

# LEGAL FRAMEWORK ON SEXTORTION/SEXUAL CORRUPTION IN SOUTH AFRICA





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## EXECUTIVE SUMMARY

Sextortion is a contraction of the words “sexual extortion.” It is a form of corruption occurring when sexual acts are demanded or required from women, men and gender non-conforming people in order to obtain a public (or private) service or benefit and is also referred to as “sexual corruption” or “sexual bribery”. Sexual corruption requires that the perpetrator is in a position of authority; there is a quid pro quo element; the benefit in the quid pro quo element is sexual in nature; and the perpetrator must rely on the coercive power of his/her authority rather than on physical force to obtain the sexual benefit (International Association of Women Judges, 2012).

Sexual corruption has been partly criminalised in South Africa through a patchwork of laws and policies against corruption, sexual violence and sexual harassment. However, the variable approach to this offence means that there are severe shortcomings with the way it is currently addressed. This report examines the legislative framework on sexual corruption in South Africa to determine if it is adequately criminalised, understand the gaps in the

existing legal framework, and make recommendations to address these gaps, in light of international experiences. The report examines South African and foreign case law on sexual corruption and also considers foreign legislation on the issue.

The report concludes that it is necessary to change the current terminology from “sextortion” to “sexual corruption” given that the term “sextortion” is also used to refer to blackmail using intimate images. The report also determines that it is important to criminalise sexual corruption through a dedicated corruption offence. In doing so, it will be necessary to address the challenges seen in other jurisdictions such as the criminalisation of sexual corruption victims and issues around requiring consent and understanding coercion. Given that sexual corruption is a corruption offence as well as a sexual offence, it is also necessary to address the infrastructure around reporting and prosecuting sexual corruption and necessary interventions in the criminal justice system to provide safe and victim-centred channels for whistleblowing and reporting.

# EXECUTIVE

## THE REPORT MAKES THE FOLLOWING RECOMMENDATIONS:

### 1. **The creation of a dedicated offence of “sexual corruption”:**

a new offence of sexual corruption should be created as an amendment to the Prevention and Combatting of Corruption Act, 2004 (PRECCA). The offence must prohibit any request for physical or non-physical sexual acts in exchange for avoiding a detriment or conferring a benefit in a way that amounts to an abuse of authority, trust or position. Under the PRECCA, there is a presumption of corruption once there has been the giving or receiving of a gratification. For this new proposed offence of sexual corruption, the presumption of corruption should be linked to the request or receipt of a sexual act and the abuse of authority. The new offence should prohibit sexual corruption in both the public and private sectors in line with the existing corruption offences under the PRECCA. The new offence should further specify that there is no defence even if the person in authority did not solicit the bribe and the current duty to report offences under the PRECCA will apply to sexual corruption offences. The law should specify the remedies available on conviction for the offence.

### 2. **The provision of victim-centred reporting mechanisms:**

As sexual corruption is also a sexual offence, it is necessary for public agencies and police stations to provide safe, confidential reporting mechanisms for sexual corruption, and ensure that victims are dealt with in a victim-centred and gender-sensitive way. Reporting mechanisms should be able to provide access to appropriate resources, including physical and psychological health services, and financial and legal support.

### 3. **Training on prosecuting sexual corruption:**

It will be necessary to provide investigators, prosecutors and judges with the technical knowledge on investigating, prosecuting and hearing this offence. Prosecutions and convictions will increase the deterrent effect of the law and reduce the impunity with which the crime is committed (Elden, 2020).

**4. Sustained advocacy:** The criminalisation of sexual corruption alone will not be sufficient to address this problem and ongoing advocacy is required to sensitise the public to their rights and available remedies in relation to this offence. This will involve the creation of materials distributed to areas where sexual corruption is rampant, including schools, universities, the judiciary, and municipalities. Advocacy also involves collaboration between the courts, the prosecutors, law enforcement, correctional institutions, and community groups (including child, women and LGBT groups) to ensure there is no friction between these groups in addressing sexual corruption. Advocacy can create awareness to clarify the processes for reporting, investigating and prosecuting sexual corruption cases and understand the barriers that may keep victims from obtaining effective redress.

### 5. **Continued efforts to address sexual and gender violence:**

South Africa has a problem with sexual and gender-based violence that falls outside the scope of this report. However, in addressing sexual corruption, it is important to recognise that it falls into the sexual violence continuum and work needs to continue to change harmful gender stereotypes, address toxic masculinity tropes and foster a culture of respect for women, children and gender non-conforming people.



# INTRODUCTION

**Sextortion is a contraction of the words “sexual extortion.” It is a form of corruption where sexual acts are the currency of the bribe requested.**

Sextortion is also referred to as “sexual corruption” or “sexual bribery” and these terms will be used interchangeably in this report. It is one of the most silent forms of corruption and occurs when sexual acts are demanded or required from women, men and gender non-conforming people in order to obtain a public (or private) service or benefit. Sexual corruption requires that the perpetrator is in a position of authority; there is a quid pro quo element; the benefit in the quid pro quo element is sexual in nature; and the perpetrator must rely on the coercive power of his/her authority rather than on physical force to obtain the sexual benefit (International Association of Women Judges, 2012).

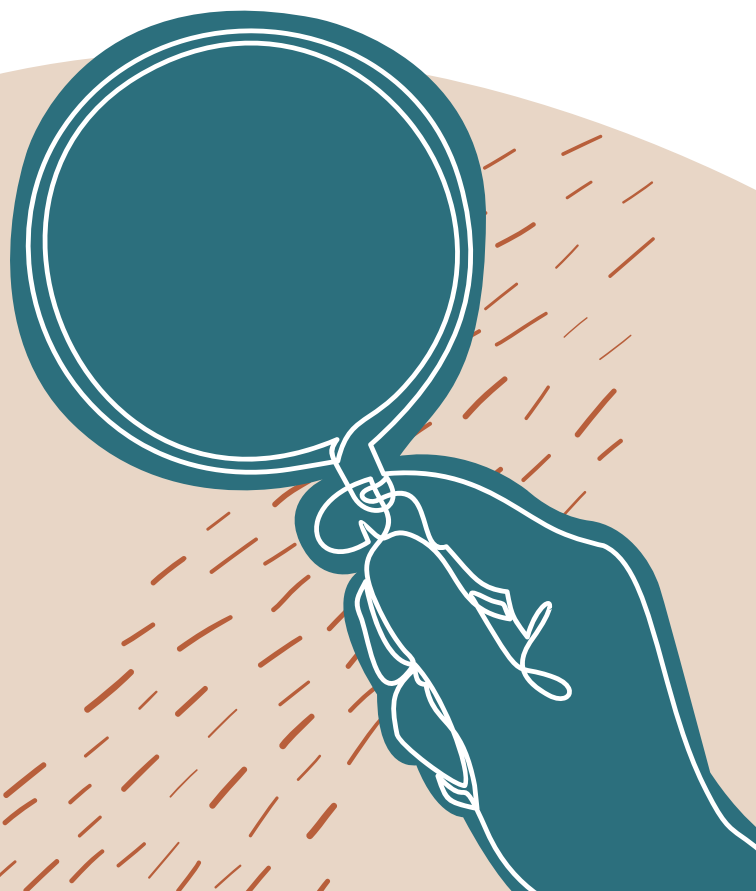
Until a decade ago sexual corruption had received very limited attention from lawmakers, academics and policy makers, meaning that it was often misunderstood, miscategorised and often mislabelled as sexual harassment or sexual misconduct. Despite the lack of legislative attention, there is evidence that sexual corruption is prevalent in countries with high levels of corruption (Aja-Eke et al, 2023; Sundström and Wängnerud, 2021) and manifests in the delivery of public services in sectors such as public procurement, crisis responses, migration/asylum, education, health and sanitation services (UNODC, 2020; Hagglund & Khan, 2023; Transparency International, 2020). Sexual corruption may be systemic, occurring frequently in a particular sector, such as for instance in education or opportunistic, (Eldén et al, 2020) where officials take advantage of a one-off interaction to demand a sexual bribe.

Sexual corruption disproportionately affects women and girls, preventing them from accessing public services (such as criminal justice, health and education services) and public privileges (such as jobs, public contracts and immigration services). In all cases, sexual corruption is oppressive, based on an asymmetry of power, access to resources and relies on coercion that impairs the legal validity of consent to the sexual act (Transparency International, 2020). Because it disproportionately affects women, it is a gendered form of corruption, (Boehm and Sierra, 2015) rooted in patriarchy, sexism, and oppressive systems that demean women. As a gendered form of corruption (Transparency International, 2020; Motala, 2021), it is the only corruption offence where the currency of the bribe may differ according to the gender of the victim and “derogates, demeans, or humiliates an individual based on that individual’s sex” (Berdahl, 2007).

Sextortion is both a corruption offence, and a form of sexual and gender-based violence, and lies on the continuum of sexual violence (Guy, 2006). Gender-based

violence constitutes any form of violence “that is directed against a woman because she is a woman or that affects women disproportionately” (United Nations 1992). Sexual violence against women “is not the sum of random, individual acts of misconduct but part of a continuum of attitudes, beliefs and actions that support violence against them. This continuum of sexual violence defines women’s experiences of everyday life and functions to maintain the overarching gender order of female inequality and domination” (Vuckovic et al, 2017).

As a result of the intersection between sexual abuse and corruption, it is a mistake to view sexual corruption solely from the prism of corruption, as this ignores its gendered nature and the harmful ways in which it impacts especially women and girls (Nilsson, et al. 2019) and also ignores the ways in which it might be fuelled by rape culture, and the ubiquitous pornography that depicts and reinforces the objectification and subordination of women (Srinivasan, 2021). Addressing sexual corruption must therefore occur through a gendered lens if we are to ensure that the often-gendered barriers to sexual corruption can be ameliorated. Sexual corruption is at once a sexual offence, a corrupt abuse of authority, a form of gender-based violence and a human rights violation. Although it is prevalent in both developing and developed countries, and occurs within different sectors, there are several barriers to its being properly criminalised and addressed.





These barriers include inconsistent and confusing nomenclature around sextortion, with it being variously referred to as sextortion, transactional sex, sexual bribery and sexual corruption, and its confusion with extortion or blackmail involving sexual or private images (Wolak et al. 2018). This report will not focus on extortion related to sexual images but will rather consider sexual corruption/sexual bribery, defined by Transparency International as “when those entrusted with power use it to sexually exploit those dependent on that power” (Transparency International 2020).

Another barrier to addressing sexual corruption is the fact that most anti-corruption legislation do not define sexual corruption as a corruption offence and the corrupt exchange in bribery offences often refers to the receipt of a gratification, financial, undue or other advantage or anything of value and sexual favours are not always explicitly included in the definition of a gratification, advantage or thing of value, leaving sexual acts outside the ostensible ambit of anti-corruption laws.

Further, because it is often a gendered crime, the misogynistic attitudes to sexual abuse and sexual harassment of women especially in developing countries, may normalise sexual corruption and it is in some quarters considered less serious than other forms of corruption (Eldén et al, 2020; Goetz 2007). Where these attitudes are coupled with the power dynamics at play in sexual corruption cases and the shame, stigma and secrecy surrounding sex, many women victims are unwilling to report it. The lack of reporting (Gitlin 2016) affects our understanding of the scale of the problem, making it difficult to properly address it from a remedial point of view.

Other barriers include the evidence that is needed to prove such cases. Sexual corruption occurs through psychological and not physical coercion and in some cases, it may be difficult to prove that a sexual act was coerced, in the absence of physical evidence (Hendry, 2020).

Although, there was a limited focus on sexual corruption in the past, recent awareness of the extent of sexual violence against women has created the impetus for further research on sexual corruption. The time is thus ripe for a comprehensive approach to addressing it in the public sector and in the delivery of public services more generally. Sexual corruption straddles the intersection of sexual and gender-based violence and corruption and thus requires cooperation from activists and policy makers in these fields to properly address it. The historical lack of cooperation has meant that sexual corruption has been sidelined by both the gender and the anti-corruption agendas.

This research report examines the legislative framework on sexual corruption in South Africa to determine if it is adequately criminalised, understand the gaps in the existing legal framework, and make recommendations to address these gaps, in light of international experiences. The report adopts a doctrinal and qualitative methodology, engaging in an analysis of available South African legislation and case law, and foreign legislation and case law on sexual corruption. The report also engages in interviews and consultations with relevant stakeholders to determine their experiences and understand the challenges inherent in the current approaches that affect successful prosecution of the offence.

The report concludes that it may be necessary to change the terminology from “sextortion” to “sexual corruption” and that it is important to criminalise sexual corruption through a dedicated corruption offence. In criminalising sexual corruption, it will be necessary to address some of the challenges seen in other jurisdictions such as the criminalisation of sexual corruption victims and issues around requiring consent and understanding coercion. It is suggested that the offence of sexual corruption includes a presumption of corruption as is the case for the other corruption offences under section 24 of PRECCA, so that when there is a demand for sexual acts accompanied by a power imbalance, an abuse of authority and the conferment of benefits or the imposition of deprivations, then sexual corruption should be presumed, with the burden on the perpetrator to prove there was no corruption. It is also necessary that there are interventions in the criminal justice system to provide safe and victim-centred channels for whistleblowing and reporting.

This report commences by considering the definitions of sexual corruption, sextortion and related offences, to distinguish sexual corruption from other offences, and determine the appropriate nomenclature required for this offence. Next the report examines the existing legal framework on the criminalisation of sexual corruption in South Africa to determine the extent to which sexual corruption is currently criminalised. The report then examines the laws against sexual corruption in foreign jurisdictions, to understand how other countries have addressed this issue and learn from international approaches. The next part of the report reviews court cases in SA and elsewhere to understand judicial approaches to this offence. The report concludes with recommendations for criminalising sexual corruption in SA, setting out the elements of the offense and creates an advocacy plan on sexual corruption given its importance to addressing sexual violence and gender equality in SA (Fuentes Téllez, n.d).

## II. DEFINITIONS

### A. SEXTORTION

The International Association of Women Judges is widely credited as being responsible for shedding light on sextortion and providing an initial definition, which defined sextortion as 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.” (IAWJ 2012). This definition requires an abuse of authority, a quid pro quo and psychological pressure or coercion. The quid pro quo requirement in the definition of sextortion is crucial as it eliminates from its ambit other forms of sexual misconduct such as sexual abuse and sexual harassment.

Transparency International (2020) developed its own definition of sextortion, defining it as “when those entrusted with power use it to sexually exploit those dependent on that power.”

Elden et al (2020) further define sextortion as “a form of corruption and gender-based violence. It occurs when a person with entrusted authority abuses this authority to obtain a sexual favor in exchange for a service or benefit which is within their power to grant or withhold.”

### B. SEXUAL CORRUPTION AND SEXUAL BRIBERY

The definitions of sexual corruption and sexual bribery are often identical. Towns defined sexual corruption as “transactional relationships that involve the trade of sex for services, benefits or goods tied to public office” (Towns, 2015). Goetz, an early scholar on this topic described sexual corruption as when sex is the currency of corruption and officials extort sexual favours, rather than money, in return for services (Goetz, 2007). In relation to sexual bribery, the Centre of Equality and Justice defines it as “when a public officer makes sexual demands for the provision of any state service” (Centre for Equality and Justice, Sri Lanka, 2022). Other descriptions of sexual bribery emphasise the element of power, coercion or veiled threats (DeFour, 1990).

### C. TRANSACTIONAL SEX

In some jurisdictions, sexual corruption traverses the boundaries of transactional sex, defined as “the exchange of a sex act for money or anything of value, such as, but not limited to, basic necessities including shelter or food.” (Bramon and Leslie, 2012). However, transactional sex is differentiated from sexual corruption, because even though there is the element of a sexual exchange and a usual power imbalance, the exchange occurs within the context of a relationship (no matter how temporary or ambiguous its nature) (Duby et al, 2021). Also, transactional sex is not accompanied by an abuse of entrusted power (Elden et al 2020).

### D. ABUSE OF FUNCTIONS OR POSITION

The United Nations Convention against Corruption does not explicitly criminalise sexual corruption, but rather contains an offence of abuse of functions, in Article 19, which provides that it is a criminal offence when there is “the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.” This offence will cover sexual corruption offences as it covers the performance or non-performance of an official act, and the obtaining of an undue advantage in the form of the sexual act. It also covers the illegitimate bargain with services or privileges within the realm of the perpetrator’s function or position in exchange for sexual favours (Elden, et al, 2020). It may be noted that some countries have criminalised sexual corruption through this approach.





## E. SEXUAL HARASSMENT

It is important to delineate between sexual harassment and sexual corruption. Sexual harassment encompasses many forms of unwanted and inappropriate conduct that do not necessarily involve perpetrators entrusted with authority, or the abuse of that authority, or a quid pro quo exchange of sexual acts – all of which are key elements of sexual corruption (Global Judicial Integrity Network, 2020). Sexual harassment is defined as “unwelcome sexual advances, requests for sexual favours, verbal or physical conduct of sexual nature, including instances where such favours or conduct are implicitly or explicitly made a condition of employment, continued employment or promotion” (Smit and Du Plessis, 2011). Sexual harassment occurs where the victim has resisted the behaviour as unacceptable, and the perpetrator is aware that his actions are offensive or unwanted (Nana, 2008). This however means also that where sexual corruption by a person in a position of authority is rejected, a charge of sexual harassment can be sustained (Hlongwane, 2017). It may be noted that many countries prohibit sexual corruption through sexual harassment and employment anti-discrimination laws, often limiting the prohibition to the employment context and treating it as a civil matter.

## F. NEW DEFINITION OF SEXUAL CORRUPTION

As a result of the limitations and confusion inherent in especially the current definition of sextortion, a new definition is proposed, which adopts the term “sexual corruption” but similar to the definition issued by Transparency International, is perpetrator-based, focusing on the responsibility of the person with the power (Elden et al, 2020). This definition utilises the term “sexual corruption”, to distinguish this offence from cyber-extortion or blackmail relating to sexual or private images, which is also referred to as “sextortion” in some countries (including the UK, the USA and Australia) and has been criminalised in several jurisdictions and in South Africa. Alternative nomenclature is necessary if we are to avoid confusing sexual corruption with sexual blackmail. A new definition is also necessary as it introduces the concept of the abuse of perceived power and the nature of the sexual exploitation to include digital and emotional forms.

The proposed definition states that sexual corruption is “an abuse of actual or perceived power that sexually exploits those who seek benefits or seek to avoid deprivations tied to that power. The sexual exploitation may be physical, emotional or digital.”

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DIGITAL.”**



### III. CONCEPTUAL ISSUES AND DIFFICULTIES

**Addressing sexual corruption presents several conceptual issues. Some of the conceptual difficulties arise due to the inherent nature of the offence and serve as barriers, limiting approaches to effectively address it.**

#### A. Lack of clarity:

In the past, legislators did not consider the nexus between corruption and sexual exploitation when drafting current anti-corruption legislation, and as a result, this issue was not addressed adequately in many jurisdictions. As stated, there is also confusion in the use of the term “sextortion”, which hampers efforts to address this offence. A 2015 review of legislative frameworks on sexual corruption found that no country used the term “sextortion” to refer to sexual corruption (Thomson Reuters Foundation et al, 2015).

#### B. Quid pro quo:

As seen from the definition of sextortion issued by the IAWJ, the exchange or the reciprocation inherent in sexual corruption differentiates it from sexual harassment and other forms of sexual abuse. This reciprocity presents several challenges: first sexual favours are not always considered in existing anti-corruption legislation as a bribery benefit, ostensibly removing sexual corruption from the ambit of these statutes. Secondly the reciprocity is often conceived of as given to obtain an advantage and not avoiding a detriment, whilst in many cases of sexual corruption, the victims are also seeking to avoid a disadvantage and the law should reflect this. Third, under many anti-corruption laws, including in South Africa, the reciprocity renders the victim of sexual corruption complicit and guilty in the commission of the offence. Although compliance with the sexual request may be a risk-mitigation strategy, the element of complicity makes reporting less likely for victims (Elden et al, 2020) and in a non-victim centred approach, may affect the likelihood that victims are believed and buttresses the perpetrator’s defence that the sexual act was consensual. Addressing the implications of this complicity will be crucial for criminalising a sexual corruption offence, as most corruption offences currently criminalise both parties to a corrupt transaction. In the case of sexual corruption, “corruption exists even if a sexual act is genuinely consensual, because it represents an abuse of power and an undue benefit, and that is enough to enforce the law” (Transparency International 2020). Any claim to consent may also be denied or at least mitigated once there is an abuse of authority and a power imbalance.

#### C. Power dynamics and fear:

The power imbalance inherent in cases of sexual corruption often creates a fear of retaliation that makes victims reticent to report it (Elden et al. 2020). This imbalance also fuels a sense of futility at reporting sexual corruption, where the perpetrator has a high status, power or wealth. If sexual corruption is not categorised as a unique offence, this power asymmetry and the attendant psychological coercion will be ignored, resulting in the criminalisation of both the recipient and the victim-provider of the sexual act (Elden et al. 2020) and requiring physical evidence to prove the commission of the offence. The power dynamics and fear may also increase the impunity with which perpetrators operate, creating serial offenders (Hagglund & Khan, 2023). A potential sexual corruption offence must require a presumption of corruption once there is the abuse of actual or perceived power and must be cognisant of the fear of retaliation possible in these cases.

#### D. Investigations and the availability of evidence:

The criminalisation of sexual corruption requires interventions in the criminal justice system, especially in relation to investigating this crime. Most bribery and corruption offences are conceived of as financial crimes and investigators trained to investigate financial crimes may not necessarily be adept in investigating sexual crimes, especially where there is psychological but not physical coercion and thus an absence of “hard” evidence (Hlongwane et al, 2023; Transparency International, 2020). The cases on sexual corruption and sexual harassment often tie the timely reporting of the offence to its believability. Thus, where victims do not report at the time of the offence, courts have inquired as to whether that impacts the credibility of the allegations. This approach does not consider the impact of sexual violence on its victims and how different persons respond to it. Apart from training investigators and prosecutors to investigate sexual corruption as a corruption offence, advocacy on how victims can gather evidence will be required.



## E. High levels of corruption and gender and sexual violence:

The prevalence of high levels of gender-based violence, sexual violence and other forms of corruption create challenges to adequately addressing sexual corruption. When violence is normalised, sexual corruption may not be considered to be serious in light of violent offences such as rape, sexual assault and femicide. In the continuum of sexual violence, common and everyday abuses might be considered a normal part of male behavior, and women might not regard them as being out of place or particularly egregious (Kelly, 1987). For instance, a survey of police sexual misconduct in the USA indicated that non-violent cases of sexual misconduct and sextortion were often considered to be consensual (Transparency International, 2020), and the International Association of Women Judges has also highlighted that coerced but not violent sexual acts may sometimes be interpreted as consensual (IAWJ, 2012).

## F. Silence around sexual corruption offences:

Many corruption offences occur in secret and sexual corruption is no exception. There is a culture of silence around sexual corruption, owing to the shame, the stigma, the power dynamics, the normalisation of sexual harassment and inadequate legal mechanisms for redress. This affects reporting and in SA, sexual corruption is under-reported and is missing from crime reports (StatsSA, 2023). Countering this silence is necessary to successful prosecution of this offence and will need the creation of suitable victim-centred platforms for reporting. One way of addressing this silence is by emphasising sexual corruption as a corruption offence given that it is both a form of sexual violence (with its proximity to sexual harassment) and a form of corruption. As a corruption offence, there is likely to be more credibility for victims than there currently is for victims of sexual offences (Transparency International, 2020). Historically, sexual offences committed against women often re-victimise the victims, (Transparency International, 2020) as defendants interrogate the credibility of the victim by highlighting the character and clothing of victims to establish consent to the sexual act.

## IV. THE EXISTING LEGAL FRAMEWORK ON SEXUAL CORRUPTION IN SOUTH AFRICA

**There has been ample research (Hlongwane et al, 2023) that indicates that the South African anti-corruption framework does not make adequate provision for sexual corruption as an offence. Although there are several laws that have direct (and indirect) implications for sexual corruption, none of them speak directly to sexual corruption as defined.**

### **A. Prevention and Combatting of Corruption Act 12 of 2004 (PRECCA):**

PRECCA is South Africa's primary anti-corruption law, and it criminalises both active and passive bribery in the public and private sector, prohibiting persons from giving or receiving "gratification." This gratification includes money, avoidance of a loss or disadvantage, any favour, service, advantage of any description, the exercise or forbearance of the exercise of any right or official power or duty (section 1). PRECCA's offence of bribery prohibits persons from giving or receiving gratification to act in an unlawful manner in the carrying out of their duty in a way that amounts to an abuse of a position, a breach of trust and the violation of a legal duty or set of rules (section 3). Although both the meaning of "gratification" and the general offence of bribery may be interpreted as covering sexual corruption, one of the challenges with reading sexual corruption into the Act is that it criminalises both the giver and the receiver in a corrupt transaction. Whilst there are good reasons for doing so in relation to pecuniary corruption, this creates challenges in relation to sexual corruption, where the asymmetry of power, the psychological coercion and threats mean that the perpetrator and the victim should not be considered as equally culpable under the law. This means that reading a sexual corruption offence into PRECCA includes the criminalisation of victims and will significantly limit reporting and thus prosecution of an already underreported crime and will only lead to reports where the victim did not acquiesce to the demand. In cases of sexual corruption where the benefit or deprivation relates to the provision of basic goods and services or to important quality of life services, denial of the request may be impossible for the victim and may often be a risk mitigation strategy where there is a high-power imbalance and the potential for further harms. It may be noted that PRECCA contains a presumption that the giver or receiver of a gratification acted corruptly (section 24), which may be useful to ensuring the prosecution of sexual corruption but will require the partial decriminalisation of the victims. PRECCA also provides that it is not a defence that the

receiver of the gratification did not have the power to perform the act for which the gratification was given or did not intend to perform the act (section 25).

### **B. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007:**

This Act aims to criminalise all forms of sexual abuse and exploitation. The Act also seeks to provide victims of sexual offences the "maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences..." The Act criminalises inter alia, rape, statutory rape, sexual assault, compelling persons to witness sexual offences, child pornography, sexual offences involving children and prostitution. Under the Act, consent is defined as voluntary or uncoerced agreement and will not exist where the complainant submits to a sexual act as a result of the use of force, intimidation or a threat of harm by the accused person or where there is an abuse of power or authority by the accused person to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to participate in a sexual act; or where the sexual act is committed under false pretences or by fraudulent means. The definition of consent under the Act will be useful in prosecuting sexual corruption where there is an abuse of power and the sexual act is one that is criminalised under the Act, such as rape, sexual assault, compelled rape and compelled sexual assault etc. However, sexual acts that do not meet the definitions under the Act will not be covered.

### **C. The Sexual Offences Act 23 of 1957:**

This Act criminalises sexual relations with a person under the age of 16, and also criminalises the enticement of a person under the age of 16 for



the commission of an “immoral or indecent act”. This provision is broad enough to criminalise the sextortion of persons under the age of 16. Research by Corruption Watch in 2020 found that 14% of young persons surveyed in South Africa had been faced with requests for sexual favours in order to access public services or obtain employment (Corruption Watch, 2020). This Act may thus be read as criminalising sexual corruption involving minors.

#### **D. The Cybercrimes Act 19 of 2020:**

This Act criminalises blackmail, referred to as “cyber extortion,” providing that a person who unlawfully and intentionally commits or threatens to commit any offence by making data available to a person, other than the lawful owner or holder of the data, for the purpose of obtaining any advantage from another person; or compelling another person to perform or to abstain from performing any act, is guilty of the offence of cyber extortion (Section 10). Section 16 further provides for a specific offence of “disclosure of data message of intimate image,” providing that any person (“A”) who unlawfully and intentionally discloses, by means of an electronic communications service, a data message of an intimate image of a person (“B”), without the consent of B, is guilty of an offence. These offences (section 10 and section 16) could potentially cover sexual corruption that involves non-physical sexual exploitation, where a victim is asked to provide explicit photos in exchange for obtaining a benefit or avoiding a detriment and the receiver “discloses” such an image by sending the image to any other person (section 13). Under section 20, persons who fall victim to and acquiesce to this type of sexual exploitation may approach the courts for a protection order pending the finalisation of the criminal proceedings to prohibit disclosure of the data message which relates to the charge; or order an electronic communications service provider whose platform hosts or discloses the data message, to remove or disable access to the data message. It may be noted that the section 20 measures have not yet entered into force.

#### **E. The Film and Publications Amendment Act 11 of 2019:**

This Act addresses inter alia the classification of films and publications including sexually suggestive content. The Act contains a prohibition against exposing “through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made without the consent of the individual or individuals who appear in the photograph or film; and with the intention of causing that individual harm (Section 18F). Disclosure is prohibited even if the person who appears in the photograph or film might have consented to the original creation of such photograph or film (van der Linde, 2021). Under the Act, a photograph or film is ‘private’ if, judging from the context in which the photograph or film is taken or made, it was not intended by any individual in the photograph or film to be seen by others (Section 18F (3)). Essentially this section criminalises what is referred to as ‘revenge porn.’ It does not require there to be extortion as is the case under section 10 of the Cybercrimes Act. It may be interpreted as applying to the disclosure of intimate images as a means of harming a victim of sexual corruption but does not address sexual corruption directly.

#### **F. The Employment of Educators Act 76 of 1998:**

This Act addresses the conditions of employment and misconduct by educators. an educator is any person who teaches, educates, or trains other persons or who provides professional educational services, including professional therapy and psychological services, at any public school, further education and training institution, departmental office or adult basic education centre. The Act provides that an educator is guilty of misconduct when an educator “behaves in a disgraceful, improper or unbecoming manner, or, while on duty, is discourteous to any person, or commits sexual or any other form of harassment” (section 17 (g)). Section 17 (j) provides that an educator commits an offense where “an educator without prior



permission of the employer, accepts or demands in respect of the carrying out of or the failure to carry out the educator's duties any commission, fee, pecuniary or other reward to which the educator is not entitled by virtue of the educator's office, or fails to report to the employer the offer of any such commission, fee or reward..." Read together, these offences are broad enough to cover sexual corruption by educators. Under the Act, an employer may investigate the misconduct and take disciplinary action against the educator who committed the misconduct.

## **G. The Employment Equity Act 55 of 1998:**

This Act seeks to promote equality and eliminate unfair discrimination in employment. The Act prohibits discrimination by providing that "No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.... Harassment of an employee is a form of unfair discrimination..." (Section 6). This provision covers sexual harassment and may be interpreted as preventing sexual corruption, in so far as it affects a particular gender or sexual orientation.

There is a Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022, which employers are required to comply with in drafting sexual harassment policies and procedures.

The Code defines sexual harassment as unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors: (1) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; (2) whether the sexual conduct was unwelcome; (3) the nature and extent of the sexual conduct; and (4) the impact of the sexual conduct on the employee. Sexual harassment must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

Under the Code, sexual harassment may include, victimisation, quid pro quo harassment and sexual favouritism. Quid pro quo harassment occurs "where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances".

The Code prohibits sexual corruption in the employment context and as will be seen through the cases below, is the primary means of addressing sexual corruption in South Africa. However, it is limited to the employment context, meaning that victims outside of this context do not have recourse.





# CONCLUSION

The upshot of all these laws is that sexual corruption is partly criminalised through a purposive interpretation of a patchwork of laws in the following manner:

- **Prevention of Corruption Act-** can be read as criminalising active and passive sexual corruption and it thus criminalises the “giver” or the victim in the sexual corruption context.

- **The Criminal Law (Sexual Offences and Related Matters) Amendment Act-** could be read as criminalising sexual corruption if the sexual act amounts to rape, sexual assault, compelled sexual assault, and sexual offences involving children.

- **The Sexual Offences Act-** can be read as criminalising sexual corruption if it involves a person under the age of 16 years.

- **The Cybercrimes Act-** can be read as criminalising sexual corruption where the quid pro quo is a threat not to disclose an intimate image in exchange for a sexual act.

- **The Film and Publications Amendment Act-** covers a threat to disclose an intimate image but a quid pro quo is not required and as such does not cover sexual corruption.

- **The Employment of Educators Act-** will cover sexual corruption by educators.

- **The Employment Equity Act read with the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022** covers sexual corruption in the employment context.

In sum, sexual corruption is criminalised (without criminalising the victim) only for certain categories of persons and certain contexts - in relation to violent sexual acts, in relation to minors, learners and students, in the employment context and where the threat relates to the disclosure of an intimate image. Other forms of sexual corruption such as abuses in other spheres of the public and private sector are currently not covered by South African law. These gaps mean sexual corruption is not adequately or comprehensively prohibited with accompanying criminal remedies. To remedy this, it is necessary to create a dedicated offence that is expressed both within the anti-corruption and the sexual offences architecture.



## Matrix of laws that may cover sexual corruption.

Anti-corruption laws	Sexual misconduct laws	Employment laws	Digital/technology/ film laws
<b>Prevention and Combatting of Corruption Act, 2004</b> <ul style="list-style-type: none"> <li>• Criminalises active and passive bribery in public and private sectors.</li> <li>• Prohibits giving or receiving any gratification in order to act unlawfully and abuse trust or position.</li> </ul>	<b>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</b> <ul style="list-style-type: none"> <li>• Criminalises sexual assault, compelled sexual assault involving a third party and compelled self- sexual assault.</li> <li>• Denies consent where there is the use of force, intimidation or a threat of harm or where there is an abuse of power or authority.</li> </ul>	<b>Employment of Educators Act, 1998</b> <ul style="list-style-type: none"> <li>• An educator commits misconduct if he/ she commits sexual harassment or receives a bribe.</li> </ul>	<b>Cybercrimes Act 2020</b> <ul style="list-style-type: none"> <li>• Criminalises making data available to a person, in order to obtain an advantage from another person.</li> <li>• Criminalises making data available to a person to force that person to perform or to abstain from performing any act.</li> <li>• Criminalises unlawfully disclosing an intimate image of a person in a way that offends their dignity or amounts to sexual exploitation.</li> </ul>
	<b>Sexual Offences Act, 1957</b> <ul style="list-style-type: none"> <li>• Criminalises sexual intercourse with a girl under the age of 16.</li> <li>• Criminalises immoral or indecent acts with persons under the age of 16 years.</li> <li>• Criminalises the solicitation or enticement of a person under the age of 16 years to commit an immoral or indecent act.</li> </ul>	<b>Employment Equity Act, 1998</b> <ul style="list-style-type: none"> <li>• Prohibits discrimination in employment on a number of grounds including gender and sexual orientation.</li> <li>• Prohibits sexual harassment, defined to include quid pro quo sexual harassment and sexual favouritism.</li> </ul>	<b>Film and Publications Amendment Act 11 of 2019</b> <ul style="list-style-type: none"> <li>• Criminalises sharing of sexual images or film without consent in order to cause harm.</li> </ul>



## V. THE LEGAL FRAMEWORK ON SEXUAL CORRUPTION IN FOREIGN JURISDICTIONS

This section presents the legal framework on sexual corruption in several foreign jurisdictions, providing a summary on how these countries have criminalised sexual corruption to provide guidance for SA. The countries examined were selected for their differing approaches to addressing sexual corruption, their geographical importance or socio-economic similarity to South Africa. The USA and two US states are also examined as examples of how sexual corruption is addressed outside of the global South.



### A. BRAZIL

In 2023, Brazil passed a law to criminalise sexual corruption through PL 4534/2021. The law provides that an official that solicits sexual favours in the conduct of his/her employment is liable to between two- and six-years imprisonment and if the sexual activity is consummated, is liable to between six and ten years imprisonment. The law states that there is an offence if an official conditions “the provision of a service or the practice of an official duty to the performance of a sexual activity that involves carnal intercourse or the practice of any other lewd act.” The offender may be any individual that uses a position of supremacy over the victim (Transparency International, 2022). It is not restricted to public officials, covering cases of sexual corruption in the private sector. The law focuses on the transactional nature of the corrupt exchange and does not address the issue of consent at all. Thus, once there is the request or the receipt of a sexual act by an official, there is a breach of the law. The law does not expressly address non-physical sexual activity, such as requests for intimate images or pictures, although such may be covered by the terms “lewd act.”

### B. CROATIA

The Criminal Code of Croatia criminalises sexual intercourse through an “abuse of position”. The law provides that where a person abuses his/her position and induces another person to submit to sexual intercourse or an equivalent sexual act and where that person is in a position dependent towards him/her due to harsh material, family, social, health or any other conditions or circumstances shall be punished by imprisonment for three months to three years (Art 191). The Criminal Code also criminalises bribery, and the bribery prohibitions are wide enough to cover sexual bribery. The law provides that whoever gives a gift or promises a gift or any other gain as a counter favour shall be punished by imprisonment for three months to three years. However, where the bribe giver reports the act prior to its discovery might avoid the punishment. Whilst the Croatian provisions address sexual corruption, it appears that the provisions are predicated on a clear power imbalance between the perpetrator and the victim. There is no need for a reciprocal exchange in the abuse of position offence, but this is required for the bribery offence. There is also no criminalisation of the victim or need for coercion under the bribery offence.





## C. INDIA

India has a Prevention of Corruption (Amendment) Act, 2018, which defines the “undue advantage” in corrupt transactions. The Act provides that “undue advantage” means any gratification whatever, other than legal remuneration...the word “gratification” is not limited to pecuniary gratifications or to gratifications estimable in money...” (section 2). Under the Act, any public servant who obtains or accepts or attempts to obtain an undue advantage in the performance of public duty or obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty is punishable with imprisonment for a term of between three and seven years (section 7). In addition, section 8 makes it an offence for a person to give an undue advantage to induce a public servant to perform improperly a public duty; or to reward such public servant for the improper performance of public duty. However, these provisions shall not apply where a person is compelled to give such undue advantage and reports the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage (section 8 (1)). These provisions are broad enough to cover sexual corruption, with the potential decriminalisation of the victim where there is coercion.

In 2013, India also passed the Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which addresses sexual harassment in the public and private sectors. The Act defines sexual harassment to include physical contact and advances; a demand or request for sexual favours; making sexually coloured remarks; showing pornography; or any other unwelcome physical, verbal or non-verbal conduct of sexual nature (section 2 (n)).

The Act provides that the following behaviour also amounts to sexual harassment (which includes behaviour which resembles sexual corruption):

- (i) implied or explicit promise of preferential treatment in employment;
- (ii) implied or explicit threat of detrimental treatment in employment;
- (iii) implied or explicit threat about present or future employment status;
- (iv) interference with work or creating an intimidating or offensive or hostile work environment for a woman; or
- (v) humiliating treatment likely to affect a woman's health or safety (section 3).

Under the Act, employers are required to establish an “Internal Complaints Committee” (section 4) staffed by women that is tasked with receiving sexual harassment complaints from employees. Complaints must be made within three months of the incident (section 9) and at the request of the complainant, the matter may be settled by conciliation (Section 10). The internal complaints committee has the power to transfer the complainant or the respondent to a different workplace, to give the complainant three months leave or provide the complainant with any other relief. The internal complaints committee may refer complaints and also pay the complainant a sum of money deducted from the respondent's wages. The Act also addresses malicious complaints. Although this Act is comprehensive, it is limited to sexual harassment and sexual corruption that occurs in the employment context and because of non-adherence to the Act, there have been recent discussions on enhancing its efficacy in India (Munjial, 2023).



## D. INDONESIA

In 2022, Indonesia passed the Sexual Violence Elimination Law 12 of 2022, which addresses sexual exploitation. The Act defines sexual violence as any act of a physical and/or non-physical nature, directed at the body and/or function of the reproductive organs, using threats, deception or persuasion which results in physical, psychological, sexual suffering or misery and economic loss. The Act criminalises non-physical and (unwanted) physical sexual acts (section 2) as well as acts and threats of violence, deception, lies, a false identity, abuse of trust, abuse of authority, taking advantage of someone's vulnerability, inequality, or dependency, to have sexual relations with any person or use the person's body for sexual purposes (section 5). The Act prohibits retaliation in section 6 and increases the level of punishment for aggravated offences and persons in certain institutions, including educational institutions (section 7). Corporations may also be liable for sexual violence and liable to pay fines if convicted (section 10). Investigators and prosecutors are required to act from a victim and human rights centered perspective (section 14). The Act also deals with several procedural matters including the kind of admissible evidence (section 17), treatment of minor victims (section 17), restitution (section 18), mandatory reporting requirements (section 21), the creation of integrated reporting centres (section 22 and 23) and the examination of victims. The Act also requires the government to foster education and advocacy on sexual violence in the regions and integrate this education in situations of conflict and natural disaster. Relevant government departments are also required to coordinate to ensure that addressing sexual violence measures are effective. The Act is a comprehensive statute, which addresses sexual corruption as a sexual offence. Because it is addressed from the sexual violence perspective, there is no requirement for reciprocity.

## E. NIGERIA

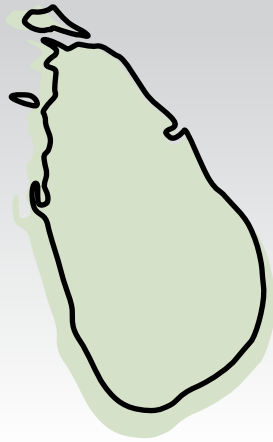
Nigeria has a problem with sexual corruption, and the scale of the problem in the education sector was exposed in the "Sex for grades" scandal (BBC, 2019). In response to these revelations, the Nigerian parliament drafted a bill called the "Prevention, Prohibition and Redressal of Sexual Harassment in Tertiary Educational Institutions Bill, 2019" to protect students against sexual harassment by educators in tertiary educational institutions. The Bill creates a fiduciary relationship between educators and students and provides that an educator shall not exploit a student or his/her relationship with a student for personal gains, sexual pleasure, or immoral satisfaction (section 3). An educator is guilty of an offence or a felony if he/she has sexual intercourse with a student, makes sexual advances to towards a student, directs another person to sexually harass a student, touches the private parts of a student, sends explicit images to a student, or makes sexually suggestive remarks to a student (Section 4). Consent is not a defence to the offence. Criminal proceedings must be filed against the educator who may be liable for up to 14 years imprisonment and will also be liable to a disciplinary proceeding, and a civil claim for a breach of a fiduciary duty. Where a student makes a complaint to an administrative head of an institution and this complaint is not referred, the administrative head shall be guilty of a misdemeanour. The Bill also addresses false complaints and protects students from victimisation.

This Bill was limited to sexual corruption/harassment in the higher education sector but provides guidance in the way in which consent is negated once there is a breach of duty and ensures that administrative heads of institutions refer complaints by making them liable if they fail to do so. The Bill is however limited to tertiary institutions and has not yet been signed into law.



## F. SRI LANKA

Sri Lanka has a 2023 Anti-Corruption law which criminalises active and passive bribery in the public and private sector. Under the Act, it is an offence for a wide range of persons to directly or indirectly solicit, receive or give any gratification. Under the Act, gratification is defined to include sexual favour, which is described as sexual intercourse and any physical, verbal or non-verbal conduct of a sexual nature, including the exposure of a private body part or any act performed by the use of information and communication technology or any other means. (section 162 (2)). The Sri Lankan legislation thus criminalises sexual corruption, but as is the case with most anti-corruption legislation, also criminalises the victim or the giver of the sexual favour.



## G. TANZANIA

The Tanzanian Prevention and Combatting of Corruption Act, 2007 contains a sexual corruption offence, which criminalises the receipt of “sexual or any other favours”. It provides that “any person being in a position of power or authority, who in the exercise of his authority demands or imposes sexual favours or any other favour on any person as a condition for giving employment, a promotion, a right, a privilege, or any preferential treatment, commits an offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years or to both” (section 25). This provision specifies the reciprocity, the abuse of authority as well as the demand for a sexual act. Although it avoids the criminalisation of the victim, it requires the exchange to be for the conferment of a benefit or advantage and not for the avoidance of a detriment, which occurs in many sexual corruption cases.



## H. UNITED STATES

The US federal bribery statute 18 USC 201 criminalises both active and passive bribery of public officials. Thus where a person corruptly gives, anything of value to any public official or offers or promises any public official to give anything of value to any other person or entity, with intent to influence any official act; or to influence such public official to commit or allow any fraud on the United States; or to induce such public official to do or omit to do any act in violation of the lawful duty of such official; or being a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, anything of value personally or for any other person or entity, in return for being influenced in the performance of any official act; being influenced to commit or aid in committing, or allow, any fraud, on the United States; or being induced to do or omit to do any act in violation of the official duty of such official or person shall be fined not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States. It may be noted that “a thing of value” has been interpreted by the courts to cover intangible things and sexual acts. However, as is the case in SA, the anti-bribery law criminalises the victim as well as the perpetrator.



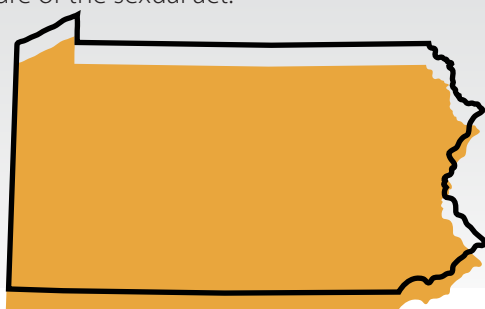
## A. NEW YORK

The State of New York has a sexual harassment law which prohibits sexual harassment that amounts to sexual corruption. The law prohibits unwanted sexual advances or propositions, such as: requests for sexual favours accompanied by implied or overt threats concerning the target's job performance evaluation, a promotion or other job benefits or detriments; subtle or obvious pressure for unwelcome sexual activities.



## B. PENNSYLVANIA

The state of Pennsylvania in 2019 amended its law (Title 18 Crimes and Offenses of the Pennsylvania Consolidated Statutes) to create the offence of sexual extortion which covers sexual corruption as well as cyber blackmail. Under the Act, where a person knowingly or intentionally coerces or causes a complainant, to engage in sexual conduct, the simulation of sexual conduct or a state of nudity; or transmits or distributes any image, video, recording or other material depicting the complainant in a state of nudity or engaging in sexual conduct or in the simulation of sexual conduct is guilty of sexual extortion. A person commits sexual extortion where there is harm or a threat to harm the complainant or the property of the complainant, the reputation of the complainant or any other thing of value of the complainant, or the perpetrator withholds or threatens to withhold a service, employment, position or other thing of value or threatens to cause loss, disadvantage or injury, including a loss, disadvantage or injury to a family. This Act criminalises sexual extortion, including sexual corruption as defined, and addresses the issues of coercion, reciprocity and the nature of the sexual act.



## CONCLUSION

The approaches summarised above indicate that many jurisdictions have addressed sexual corruption as a corruption and a criminal offence (Tanzania, Brazil, India, Croatia, Pennsylvania, Sri Lanka). Others criminalise it as part of sexual violence laws (Indonesia) and the others address it as part of the sexual harassment framework in the employment or other context (India, New York, Nigeria).

There are several overarching themes in foreign legislation, which can provide guidance as SA considers the criminalisation of sexual corruption. These are:

1. Detail on the specificity of offences: most of the foreign laws provide a granular level of detail in relation to the kinds of offences that are criminalised, for instance, India, Indonesia, Pennsylvania, Sri Lanka and the Nigerian Bill, specify what kind of sexual conduct offends the law.
2. Inclusion of abuse of trust, abuse of duty or abuse of fiduciary position: this is an important aspect of the laws where the law is based upon and triggered by an abuse of position as we see in Croatia, the Nigerian Bill, Indonesia, and Brazil.
3. Creation of reporting institution: countries like India and Indonesia and the Nigerian bill require the creation of an independent mechanism for reporting the named offences.
4. Clarity on remedies: Most of the laws state the kinds of criminal punishment that may be applied on conviction.
5. Victim centered approaches: This arises in relation to the laws of India and Indonesia, where it is specified that a victim and human rights centred approach must be adopted in dealing with victims.
6. Decriminalisation of victims: The laws in Croatia and India include provisions for decriminalisation of victims. Other laws like Tanzania only address the receiver of the sexual bribe, eliminating this issue.
7. Dealing with malicious complaints: This is seen in relation to Indonesia and the Nigerian Bill and will be important especially in the employment context.

## VI. CASE LAW ON SEXTORTION & SEXUAL CORRUPTION IN SOUTH AFRICA & BEYOND

**This section reviews several court decisions which address sexual corruption directly and indirectly. The cases were selected from jurisdictions including South Africa where the law was examined and where case law was available.**

### A. SOUTH AFRICA

#### 1. **S v W 1991 (2) SACR 642 (T)**

In this case, the appellant, a traffic officer, was convicted for contravening section 2(a) of the Prevention of Corruption Act 6 of 1958 which criminalised bribery through the receipt or acquisition by an agent in a corrupt manner of a gift or compensation in the performance of an act in relation to the affairs or business of his principal. The appellant attempted to persuade a young girl to have sexual intercourse with him in return for him declining to prosecute her for a traffic offence. It was argued that he was not liable for bribery as sexual intercourse did not fall within the ambit of the words 'any gift or consideration' in s 2(a) of the Act and that the trial court had accordingly erred in finding that the offence had been proved. His appeal was dismissed, and it was held that was not only the giving of a financial reward which constituted the crime of bribery, and the attempt to have sexual intercourse also constituted the crime of bribery.

This is the only known case where sexual corruption was prosecuted as a corruption offence under South African law, although it was litigated under an earlier version of the Prevention of Corruption Act. However, it provides precedent for litigating sexual corruption under the current Prevention and Combatting of Corruption Act, although as discussed, this Act criminalises the victim provider of the sexual act. The case did not place any emphasis on the sexual elements of the offence and the victim was not criminalised as she had not agreed to the demands.

#### 2. **University of Venda v Maluleke and Others**

**(JR2125/13) [2017] ZALCJHB 72; (2017) 38 ILJ 1376 (LC) (28 February 2017)**

The respondent was a university lecturer who was dismissed for sexually harassing three female students. He approached them at various times and requested sexual intercourse if they wanted to pass the course he taught. He also touched and kissed one student without consent. The students who refused his advances failed the course. The actions of the

respondent were a breach of the university's sexual harassment policy, which defines sexual harassment as unwelcome sexual advances in exchange for favours, or other requests which are objectionable in the context of the working environment, including the intimidation of students into submitting to unwanted sexual advances in return for marks.

The respondent challenged his dismissal before the Labour Court and the case was considered under the Employment of Educators Act and the university's sexual harassment policy issued under the Employment Equity Act. There was no discussion of sexual corruption or bribery. The case focused on the meaning of sexual harassment, stating that sexual harassment must be unwelcome and previous consensual activity does not preclude later actions from being unwelcome. Actions could be unwelcome based on the power dynamic and the relationship between the parties. The case discussed the power differential between the respondent and his victims and also discussed quid pro quo sexual harassment and sexual favouritism under the policy, which stated that "Quid pro quo harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances." Although this was a clear case of sexual corruption, the absence of a dedicated law on sexual corruption meant the case was addressed as a civil and not a criminal matter under the university's sexual harassment policy.

#### 3. **G v Minister of Safety and Security and Another**

**(D495/06) [2010] ZALC 312 (18 June 2010)**

The applicant was a member of the South African Police Force (SAPS) who alleged that her area commissioner (also an employee of SAPS) sexually harassed her for three years before she reported

it. She sued the harasser's employer (the Minister for Safety and Security) to hold them liable for the harassment suffered. She claimed that SAPS did not investigate the complaint when it was made, and she was victimised because of the complaint. The allegations are that the area commissioner persuaded her to have sexual intercourse with him if she wanted to be promoted and she acquiesced. After the sexual encounter, the allegation is that he began to blackmail her into continuing to have sexual intercourse with him, threatening to expose her for having had sexual intercourse with him. Because this was at odds with her family's values and she had family members who worked for SAPS, she gave in to the blackmail. She also lent him money at his request, which she obtained from moneylenders. She also alleged that he raped her on one occasion. SAPS found that he did not commit sexual harassment, but committed misconduct and was reprimanded. The court agreed that the relationship was consensual even though the area commissioner had breached several laws and engaged in many corrupt acts. This case highlights that sexual harassment laws and policies will not always be sufficient to address sexual corruption as they focus on issues of consent, the behaviour of the victim, whether there was prompt reporting, and do not give sufficient attention to abuses of authority and coercion.

#### **4. Makoti v Jesuit Refugee Service South Africa**

**(JS 323B/09) [2011] ZALCJHB 122; (2012) 33 ILJ 1706 (LC) (13 January 2011)**

The applicant alleged that she was sexually harassed by her supervisor on several occasions through requests for sexual intercourse and sexual innuendo, and he had offered her a promotion to another province, which she rejected. She did not report these incidents, although she discussed them with a colleague. After several advances, she told him that she had reported him to her husband, which surprised him and from then on, he became unpleasant and spiteful towards her. She was denied a promotion even though she had been acting in the role and was informed that year that her annual contract would not be renewed, based on her "continued poor performance." In the past, her contract had been renewed without a performance assessment as a pre-requisite for a renewal. The respondent claimed there could not be sexual harassment since she did not report it at the time. The court found that there was sexual harassment under the Employment Equity Act, and she was unfairly dismissed under the Labour Relations Act. She was granted compensation for her unfair dismissal. This case was dealt with as a civil matter even though it was a clear case of sexual corruption with retaliation.

#### **5. Tshivhase-Phendla v University of Venda (JS1145/12) [2017] ZALCJHB 491 (12 October 2017)**

The applicant was a professor in the respondent university and was dismissed for taking bribes to wrongly influence a university cleaning contract. She alleged that she was sexually harassed and raped by the Vice-Chancellor of the University and was in a coerced relationship with him, where she was rewarded with the post of Dean and a nomination for membership of a foreign research project. She alleged that she was dismissed only when she sought to terminate the sexual relationship. The court found that there were many inconsistencies in her testimony and no evidence that she was subjected to sexual harassment and her dismissal was fair under the Labour Relations Act.

### **B. INDIA**

#### **1. Court of its own motion v State of JK & Anor [2018] High Court of Jammu and Kashmir at Srinagar CMP No 31/2012.**

This case concerned an accused who set up an agency to provide support and security staff to hospitals and other organisations. In doing so, the accused employed women from disadvantaged backgrounds and coerced them into having sexual relations with him and coerced these women into having sexual relations with other men. The offence was regarded as a breach of section 22 of the Constitution of Jammu and Kashmir, which secures equality for women, especially, "special protection against discourtesy, defamation, hooliganism and other forms of misconduct" (section 22 (e) Constitution of J & K). The court also directed that the Jammu and Kashmir Prevention of Corruption Act, 2006 be amended to provide stringent penalties for this type of corruption. This case was litigated under the state Constitution but created the impetus for India's first sexual harassment law, dedicated to addressing sexual corruption in the workplace.

### **C. SRI LANKA**

#### **1. Kathubdeen v Republic of Sri Lanka [1998] 3 Sri LR 107.**

This case turned on whether sexual intercourse amounted to a gratification under section 90 of the repealed Sri Lankan Bribery Act. The accused worked in a government department and requested sexual intercourse from his subordinate in order to effect a work transfer for her. The Act defines gratification as including "any other service, favour or advantage or any descriptive whatsoever." It was held that the word gratification connotes anything which affords

gratification or satisfaction or pleasure to the taste, appetite or mind. The craving for sexual intercourse is an example of mental and bodily desires, the satisfaction of which is gratification, which is not estimable in money. As a result, the accused was rightly convicted under the Bribery Act. This case highlights that an expansive meaning of "gratification" under bribery laws can be used to address sexual corruption. As was seen above, the new anti-corruption law in Sri Lanka expressly includes sexual favours and acts as part of the meaning of gratification for the purpose of the offence of bribery.

## D. TANZANIA

### 1. Republic v Ngilangwa RM Crim Case No 07 of 2010 (Resident Mag Ct of Iringa, June 6, 2011) Tanzania.

In this case, the accused was a secondary school teacher, who requested sexual intercourse from a 14-year-old student to provide her with high marks in his class. The child's mother reported the matter to the police and the teacher was apprehended. He was tried and convicted of demanding sexual favours under Section 25 of the Prevention and Combating of Corruption Act of 2007, and of attempted rape under Section 132(2) (b) of the Penal Code, 2002, which provides that "[a] person attempts to commit rape if, with the intent to procure prohibited sexual intercourse with any girl or woman, he manifests his intention by . . . (b) being a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes." He was sentenced to five years in jail. This case illustrates that sexual corruption can be prosecuted under a dedicated sexual corruption offence in the African context.

### 2. Onesphory Materu vs Republic

(Criminal Appeal 334 of 2009) [2011] TZCA 165 (28 March 2011)

The accused was a police officer who requested sexual intercourse from a 14-year-old girl remanded for a charge of theft in exchange for releasing her from custody. After the sexual intercourse, she was not released, and she reported the matter. She was medically examined, and evidence of the intercourse was found. The officer was convicted under the Penal Code and sentenced to 30 years imprisonment, 24 strokes of the cane and ordered to pay 700,000 shillings to the complainant. This case was litigated under the Penal Code since the victim was a minor, the act also violated the provisions on rape under section 130 of the Penal Code as amended.

## E. UNITED STATES OF AMERICA

### 1. State v. Moore,

419 So. 2d 963, 967 (La. 1982)

In this case, a state police officer in Louisiana found two occupants in a car breaching public obscenity laws. He requested the woman occupant of the car to have sexual intercourse with him in order to avoid arrest. At his trial, the accused argued that the state failed to prove an essential element of extortion, namely the intent to obtain anything of value by communication of threats. It was held that sexual favours are "anything of value" under the state extortion law.

### 2. United States v Moore

525 F.3d 1033 (11th Cir 2008).

The two accused were correctional officers at a women's prison and operated a "sex for contraband scheme" where they engaged in sexual contact with the inmates in exchange for contraband. They assisted each other in undertaking these activities and were convicted of conspiracy to commit bribery and bribery. It was held that "a thing of value" covers intangible considerations and monetary worth is not the sole measure of value and sex was covered under this term.

## CONCLUSION:

Case law on sexual corruption is very scant, even in countries which criminalise it. In SA, there is a dearth of litigation on sexual corruption, partly because there is a dearth of litigation on corruption generally and sexual corruption is mostly addressed as a civil matter under the Employment Equity Act. In other countries, most cases are addressed under rape laws (when the victim is a minor) and under sexual harassment law or extortion laws.





## VII. PROPOSED LEGISLATIVE AND INSTITUTIONAL CHANGES TO CRIMINALISE SEXUAL CORRUPTION IN SOUTH AFRICA

**From the review of the legislation and court decisions, sexual corruption in SA is most often addressed as a breach of the sexual harassment provisions of the Employment Equity Act.**

Whilst sexual corruption offence is also covered to a limited extent under the Employment of Educators Act, the sexual offences laws, the Cybercrime Act and under the Amended Code of Good Practice on Handling Sexual Harassment in the Workplace issued under the Employment Equity Act, these are limited to certain conduct and contexts and do not apply to sexual corruption outside these realms. Addressing sexual corruption as a civil matter also means that offenders do not suffer criminal or serious consequences for their actions.

It is recommended that SA creates a dedicated sexual corruption offence, which will address the gaps in the existing legislative framework (Hendry, 2020; IBA 2019; Hlongwane, 2017). Criminalisation is necessary as the criminal law prohibits conduct that is harmful to individuals and to society and warns about conduct that is subject to criminal punishment (Lippman 2018). As South Africa grapples with the fall out of the Zondo Commission report, there is currently the possibility of a legislative window to amend its anti-corruption laws. If a sexual corruption offence is created, this will mean that the issues of consent and coercion become irrelevant, but the law must criminalise the perpetrator alone and avoid criminalising the victims. This report thus makes the following recommendations:

1. **Creating a dedicated offence of “sexual corruption”:** The proposed sexual corruption offence should thus be dealt with as an amendment to the Prevention and Combatting of Corruption Act. It is suggested that the proposed offence models the simplicity of the Tanzanian provision with some modifications.

a. **Scope of the offence:** the offence must prohibit any request for physical or non-physical sexual acts in exchange for avoiding a detriment or conferring a benefit in a way that amounts to an abuse of authority, trust or position. There will be a presumption of corruption once there is the abuse of authority as is the case with other corruption offences under section 24 of PRECCA. Consent for the sexual act is irrelevant once there is an abuse of

position on the part of the perpetrator (the denial of consent is present in Canada and Australia where there is an “abuse of authority” by the offender-Thomson Reuters Foundation, 2015). Psychological coercion is irrelevant and presumed when there is an abuse of position/trust (Gitlin, 2016). In addition, the victim is not criminalised because the law criminalises the demander/receiver of the sexual act and not the giver of the sexual act. The offence should be prohibited in both the public and private sectors in line with the existing corruption offences under the Act. Under the proposed offence, the person in authority will not be able to rebut the sexual corruption allegation on the basis that he/she did not solicit the sexual act. In other words, if the person in authority was offered the sexual act and the person in authority accepted the sexual act in order to abuse his/her position, then the commission of the offence is established. Further, the duty to report offences under the PRECCA will also apply to sexual corruption offences.

b. **Elements of the offence:** for the offence to be established, there must be a request or the consummation of a physical/non-physical sexual act in exchange for obtaining a benefit or avoiding a detriment and the abuse of position/trust/authority.

As stated, coercion and a lack of consent are irrelevant in corruption offences (Hendry, 2020; Gitlin, 2016). Once there is an abuse of authority, and the request or receipt of for a sexual act in exchange for something, this is sufficient to establish the offence. Non-criminalisation of the victim is ensured by only criminalising the receiver of the sexual act as is the case in Tanzania.

c. **Remedies:** The law should specify the criminal and other remedies available on conviction for the offence. These may include a term of imprisonment, the option of fines and compensation for the victim.

**2. Victim-centred reporting mechanisms:** As sexual corruption is also a sexual offence, the law must also require that public agencies and police stations provide a safe, confidential reporting mechanism for sexual corruption, and victims are dealt with in a victim-centred and gender-sensitive way. Reporting mechanisms should be able to provide access to appropriate resources, including physical and psychological health services, and financial and legal support. At present, victims of sexual offences in South Africa may utilise the Thuthuzela Care centres located within some public hospitals, which provide legal, medical and psychological support. These or similar bodies may be utilised in cases of sexual corruption, which offer clear guidance on reporting processes (Transparency International, 2020). The reporting mechanisms may include police stations, an independent or ombudsman agency, or an administrative or community agency (IAWJ 2012). For instance, in Tanzania, the anti-corruption agency introduced “gender desks” where victims of sexual corruption can report to women officers (Makoye 2019). There could be reasonable time limits imposed for reporting as occurs in India or the same twenty-year prescription period that applies to criminal offences under section 18 of the Criminal Procedure Act 51 of 1977. There must also be an improvement in whistleblowing mechanisms in the public sector. It may be noted that in SA, the Public Protector is competent to investigate inter alia, abuse or unjustifiable exercise of power or unfair capricious, discourteous or other improper conduct by a person performing a public function, and any dishonest act or omission or offences referred to in part 1 to 4 or section 17, 20 or 21 of chapter 2 of PRECCA in the public administration which results in unlawful or improper prejudice to any other person (section 6 (4) Public Protector Act 23 of 1994). What this means is that victims of sexual corruption may report to the Public Protector who may investigate allegations of sexual corruption in the public sector.

**3. Training on prosecuting sexual corruption:** It will be necessary to provide investigators, prosecutors, and judges with the technical knowledge on investigating, prosecuting, and hearing this offence (Global Judiciary Integrity Network, 2020). Some learning may be obtained from agencies and practitioners who are versed in determining whether sexual harassment occurred in the workplace. South Africa currently has sexual offences courts, which may be suitable. There also exists a special corruption court, which is charged with recovering misappropriated public funds, but this court may not be suited for prosecuting sexual corruption. Prosecutions and convictions will increase the deterrent effect of the law and reduce the impunity with which the crime is committed.

**4. Sustained advocacy:** The criminalisation of sexual corruption alone will not be sufficient to address this problem and must be accompanied by an advocacy campaign.

- a. **Sensitisation of the public:** Researchers have highlighted that many victims of sexual corruption do not recognise it as a corruption offence (UNODC, 2020) and do not recognise that they are victims of a crime (IBA, 2019; Elden et al. 2020). As such, advocacy will be necessary to sensitise the public to their rights and available remedies when sexual corruption occurs. This will involve the creation of materials distributed to areas where sexual corruption is rampant, including schools, universities, the judiciary, and municipalities. Municipalities must be responsible for creating community level awareness of this crime, reporting mechanisms and victim support.



b. **Multi-stakeholder collaboration:** collaboration between the courts, the prosecutors, law enforcement, correctional institutions, and community groups (including child, women and LGBTQIA+ groups) is necessary to ensure there is no friction between these groups in addressing sexual corruption, clarify the processes for bringing sexual corruption cases and understand the “legal, social, economic, or other barriers that may keep victims either from availing themselves of those processes or from obtaining effective redress” (IAWJ 2012). This collaboration must also address the reporting process.

c. **Strengthening public service ethics codes:** Sexual corruption in the public sector is a breach of public service ethics codes, and these must be reinforced as a preventive mechanism against all types of corruption, including sexual corruption. Sexual corruption should be included in sexual harassment policies and in public codes of conduct and more work must be done to address public sector malfeasance by taking measures to institute ethics by making conduct important to reward and progression.

5. **Continued efforts to mainstream gender and address sexual violence:** South Africa has a problem with sexual and gender-based violence that is outside the scope of this report, however, in addressing sexual corruption, it is important to recognise that it falls into the sexual violence continuum and work needs to continue to change harmful gender stereotypes, address toxic masculinity tropes and foster a culture of respect for women.



## VIII. PROPOSED ADVOCACY PLAN FOR ADDRESSING SEXUAL CORRUPTION IN SOUTH AFRICA

**This advocacy plan is based on the research which highlighted certain barriers to reporting, investigating and prosecuting sexual corruption. This advocacy plan is intended to address the factors identified in the research and support a broad approach to addressing sexual corruption. The plan seeks to achieve four goals that will increase the reporting, investigation and prosecution of sexual corruption and increase the deterrent effect of the proposed law.**

### ADVOCACY GOALS:

- i. Creation of a dedicated offence of “sexual corruption” within the Prevention and Combatting of Corruption Act, 2004.
- ii. Create victim centred mechanisms for reporting sexual corruption.
- iii. Create awareness of the offence and information on how to report in different spheres and on how to obtain victim support.
- iv. Provide training and support to police stations, investigators, prosecutors, and judges on how to handle sexual corruption cases.

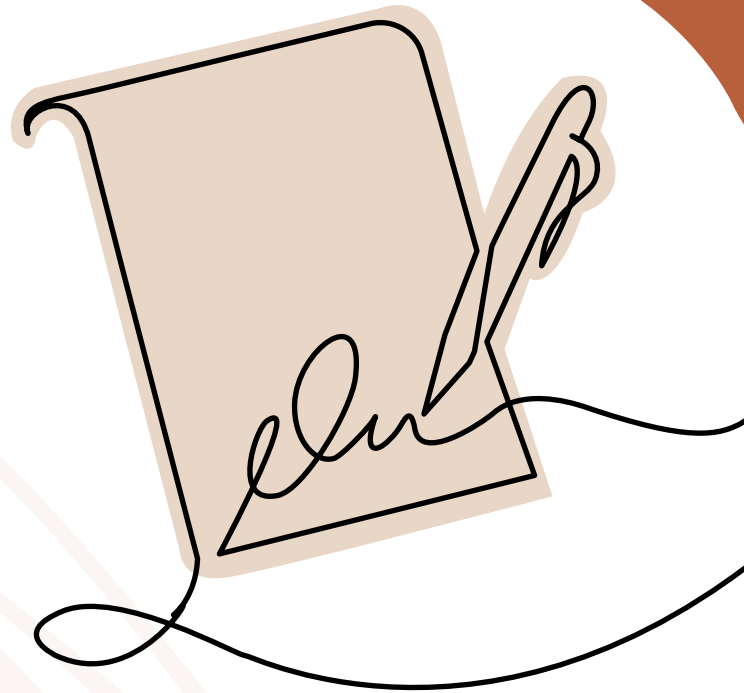
### RESOURCES:

- Department of Justice
- Department of Women, Youth and Persons with Disabilities
- Department of Public Service and Administration
- National Prosecuting Authority
- Commission for Gender Equality
- SA Human Rights Commission
- LGBTI National Task Team
- DOCKDA Rural Development Agency
- UN Women
- National Anti-Corruption Advisory Council
- Corruption Watch
- Office of the Public Protector
- African Procurement Law Unit, Stellenbosch University
- Media

### ALLIES

- National Anti-Corruption Advisory Council
- African Women Against Corruption Network
- Women For Change SA
- Gender Justice
- Southern Africa Defenders
- People Opposing Women Abuse
- Soul City Institute
- Lawyers Against Abuse
- National Business Initiative
- DOCKDA Rural Development Agency
- Black Womxn Caucus
- Nisaa Institute for Women’s Development
- Business Women’s Association, South Africa
- OUT LGBT Well-being
- Victory Institute
- South African National Child Rights Coalition
- OxFam
- Section 27
- Media





## STAKEHOLDERS

- Presidency
- Parliament
- National Treasury
- Provincial treasuries
- Department of Women, Youth and Persons with Disabilities
- Department of Justice
- Department of Public Service and Administration
- National Prosecuting Authority
- Rural Development Agency
- Commission for Gender Equality
- SA Human Rights Commission
- Office of the Chief Procurement Officer (OCPO)
- Dept of Trade and Industry (DTI)
- All government departments
- State owned enterprises
- Dept of small business development
- Small Enterprise Devpt Agency (SEDA)
- Small Enterprise Finance Agency (SEFA)
- National Economic Development and Labour Council (NEDLAC)

## TARGETS

- Presidency
- Parliament
- National Treasury
- Department of Justice
- Department of Women, Youth and Persons with Disabilities
- Department of Public Service and Administration
- National Prosecuting Authority
- Commission for Gender Equality
- National Anti-Corruption Advisory Council
- SA Human Rights Commission
- Provincial treasuries
- Dept of Trade and Industry (DTI)
- All government departments
- State owned enterprises

## STRATEGY:

- a. Engagement with relevant organisations on the need for criminalisation of sexual corruption as an amendment to the Prevention and Combating of Corruption Act 2004 [March 2024 to December 2024].
- b. Engagement with the public and private sector on the need to include sexual corruption in anti-harassment and employee conduct policies including public service codes of conduct and the creation of safe and confidential reporting mechanisms [March 2024 to December 2024].
- c. Public education and awareness campaign of what amounts to sexual corruption in schools, universities, hospitals and municipalities providing water and sanitation services and in public procurement. Create posters and handbills that specify the prohibited conduct, highlight its corrupt nature and the reporting mechanisms and support available. Rely on public and university radio stations and social media [June 2024-Feb 2025].
- d. Convene a national event with all stakeholders to determine responsibilities for implementation and tracking. Aim for end of 2024 or early 2025.

## IX. CONCLUSION

This research report examined the legislative framework on sexual corruption in South Africa and highlighted the gaps in the legal framework. It was seen that sexual corruption is criminalised by reliance on a patchwork of civil and criminal laws, but these laws cause problems for the prosecution of sexual corruption, such as the criminalisation of the victim, and the preoccupation with the issues of coercion and consent under sexual harassment laws. The report determined that it is necessary to change the terminology used in addressing sextortion to “sexual corruption” to avoid confusing sexual corruption with sexual blackmail using intimate images.

The report also examined international experiences with criminalising sexual corruption and determined that it is necessary to criminalise sexual corruption in South Africa, through a dedicated offence of sexual corruption, which may be included in the anti-corruption legislation.

The report concludes that it will be necessary to focus on the abuse of position/ authority as the key element

in criminalising sexual corruption, jettisoning issues of consent and coercion once an abuse of position/authority exists. In addition, the presumption of corruption must also apply to a sexual corruption offence, so that when there is a demand for sexual favours accompanied by a power imbalance, an abuse of authority and the conferment of benefits or the imposition of deprivations, then sexual corruption should be presumed, with the burden on the perpetrator to prove there was no corruption. It is also necessary that there are interventions in the criminal justice system to provide safe and victim-centred channels for whistleblowing and reporting and that other support is provided to victims as needed.

The report concludes with recommendations for criminalising sexual corruption in SA, setting out the elements of the offense and further creates an advocacy plan to engage with relevant stakeholders on the need for a dedicated offence, the need for creating public awareness on sexual corruption and its importance to addressing sexual violence and gender equality in SA.

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# LEGAL FRAMEWORK ON SEXTORTION/SEXUAL CORRUPTION IN SOUTH AFRICA



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