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# Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill

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*23/04/2021*

## **Submission on the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill**

### **1. Introduction**

- 1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill (**the Bill**), a member's Bill in the name of Labour MP Louisa Wall.
- 1.2. The Law Society does not seek to be heard.

### **2. Executive Summary**

- 2.1. The Bill amends the Harmful Digital Communications Act 2015 (**HDCA**) by inserting a new section 22A. The proposed section makes it an offence to post a digital communication that is an intimate visual recording knowing the subject of the recording did not consent to it being posted or being reckless whether the subject consented to it being posted. The Explanatory Note to the Bill states this new offence responds to a form of sexual exploitation, often referred to as "revenge pornography". It also recognises that "consent must be shown to be express, voluntary and informed."
- 2.2. The Law Society's submission briefly explains why the proposed offence is necessary and highlights some concerns with the drafting of the proposed section 22A. The submission makes several recommendations to improve the Bill's drafting and clarity, to ensure greater consistency with the Bill's underlying objective.

### **3. Existing offence provisions covering similar conduct**

- 3.1. Section 22 of the HDCA contains an offence of causing harm by posting "a digital communication". Harm is defined in section 4 as "serious emotional distress". Proof of an offence under this section requires the court to be satisfied that:
  - (a) the intent of the person who posted the digital communication was to cause harm;
  - (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim, taking into account the various matters listed in subs (2); and
  - (c) posting the communication caused harm to the victim.
- 3.2. It is possible that this section could capture some examples of posting an intimate visual recording without consent, as targeted by this Bill. But the section is very much directed towards cyberbullying and the like which explains why proof of harm is required. No proof of harm is required under the proposed section 22A as "the harm is implicit in the action".<sup>1</sup>
- 3.3. The Crimes Act 1961 also proscribes certain actions in relation to intimate visual recordings. The way intimate visual recording is defined in the Crimes Act means those offences only apply where the subject of the recording had no knowledge of, or did not consent to, the making of the

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<sup>1</sup> Harmful Digital Communication Act (Unauthorised Posting of an Intimate Digital Recording) Amendment Bill, Explanatory Note, at p 1.

recording. The corollary is that if there was knowledge/consent at the time the recording was made, it would not fall within the definition of intimate visual recording and the offences would not apply.

- 3.4. There is, accordingly, a gap in existing legislation. For example, if someone takes a video of their partner engaging in intimate sexual behaviour while they are in a relationship, with that person's knowledge of, and consent to, the making of the recording, by reason of the definition of "intimate visual recording" no offence has been committed under the Crimes Act (see section 216G and H). A later posting of the recording (in circumstances where the relationship has broken down and the person knows their ex-partner does not consent to the posting) would not be captured by the Crimes Act provisions. But that conduct would be caught by the proposed section 22A.
- 3.5. The proposed section 22A therefore focuses on the lack of consent to the *posting* of the intimate visual recording, as opposed to whether there was consent to the recording itself or whether the posting was done intentionally to, and did, cause harm. The proposed section 22A thus serves a distinct purpose.
- 3.6. Nonetheless, there is a degree of overlap between the existing offences and the proposed new offence, and the Committee may wish to seek official advice about whether an amendment to one of the existing offences (under the HDCA or the Crimes Act) might equally be an appropriate avenue to achieve the Bill's underlying objective.

#### **4. Proposed section 22A**

##### ***"Express consent"***

- 4.1. The term "express consent" is unusual. It appears to have been used to distinguish between consent to the recording and consent to the posting (of the recording).
- 4.2. The definition of "intimate visual recording" in the HDCA includes the words: "with or without the knowledge or consent of the individual who is the subject of the recording". So, the way in which "intimate visual recording" is defined means issues about consent to the recording are not relevant. If that is the case, there is no need to use the phrase "express consent" to distinguish between consent to the recording and consent to the posting.
- 4.3. In addition, the phrase "express consent" may give the perception that posting an intimate visual recording requires a heightened level of consent (for example a particular form of words or consent in writing). Such an approach is also likely to create confusion and is inconsistent with approaches taken in existing legislation (in regard to the more commonly used word "consent").
- 4.4. Subsection (4) of proposed section 22A provides a partial definition of "express consent" by requiring that the victim gave their consent voluntarily and in full knowledge of how the intimate visual recording will be used. However, the language used in this subsection is about whether the victim has given *informed consent* – not whether the consent is "express".
- 4.5. The Law Society considers that, due to the issues identified above, the word "express" should be removed from the proposed section 22A.

### ***Consent in fact***

- 4.6. Proposed section 22A does not explicitly state that the subject of the recording must not have consented to the posting of the recording. At present, such a requirement is only a matter of inference from the mental elements of the offence.
- 4.7. The Law Society therefore considers that amendments to subsection (1) would help to better achieve the intent of the Bill (along with providing greater clarity). The Law Society recommends amending subsection (1) of proposed section 22A as follows:
- (1) A person commits an offence if that person posts a digital communication that is an intimate visual recording without the consent of the person who is the subject of the recording—
    - (a) knowing that the person did not consent to the recording being posted; or
    - (b) being reckless as to whether the person consented to the recording being posted.

### ***Multiple victims***

- 4.8. The section should also make it clear that if there are multiple persons in the recording, each of them must consent to the posting of the recording. The same applies to the mental elements. By way of example, explanatory subsections along the following lines could be added (as new subsections (4) and (5)):
- (4) For the purposes of subsection (1), where the recording displays more than one individual, all of the people in the recording must consent to it being posted.
  - (5) In a prosecution under subsection (1) involving multiple people in a recording, it will be sufficient for the Crown to prove that the defendant knew that at least one of the people in the recording did not consent to it being posted or was reckless as to whether at least one of the people in the recording consented to it being posted.

### ***Recommendation***

- 4.9. If the Law Society's suggested amendments were adopted, proposed section 22A would read as follows:
- (1) A person commits an offence if that person posts a digital communication that is an intimate visual recording without the consent of the person who is the subject of the recording—
    - (a) knowing that the person did not consent to the recording being posted; or
    - (b) being reckless as to whether the person consented to the recording being posted.
  - (2) A person who commits an offence against this section is liable on conviction to,—
    - (a) in the case of a natural person, imprisonment for a term not exceeding 3 years or a fine not exceeding \$50,000;
    - (b) in the case of a body corporate, a fine exceeding \$200,000.

- (3) In addition to any penalty imposed on a person convicted under **subsection (2)**, a court may make any order that the District Court may make under section 19(1) of this Act that it thinks fit.
- (4) For the purposes of subsection (1), where the recording displays more than one individual, all of the people in the recording must consent to it being posted.
- (5) In a prosecution under subsection (1) involving multiple people in a recording, it will be sufficient for the Crown to prove that the defendant knew that at least one of the people in the recording did not consent to it being posted or was reckless as to whether at least one of the people in the recording consented to it being posted.
- (6) To avoid doubt, the fact that a person has consented to the posting of an intimate visual recording on a particular occasion, or in a particular manner, is not to be regarded as consent to a posting on any other occasion or in any other manner.

***Age, disability and other vulnerabilities***

4.10. The Law Society notes that the Bill does not engage with issues of consent that may arise where the victim of the posting of an intimate visual recording is a minor, disabled, or otherwise considered vulnerable (by reason of mental or physical impairment). But these issues have been dealt with in other areas of criminal law. If the Law Society's recommendation to remove the statutory definition of express consent is adopted, the case law from other areas of criminal law will inform the answer to any difficulties under the proposed section 22A.



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