

Privacy Commissioner's submission to the Justice Committee on the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill (305-1)

Executive Summary

1. I am pleased to provide a submission on the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill (the Bill).
2. The Privacy Act 2020 is New Zealand's main privacy statute. One of the Privacy Commissioner's functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.
3. Posting of intimate visual recordings without consent is a serious invasion of privacy and can cause significant distress for the person whose images have been shared. I support enhancing sanctions and remedies for abuse of intimate visual recordings, but I do not currently have sufficient evidence of the need for the new offence that would be created by the Bill. I am therefore unable to support the Bill in its current form.
4. There are already a number of criminal offences and civil remedies that either directly address image-based abuse or can be used in cases of such abuse. I therefore propose that the Committee consider and seek advice on some key questions:
 - *Is the new offence that would be created by the Bill needed?* I encourage the Committee to seek further information about how the existing offence in section 22 of the Harmful Digital Communications Act 2015 (HDCA) is working, whether the harm threshold is a significant obstacle to prosecution and conviction, and whether removing the harm threshold would address the problem identified.
 - *Is the scope of the proposed new offence appropriate?* The Committee will need to consider whether completely removing the harm threshold in the existing HDCA offence could have unintended negative consequences (particularly for young people). Other issues should also be considered, including whether the Bill should provide for defences, and how the offence would relate to manipulated images such as deepfakes.
 - *Are more effective civil remedies required?* To address the serious harm and invasion of privacy caused by non-consensual posting of intimate images, effective measures are needed to have the images taken down and permanently removed from public circulation. Complaints under the HDCA and the Privacy Act can result in take-down orders, but an expedited process for obtaining such orders may be needed. Other options, such as a statutory 'right to erasure' and civil penalties for serious breaches of privacy, should also be considered.
5. Rather than focusing only on the new offence proposed in the Bill, I recommend a broader look at the problem of image-based abuse, and options for responding to it. A new criminal offence may not be the most effective way of providing remedies for victims, particularly given the stress and trauma involved in giving evidence in a criminal case.
6. If the Committee decides that the Bill should proceed, I recommend that the Committee:

- amend the Bill to provide that posting an intimate visual recording is no longer expressly covered by section 22 of the HDCA, to remove potential problems from having the same behaviour covered by two offences
- consider issues relating to the scope of the offence, and particularly whether removal of the harm threshold could have unintended negative consequences
- seek advice on options for expediting the take-down process for intimate visual recordings posted without consent, and on other civil remedies
- provide in the Bill for a right of erasure to assist victims in removing access to intimate visual recordings shared non-consensually.

Current law relating to image-based abuse

7. Image-based abuse can take different forms and have different motivations, but the common factor is that intimate images of an individual are shared without the consent of that individual. Such non-consensual sharing is a serious invasion of privacy and can cause significant harm and distress. There is evidence that New Zealanders (especially, but not exclusively, younger people) are experiencing image-based abuse.¹
8. New Zealand criminal and civil law already recognises the serious and damaging nature of image-based abuse.² I summarise some key laws below, to assist in assessing whether there is a gap in the coverage of existing law that needs to be filled.

Criminal law

Crimes Act – publishing an intimate visual recording

9. Sections 216G to 216N of the Crimes Act 1961 deal with intimate visual recordings. ‘Intimate visual recording’ is defined in the Act and covers intimate recordings that are made without the knowledge or consent of the individual who is the subject of the recording. Section 216H prohibits making an intimate visual recording and section 216J prohibits publishing such a recording.

Harmful Digital Communications Act – causing harm by posting a digital communication

10. The HDCA has a definition of ‘intimate visual recording’ that is similar to that in the Crimes Act, but covers recordings made **with or without** the knowledge or consent of the subject of the recording. Section 22 of the HDCA makes it an offence to cause harm by posting a digital communication, which includes sharing a digital communication that is an intimate visual recording of another individual. The harm threshold in the existing offence requires that:
 - the person posting the digital communication **intends to cause harm**
 - posting the communication **would cause harm to an ordinary reasonable person** in the position of the victim
 - posting the communication **causes harm** to the victim.

¹ Edgar Pacheco, Neil Melhuish and Jandy Fiske, *Image-Based Sexual Abuse: A Snapshot of New Zealand Adults’ Experiences* (Netsafe, 2019).

² See the summary of the current law in Amber Hosking, ‘Intimate with the Internet: Does New Zealand’s Law Provide Adequate Protection in Cases of Non-Consensual Pornography’ (Bachelor of Laws with Honours thesis, University of Otago, 2015).

11. 'Harm' is defined in the HDCA as 'serious emotional distress', and section 22(1) of the Act sets out a non-exclusive list of factors a court may take into account in determining whether a post would cause harm.

Films, Videos, and Publications Classification Act – distributing an objectionable publication

12. It is an offence under sections 123-124 of the Films, Videos, and Publications Classification Act 1993 to make or distribute an objectionable publication. In some circumstances an intimate visual recording could fit the definition of 'objectionable publication' in that Act.

Civil law

Harmful Digital Communications Act

13. The HDCA sets up a process for making complaints about harmful digital communications to Netsafe, which is the Approved Agency under that Act. Image-based abuse falls within the scope of matters that people can complain about. Netsafe does not have enforcement powers but can work with parties to try to resolve complaints, including by requesting that online material be taken down.
14. If Netsafe is unable to resolve the matter, the person making the complaint can apply to the District Court, which can make a range of orders under section 19, including an order to take down or disable material. The court can also make an interim order pending determination of an application for orders under section 19.

Privacy Act

15. Image-based abuse can be a breach of the Privacy Act 2020. An intimate visual recording that is made covertly or deceptively would generally breach privacy principle 4.³ Depending on the circumstances, posting an intimate visual recording without the individual's authorisation could breach the limits on use and disclosure of personal information in privacy principles 10 and 11.⁴
16. Individuals can complain to the Privacy Commissioner if intimate images of them are shared without consent and if they have suffered harm as a result. The Office of the Privacy Commissioner can try to facilitate a resolution of the complaint. If a resolution cannot be reached, the complaint can be heard by the Human Rights Review Tribunal, which can award damages and make other orders to remedy a breach. The Privacy Commissioner could refer a serious breach to the Director of Human Rights Proceedings to decide whether to bring proceedings in the Tribunal on the individual's behalf.
17. The Privacy Commissioner also has a power to issue a compliance notice, requiring an agency (which can be an individual) to take action to remedy a breach of the Act. A compliance notice can be issued without a complaint having been made and can be enforced in the Human Rights Review Tribunal.

³ Privacy principle 4 requires that personal information be collected lawfully and by a means that is not unfair or unreasonably intrusive (particularly where the information is collected from children or young persons).

⁴ These principles do not generally apply to individuals collecting, using and disclosing personal information in connection with their personal or domestic affairs. However, the 'domestic affairs' exemption does not apply to a collection, use or disclosure that would be highly offensive to a reasonable person. Although 'highly offensive' is a high threshold, court decisions on invasion of privacy suggest that image-based abuse is likely to readily meet this test.

Other civil law

18. People affected by image-based abuse may be able to sue in the courts for invasion of privacy, breach of confidence or defamation.⁵
19. Image-based abuse could also constitute harassment under the Harassment Act 1997, which can result in a restraining order and is a criminal offence in some circumstances.

What the Bill does

20. Clause 4 of the Bill would insert new section 22A of the HDCA. The new section would make it an offence to post a digital communication that is an intimate visual recording:
 - knowing that the individual who is the subject of the recording has not expressly consented to it being posted, or
 - being reckless as to whether the affected individual has so consented.
21. The new section provides that express consent must be informed and voluntary, and that consent to posting of an intimate visual recording on a particular occasion or in a particular manner is not to be regarded as express consent on any other occasion or in any other manner.
22. Offenders would be liable on conviction to imprisonment for up to 3 years or a fine of up to \$50,000 for an individual, or a fine of up to \$200,000 for a body corporate. The court would also have the power to make any order that can be made under section 19(1) of the HDCA (such as a take-down order).
23. While it is already an offence to post a digital communication that is an intimate visual recording, the new offence in the Bill would:
 - remove the requirement that the posting caused and was intended to cause harm
 - allow court orders to be made, in addition to the imposition of penalties
 - provide for a higher maximum term of imprisonment (3 years, compared to 2 years for the existing offence in section 22).

Comment on the Bill

24. I support the intent of the Bill to deter and remedy harm resulting from image-based abuse. Effective action against such abuse would enhance protection of privacy in New Zealand. However, I have some questions that the Committee may wish to consider and seek further advice on.

Is a new offence needed?

25. I agree that non-consensual sharing of intimate visual recordings is inherently harmful, so I am sympathetic to the argument that it should not be necessary to show that harm was either intended or suffered. However, I do not have sufficient information to assess whether the current harm threshold is acting as an obstacle to prosecutions under the HDCA for image-based abuse. On the face of it, image-based abuse should relatively

⁵ Image-based abuse has been considered in New Zealand invasion of privacy tort cases: see *L v G* [2002] DCR 234, and *C v Holland* [2012] 3 NZLR 672.

easily meet the test of causing serious emotional distress. It may be more difficult to prove that the person posting the recording intended to cause harm.

26. I encourage the Committee to seek further information about how the existing offence provisions have worked in practice, whether the harm threshold is a significant obstacle to prosecution and conviction, and whether removing the threshold would address the problem identified.⁶ As discussed below, the Committee should also consider whether completely removing the harm threshold may have unintended negative consequences.

Is the scope of the proposed new offence appropriate?

27. The Bill as currently drafted would create a second offence of posting a digital communication that is an intimate visual recording, alongside the existing offence in section 22 of the HDCA. This is in addition to the offence in the Crimes Act of publishing an intimate visual recording.
28. Having several closely related offences has the potential to create confusion. As drafted, the Bill also creates anomalies with regard to the maximum term of imprisonment:
- the offence of posting an intimate visual recording under section 22 of the HDCA, with a requirement to show that harm was intended and caused, has a maximum prison term of 2 years
 - the offence under proposed new section 22A, with no requirement to show harm or intent, has a maximum prison term of 3 years
 - the offence under the Crimes Act, which involves intimate visual recordings made without knowledge or consent, also has a maximum prison term of 3 years.
29. I recommend that the committee consider amending the HDCA so that posting an intimate visual recording without consent is no longer expressly part of the offence in section 22 of the HDCA. This approach would be more consistent with the Law Commission's recommendations, in the Ministerial briefing that led to the creation of the HDCA, for two separate offences.⁷ Consideration could also be given to whether the offence is best located within the HDCA or within the intimate visual recording offence provisions of the Crimes Act.
30. The offence that would be created by the Bill is a good starting point for a new offence of non-consensual sharing of intimate images. However, the Committee will need to consider whether the complete removal of the harm threshold could have any unintended negative consequences. In particular, the implications for young people require careful consideration. Young people are particularly vulnerable to becoming victims of image-based abuse, but they also share intimate images, perhaps naively or

⁶ Ministry of Justice figures for HDCA offences are available but are not specific to offences involving intimate visual recordings. Between 2016 and 2020, there was a 'proved' outcome (conviction or other 'guilty' outcome) in relation to between 68 and 76 per cent of charges for HDCA offences, and in relation to between 71 and 82 per cent of individuals charged with such offences. Over the same period, between 64 and 72 per cent of people charged pleaded guilty. Ministry of Justice, 'Harmful Digital Communications offences', 16 March 2021, available at <https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#offence>.

⁷ Law Commission, *Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies* (Ministerial Briefing Paper 3, 2012), pp. 90-91.

foolishly. For example, young people sent an unsolicited intimate image may feel that they are entitled to share that image with others. Awareness of the HDCA among young people may also be low.⁸

31. Other issues that should be considered when creating a new offence of posting an intimate visual recording without consent include:⁹
- Should the Bill provide for defences, such as disclosures in the public interest (for example, where the individual posting the intimate visual recording has reasonable grounds for believing that doing so is necessary for the purpose of preventing, detecting, investigating or prosecuting a crime)?
 - Are there any circumstances in which an intimate visual recording has been shared so widely **with the consent of the subject of the recording** that the image is now essentially in the public domain and further consent to posting is not required (for example, intimate images in commercial films that have been screened publicly)?¹⁰ If so, how should the Bill provide for such circumstances?
 - Should other factors, such as the extent of circulation of the recording and whether or not the victim is identifiable from the image, be provided for in the offence?
 - Given the equal potential for manipulated images to cause significant emotional harm and distress, should the offence relate to photo-shopped images and deepfakes, and if so, how?¹¹

Are more effective civil remedies required?

32. In most cases, to address the serious harm caused, the main objective of the individual whose intimate images have been shared without consent will be to have the images taken down and permanently removed from public circulation. It is appropriate that the Bill provides for courts to make take-down and other orders in conjunction with a criminal conviction under new section 22A. However, it is worth considering whether more effective civil remedies are also required, without the need for a criminal prosecution.
33. The committee may wish to seek advice on how quickly intimate visual recordings posted without consent can be taken down, particularly when the offender or any third party with the ability to take down the images is not cooperative. Anyone seeking to have the images taken down under the complaint provisions in the HDCA needs to complain first to Netsafe, which has no enforcement powers, and can only seek a take-down order in the District Court after Netsafe has investigated the complaint. Likewise, a Privacy Act

⁸ Nikki Macdonald, 'Revenge Porn: Is the Harmful Digital Communications Act Working?', 9 March 2019, <https://www.stuff.co.nz/national/crime/110768981/revenge-porn-is-the-harmful-digital-communications-act-working>. Between 2016 and 2020, those aged 19 years and under made up between 8 and 19 per cent of those charged, and between 1 and 14 per cent of those convicted, for HDCA offences: Ministry of Justice, 'Harmful Digital Communications offences', 16 March 2021.

⁹ The committee may find it helpful to look at the issues raised in a current paper from the Law Commission of England and Wales, *Intimate Image Abuse: A Consultation Paper* (2021).

¹⁰ See the discussion of this issue in Law Commission of England and Wales, *Intimate Image Abuse: A Consultation Paper* (2021), pp. 275-284.

¹¹ See Chris Barnes and Tom Barraclough, *Perception Inception: Preparing for Deepfakes and the Synthetic Media of Tomorrow* (Brainbox Institute, 2019).

complaint must be investigated and conciliated by my office before the option of seeking a binding decision from the Human Rights Review Tribunal becomes available.¹²

34. Complainants must therefore wait some time for an enforceable order to take down intimate visual recordings, although it will sometimes be possible to achieve voluntary take-down more quickly. I do not have a specific proposal at this stage for an expedited process for obtaining take-down orders for intimate visual recordings posted without consent. However, I consider that options for such a process should be investigated.
35. I have also previously recommended an amendment to the Privacy Act that would be helpful in cases of image-based abuse.¹³ A right to erasure of personal information (also known as the 'right to be forgotten') would give individuals a right to request their personal information be erased in certain circumstances. For example, an individual could request that a search engine remove certain results from a search for their name, such as links to pages where intimate visual recordings have been posted without consent.
36. A statutory right to erasure could complement and reinforce take-down orders and other existing remedies. I recognise that a wider 'right to be forgotten' (like that in the European Union's General Data Protection Regulation) would require a more wide-ranging public discussion. However, I suggest that there could be no serious public objection to an enforceable right to remove images of the sort captured by the Bill. An advantage of providing a remedy under the Privacy Act is that the Privacy Act expressly provides for extraterritorial effect (that is, the Act can apply to overseas agencies that carry on business in New Zealand).¹⁴
37. In addition, I previously recommended an amendment to the Privacy Act that would provide for a court, on application from the Privacy Commissioner, to impose civil pecuniary penalties for serious or repeated breaches of the Act.¹⁵ A civil penalty regime under the Privacy Act could provide another effective option for deterring the serious invasion of privacy that image-based abuse entails.

Conclusion

38. At present, I am not aware of evidence that the new offence that would be created by the Bill is necessary to better deter or remedy image-based abuse. I am therefore unable to support the Bill in its current form. I support enhancing sanctions and remedies for image-based abuse. The Bill provides one option for doing so, a new criminal offence. However, I recommend a broader look at the problem and the options for responding to it, to ensure reform in this area will result in effective reduction of harm. A criminal

¹² As noted above, the Privacy Commissioner can also issue a compliance notice, which need not be in response to a complaint. A compliance notice can be enforced in the Human Rights Review Tribunal if the agency to which it is issued does not take the required steps to remedy a breach.

¹³ Privacy Commissioner's Submission on the Privacy Bill to the Justice and Electoral Select Committee, 31 May 2018, pp. 27-30, <https://privacy.org.nz/assets/Uploads/Privacy-Commissioner-Submission-on-the-Privacy-Bill.pdf>.

¹⁴ Privacy Act 2020, s 4.


¹⁵ Privacy Commissioner's Submission on the Privacy Bill to the Justice and Electoral Select Committee, 31 May 2018, pp. 17-19.

offence may not result in meaningful remedies for victims, who may suffer additional stress and trauma from having to give evidence in a criminal prosecution.

39. If the Bill proceeds, I **recommend** that the Committee:

- amend the Bill to provide that posting an intimate visual recording is no longer expressly covered by section 22 of the HDCA, to eliminate potential confusion and anomalies that would be created by having two intimate visual recording offences in the same Act
- consider the issues raised at paragraphs 30 and 31 above, particularly whether the removal of the harm threshold for the offence could have any unintended negative consequences, and make any necessary amendments to the Bill
- seek advice on legal and other options for expediting the take-down process for intimate visual recordings posted without consent, and on other civil remedies and deterrents (such as civil penalties for serious breaches of the Privacy Act)
- amend the Bill to provide for a right of erasure or consider whether a right to erasure should be included in the Privacy Act, to assist victims in removing access to intimate visual recordings posted without consent.

40. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance. I would be happy to provide further information about remedies under the Privacy Act, and about the right to erasure if the Committee would like to explore that idea.

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a horizontal line and a small upward flick.

John Edwards
Privacy Commissioner

23 April 2021