

Deepfake Digital Harm and Exploitation Bill

Submission of the New Zealand Law Society Te
Kāhui Ture o Aotearoa

19 June 2026

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**the Law Society**) welcomes the opportunity to comment on the Deepfake Digital Harm and Exploitation Bill (**the Bill**).
- 1.2 The Bill proposes to amend both the Crimes Act 1961 and the Harmful Digital Communications Act 2015 (**the HDCA**) to expand the definition of an “intimate visual recording” to include digitally altered, created or synthesised images showing a person’s likeness, produced without consent.
- 1.3 While the Law Society supports the underlying objective of the Bill, this submission addresses several issues with aspects of the current drafting, including the need for clarity regarding the definition of ‘subject’, the possible effect of the proposed changes in regard to satire and political speech, the relationship with proposed changes to the definition of ‘woman’, and issues of consent and penalties.
- 1.4 This submission has been prepared with the assistance of the Law Society’s Criminal Law Committee.¹
- 1.5 The Law Society wishes to be heard.

2 Definition of ‘subject’

- 2.1 Proposed section 216G(4) of the Crimes Act (and similarly proposed section 4 of the HDCA) states that, in relation to an intimate visual recording, a ‘subject’ means “an individual who is, or appears to be, featured or depicted in the recording”.
- 2.2 The words ‘appears to be’ is a subjective phrase, raising questions of who is making the judgment. This will often be a critical issue which will have to be decided by the fact-finder at trial. Imagine the following scenario: ‘X’ creates an intimate visual recording of ‘Y’ and manipulates it with ‘Y’s permission. ‘A’ sees it and decides that it looks like her (similar build, hair etc). Those who know ‘Y’ and ‘A’ well don’t mistake it for ‘A’, but people who know them slightly (for example classmates or colleagues) might do so. At trial, the fact-finder has to decide whether ‘A’ appears to be featured. Do they decide this by:
 - (a) The fact-finder looking closely at the recording, slowing it down and pausing it, comparing the person onscreen to pictures of A?
 - (b) The fact-finder looking closely at the recording and making the decision whether it looks more like Y than A?
 - (c) The fact-finder watching the image as it is intended to be seen, asking whether a reasonable person who does not know A and Y well might think it is A?

¹ More information on the Law Society’s Criminal Law Committee is available on the Law Society’s website here: [NZLS | Criminal Law Committee](#)

- (d) The fact-finder watching the image as it is intended to be seen, asking whether a reasonable person who knows both A and Y well might think it is A?

These may result in very different outcomes. Is it for the prosecution to prove that A is a subject? Or is it for the defence to prove that A is not a subject?

- 2.3 We recommend the Select Committee seek further advice on the test to be applied, and particularly whether the intention is to include a subjective element in the definition of subject using the phrase ‘appears to be’. The Law Society can provide further feedback on the drafting of such a provision if that is of assistance to the Committee.

3 Satire and political speech

- 3.1 Section 6(2)(b) of the HDCA requires the courts to “act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.” More generally, all legislation should be consistent with the New Zealand Bill of Rights Act (**Bill of Rights Act**), subject only to reasonable limits as prescribed by law and demonstrably justified in a free and democratic society.
- 3.2 The current drafting of the Bill does not appear to have considered the effect of political speech or satire or its relationship with the Bill of Rights Act. The Law Society acknowledges that this will be the consequence of its status as a Member’s Bill, but notes that consideration needs to be given to whether the proposed provisions may infringe the right to freedom of expression, enshrined in section 14 of the Bill of Rights Act.
- 3.3 The ban on creation and distribution of images of the kind covered in current section 216G(a)(ii) and (iii) of the Crimes Act, or proposed 216G(1A)(b) and (c), (or with images in section 216G(a)(i) or proposed 216G(1A)(a) which involve nudity or sexualised content), is a limitation which could well be justified in a free and democratic society. However, it is far from clear that images which come within the definitions but have no sexual content, and are generated as a form of satire and/or political speech, can be considered in the same way.
- 3.4 Nudity or sexualised content is generally not a part of political speech or satire, but the same cannot be said of possible cases where the images are of a recognisable person “clad solely in undergarments”. An example might be where a politician who publicly argues for a reduction in the winter heating supplement for pensioners is depicted in a digitally altered video as wearing long woolly underpants rather than trousers. The image is within the literal meaning of the statutory wording but arguably not a part of the mischief at which the Bill is aimed at criminalising.
- 3.5 The Law Society therefore recommends the Committee take advice on this point. The Bill could be amended, in relation to both the Crimes Act and the HDCA sections, by adding a provision which allows a defence to the respective charge where the defendant establishes, on the balance of probabilities, that the images or video in question was solely satire and/or political comment. While such a reverse onus is on its face contrary to section 25(c) of the Bill of Rights Act (the right to the presumption of innocence), it is quite likely to be seen by the courts as a limitation of that right that is justified in a free and democratic society.

- 3.6 The Law Society is able to provide further feedback on the drafting of such a provision if that is of assistance to the Committee.

4 Relationship with Legislation (Definitions of Woman and Man) Amendment Bill

- 4.1 The Bill also has a connection with the Legislation (Definitions of Woman and Man) Amendment Bill (**LDWMA Bill**) currently before Parliament, and unforeseen consequences may arise if that Bill is passed in its current form. The LDWMA Bill proposes an amendment to the Legislation Act 2019 to the effect that “female means a human biological female.”
- 4.2 Proposed elements of both this Bill, and the current Crimes Act provisions regarding an intimate visual recording, refer to “female breasts”. If the proposed sections only apply to persons who are “biologically female”, there will be no protection for persons who have transitioned from “male” to “female” and have breasts similar to those of “females”. It is also possible that malefactors may generate images of females with bared breasts but add overtly male genitalia so that they can claim the images do not contravene the proposed provisions of the Bill. Alternatively, the malefactors might choose to remove the breasts of a trans woman leaving them without female breasts. Both of these examples could be considered offensive, but would not be covered by the language of the current drafting.
- 4.3 We recommend the Select Committee take further advice from officials on the interrelationship between the Bills.

5 Issues of consent


- 5.1 The provisions of the Bill as drafted, along with the current Crimes Act definition of an intimate visual recording, are premised on there being no consent, by the person who is the subject of the recording, to the image being recorded. Both the current law and the Bill are silent as to who is entitled to give consent to the creation, synthesis, or alteration of a recording. Is it intended to be only the individual imitated? Or, can a proxy (such as a parent) give their consent – for example, to the digital alteration of a video of a clothed child to remove external clothing with the image to be used in advertising of children’s undergarments? In either case, is informed consent needed? The Law Society notes the current HDCA does not provide any guidance as to substituted consent.
- 5.2 The Law Society recommends the Select Committee seek further advice from officials. The issue will be important both to investigative agencies and to the courts seeking to apply the law. We would be happy to provide further feedback on the drafting of such a provision if that would be of assistance to the Committee.

6 Penalties

- 6.1 Finally, the Bill is silent as to the appropriate penalties for contravening proposed section 216G of the Crimes Act, or section 4 of the HDCA. This suggests the same penalties for other intimate visual recordings applies: for an individual, a maximum of

three years' imprisonment (under the Crimes Act) or two years' imprisonment or a \$50,000 fine (under the HDCA). It is increasingly recognised that deepfakes are being used for financial fraud or other commercial gain. A recent example indicates that "prices-per-minute of deepfake video can range from \$300 to \$20,000. If the buyer is ready to pay, deepfake creators can offer videos that are incredibly realistic and can convey authentic emotions, making them indistinguishable from genuine footage."²

- 6.2 While the Law Society does not provide comment on whether the penalties should or should not change, given the clear potential for commercial gain to incentivise the making of deepfakes, the Committee may wish to consider whether the financial penalties in the Crimes Act/HDCA are sufficient to deter further criminal behaviour.



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² 'How real is Deepfake Threat', accessed here: [Deepfake market analysis | Kaspersky official blog](#).