a person who discloses pornography in which another person appears or is described without that person’s consent where such disclosure causes harm to that person, or another person in a close relationship to that person, will be guilty of an offence.

The offences that are reflected in the proposed subsections (2) and (3) are similar to the extent that they provide that a person who threatens to disclose or threatens to cause the disclosure of pornography, is guilty of an offence, if such threat causes, or such disclosure could reasonably be expected to cause, any harm. The difference between subsections (2) and (3) is that subsection (3) aims to create the offence of extortion where the threat of disclosure is made for the purposes of obtaining any advantage from the victim or a person who is in a close relationship with the victim.

Interested parties are requested to comment on the feasibility of the proposed subsection (4). The subsection provides that a third party commits an offence if he or she accesses or possesses pornography while knowing that the disclosure of such pornography took place in a harmful manner.

The proposed subsection (5) deals with penalties and is self-explanatory.

Section 56A of the 2007-Act deals with sentencing and it is proposed that a new subsection should be included in that section in order to require that a court, after having convicted a person of contravening the section 10A, should consider the fact that the offence caused harm as an aggravating factor during the sentencing process.

***PROPOSED AMENDMENTS:  “HARMFUL DISCLOSURE OF PORNOGRAPHY” TO BE INSERTED IN ACT 32 OF 2007 BY MEANS OF THE CYBERCRIMES AND CYBERSECURITY BILL***

*The insertion of the following section after section 10:*

            “**Harmful disclosure of pornography**

**10A.**    (1)        A person (“A”) who unlawfully and intentionally discloses or causes the disclosure of pornography in which a person 18 years or older (“B”) appears or is described and such disclosure—

*(a)*        takes place without the consent of B; and

*(b)*        causes any harm, including mental, psychological, physical, social or economic harm, to B or any member of the family of B or any other person in a close relationship to B,

is guilty of the offence of harmful disclosure of pornography.

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

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

(4)        A person (“A”) who unlawfully and intentionally accesses or possesses pornography referred to in subsection (1) and A knows or is reasonably expected to know that the disclosure of such pornography took place as referred to in subsection (1), is guilty of accessing or possessing pornography resulting in harm.

(5)        *(a)*        A person who contravenes the provisions of subsection (1) or (2) is liable, on conviction to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

*(b)*        A person who contravenes the provisions of subsection (3) is liable, on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

*(c)*        A person who contravenes the provisions of subsection (4) is liable, on conviction to a fine or to imprisonment for a period not exceeding 3 years or to both such fine and imprisonment.”

*The amendment of section 56A by the insertion after subsection (2) of the following subsection:*

(3)        If a person is convicted of an offence referred to in section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996), or section 10A of this Act the court that imposes the sentence shall consider as an aggravating factor the fact that that offence causes harm, including mental, psychological, physical, social or economicharm.