



TITLE: BILL 22-0472: The Protection From Sexual Extortion Amendment Act of 2017
COMMITTEE: Committee on the Judiciary and Public Safety, Council of the District of Columbia
HEARING DATE: July 11, 2018
POSITION: **GENERAL SUPPORT**

INTRODUCTION

The Amara Legal Center is based in DC and provides free, direct legal services to sex workers and survivors of human trafficking in DC, Maryland, and Northern Virginia. At Amara, we see many complex ways in which our clients are recruited and exploited. This includes “revenge pornography” where someone’s sexually explicit images are distributed, often by a former romantic partner or another individual our client knows personally. As part of Amara’s trafficking prevention work, we are invested in tackling the similarly destructive practice of sexual extortion. Unfortunately, one of the ways in which someone, whether a juvenile or an adult, can become vulnerable to exploitation is by the threat or actual distribution of their sexual images.

Amara supports amending the DC Code to tackle this problem. Our concern is for the many children and adults potentially being coerced into providing forced services in exchange for keeping their sexually explicit images private.

During the hearing on July 11, 2018, individuals from the Public Defender Service (“PDS”) and the Criminal Code Reform Commission (“CCRC”) acknowledged that sexual extortion should be criminalized. PDS and the CCRC argued that sextortion is either effectively addressed under current statutes or current statutes could be amended to make clear the applicability of existing laws to sextortion. PDS testified that the sextortion statute is potentially unnecessary because of other offenses that criminalize the same activity that Bill 22-0472 seeks to criminalize. As a result, prosecutors would be given too much discretion in deciding under which crimes to prosecute sextortion, which could lead to inconsistent prosecutions for multiple defendants engaging in similar activities. Additionally, individuals could be charged with only one or multiple offenses for the same criminalized activity.

Amara is sympathetic to the concerns expressed by these entities. We have a similar desire to avoid confusion in charging decisions and avoid adding unnecessary laws to the books. However, we also want to ensure that the specific activity sought to be criminalized in the amendment, is adequately criminalized elsewhere, before dismissing the sextortion amendment. In the sections that follow, Amara explains why an amendment is necessary to clearly criminalize sextortion, even if that amendment is not the one under consideration.



Applicability of Existing DC Code Provisions

At the hearing, several code sections were mentioned as potential avenues to criminalizing sextortion. Amara addresses the applicability of some specific sections below. In assessing these offenses, Amara applied the general fact pattern of a perpetrator obtaining sexual images from another individual and threatening to disseminate the sexual images in order to direct that individual to engage in sexual or non-sexual activity.

Some of the code sections do appear to be applicable to sextortion. However, just like how PDS was concerned about the consistency of prosecutions and confusion as to which laws should be charged and when, the absence of specific language relating to sextortion could lead to similar confusion and inconsistent prosecution. The Council could achieve the objective of protecting victims of sextortion either by amending one or more of the following code sections, or by creating a new offense that would very clearly criminalize sexual extortion. Indeed, it may be better to amend multiple sections of the code to avoid inconsistent criminal penalties and to criminalize the many ways in which sextortion could occur.

Sex Offenses

Chapter 30 of the DC Code governs crimes relating to sexual abuse. The definition of “force” that applies to any offense in that chapter is “the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm *sufficient to coerce or compel submission* by the victim.”¹

First Degree Sexual Abuse

Subsection one of First Degree Sexual Abuse states it is unlawful to “us[e] force against that other person” to engage in sexual acts.² Since “force” is the threat of harm sufficient to coerce or compel submission by the victim, it is possible that this statute could apply to instances of sextortion. However, it is not explicit under the statute whether harm includes injury to reputation or emotional distress, which are commonly the threats sexual extortion victims face. Clarity may be needed to ensure a perpetrator could be charged for compelling submission by threat of disclosure of sexual images.

Second Degree Sexual Abuse³

Second degree sexual abuse could potentially be applicable because subsection one

¹ DC Code § 22–3001(5) (emphasis added).

² DC Code § 22–3002. First Degree Sexual Abuse.

³ DC Code § 22–3003. Second Degree Sexual Abuse.



criminalizes “threatening or placing [another person] in reasonable fear” which then causes the victim to engage in or submit to a sexual act. A perpetrator could also be liable, under subsection two, because a victim will most likely be incapable of declining participation in a sexual act because of the potential spread their images or others. Again, clarity would be beneficial in ensuring that sextortion is criminalized and in ensuring consistent prosecution.

Third Degree Sexual Abuse⁴

Similar to the concern with First Degree Sexual Abuse, it is unclear whether a perpetrator may be prosecuted under Third Degree Sexual Abuse because of the language of subsection one. It states it is unlawful to “us[e] force against that other person” to engage in sexual acts. Under the statute, “force” is defined as a use of a threat of harm sufficient to coerce or compel submission. However, again, it is not explicit under the statute, whether harm includes injury to reputation or emotional distress, which are commonly the threats sexual extortion victims face.

Non-Consensual Pornography Crimes

The DC Code criminalizes non-consensual disclosure or publication of sexual images in § 22–3052 (Unlawful disclosure), § 22–3053 (First-degree unlawful publication), and § 22–3054 (Second degree unlawful publication). These are not applicable to sextortion situations because a victim only has this recourse if their images are actually disseminated. If the perpetrator decides to retain control of the victim’s images and continues to dictate the victim’s actions, it leaves no possibility for persecution under this crime. If the Council does not want to create a new crime to tackle sextortion, one avenue would be to amend these statutes to also criminalize the threat of disclosure.

Stalking⁵

The stalking statute criminalizes “purposefully engaging in a course of conduct directed at a specific individual with the intent to cause the individual to fear for his or her safety...feel seriously alarmed, disturbed, or frightened; or suffer emotional distress.”⁶ A perpetrator could be liable because a victim would most likely fear for their safety if dissemination of their own sexual images were threatened. Also, it is reasonable to infer a victim would feel “seriously alarmed, disturbed, or frightened” by the perpetrator’s threat of disseminating their images without their consent. As a result, the victim would reasonably suffer emotional distress from the threat alone or in conjunction with the act sharing of the images. A perpetrator’s mental

⁴ DC Code §22–3004. Third Degree Sexual Abuse.

⁵ DC Code § 22–3133 Stalking.

⁶ DC Code § 22-3133(a)(1-3)



culpability would be satisfied because likely the perpetrator had intent, knew, should have known these effects on its victims.

Voyeurism⁷

It is clear from the face of the law that Voyeurism does not get to the heart of the purpose behind the sextortion amendments. Voyeurism is about criminalizing the capturing of images, as opposed to the threat of distribution of sexual images to obtain more sexual images or to get the victim to engage in sexual or other activity.

Under the Voyeurism statute subsection (b) and (c), a perpetrator may be held culpable for only taking affirmative acts to secretly obtain images of individuals, who are partially undressed or in a sexual activity. However, in situations where the perpetrator does not personally capture the images, but hacks or rather receives the images consensually from the victim, this leaves a gap in the reach of the statute.

On the face of subsection (f)(2), a perpetrator would be able to be held culpable for attempting to or disseminating sexual images of an individual. However, a perpetrator's liability of dissemination or the attempt to do so is contingent upon whether the perpetrator had knowledge that the images or film were taken without the victim's consent or the perpetrator captured the photos personally. If not, the perpetrator would be able to evade liability if the perpetrator attempted to or disseminated images the victim gave to them, even if it was unwillingly.

Blackmail⁸

Under the crime of Blackmail, a person may be able to evade liability if the sexual images do not depict a crime or if the image is not considered a secret or fact. Therefore, clarity is needed to define whether a photo can constitute a secret or an asserted fact. However, if this statute were amended to provide clarity, a perpetrator's actions would most likely be covered under the statute because the intention is to impair the reputation of an individual or subject them to hatred, contempt or ridicule.

Amendments to the Bill As-Is

Regardless of whether the Council ultimately decides to amend the crime of Extortion or another part of the Code, Amara would also like to make the following suggestions on potential additions to the bill that are specifically tailored to supporting survivors of human trafficking.

⁷ DC Code § 22-3531 Voyeurism.

⁸ DC Code § 22-3252 Blackmail.



Affirmative Defense for Survivors of Trafficking

The statute should not apply to survivors of trafficking when they committed the offense as a direct result of the trafficking they endured. Like with vacatur where the rationale is to clear the records of survivors who were coerced into committing crimes themselves, these same individuals should not be charged with an offense that they were forced to commit under duress. The Council should consider adding the following language in the event survivors are charged with “sextortion”: “in this section, it will be an affirmative defense that the defendant is a victim of human trafficking as defined in 18 U.S.C. § 1590, §1591 and DC Code § 22-1832, § 22-1833, and § 22-1834 where the alleged conduct was the direct result of the person having been a victim of trafficking.”

“Any Act” vs “Any Sexual Act”

The proposed bill provides that it is a violation of the statute to demand the victim perform or not perform “any act.” Some individuals at the hearing requested that this be changed to “any sexual act”. Amara is hoping the statute can remain broadly written, so it can be useful to individuals who may be facing other forms of exploitation. For example, some of our clients who may be victims of labor trafficking or labor violations, could have sexual images used against them to keep them in a non-sexual, exploitative situation. It does not appear that the current extortion or blackmail statutes would be sufficient to hold an abuser accountable for using their images in this way.

Sex Workers and Imperfect Victims

With respect to the victim being induced to perform an act because of a threat of economic injury or injury to reputation, the collective lack of respect for non-perfect victims and sex workers may make this part difficult to prove. For example, if one of our clients is a sex worker who was induced to perform sexual acts because someone threatened to release her images, a defendant may argue that her images would promote her business and reputation in that business. Amara proposes adding more inclusive language. For example, the current DC blackmail statute prohibits the disclosure of secrets or facts “tending to subject any person to hatred, contempt, or ridicule.”⁹ The Committee could also consider tracking language present in DC’s “revenge porn statute” that makes it a crime to disclose an image “with the intent to harm the person depicted or to receive financial gain.”¹⁰ The sextortion bill could be amended to say the victim’s consent was induced by “threat of dissemination of the property obtained” or by

⁹ DC Code § 22-3252(a)(2)

¹⁰ Criminalization of Non-Consensual Pornography, DC Code § 22-3053(a)(3).



“threat to their safety, security, or privacy.”¹¹”

An Exception for Minors Engaging in Sextortion

Finally, as an important related issue, Amara thinks it is important to deeply consider the way we handle minors creating or sharing the images of other minors. If an adult shares the sexual image of a minor, that adult can be charged with distribution of child pornography. However, minors are at risk of being charged with the creation of child pornography (for images they take of themselves) or the dissemination of child pornography (for images they share of themselves or other minors).

Given the severe consequences of a conviction for child pornography, such as the addition of an individual to the sexual offender registry, Amara hopes that the prosecutors in our jurisdiction would pursue other options before charging a child with creation or distribution of child pornography. If the Council were to consider a specific exception for minors to ensure they are not charged with creation or distribution of child pornography for images they create or disseminate of themselves, Amara would be supportive of that amendment.

A child could end up being exploited by an adult because of the very real possibility that the child does not want their abuser informing law enforcement that the child took sexually explicit images of him or herself. The threat of prosecution alone could be all an abuser needs to control a child. This is not much different than situations Amara’s clients face every day where a trafficker maintains control by threatening a survivor with the very real possibility of arrest for prostitution, despite the coercive nature of their relationship.

Thank you for your time and attention to this important issue. I’m happy to answer any questions the Committee may have.

Sincerely,

A handwritten signature in black ink that reads "Yvette Butler". The signature is written in a cursive, flowing style.

Yvette Butler, Esq.
Director of Policy and Strategic Partnerships
Amara Legal Center
(202) 836-7976
yvette.butler@amaralegal.org

¹¹ Language inspired by the definition of harassment located in Minn. Stat. Ann. § 609.748.