

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

Member's Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

This bill is a Member's bill in the name of Louisa Wall MP. It seeks to amend the Harmful Digital Communications Act 2015.

The purpose of the bill is to introduce a new offence of knowingly posting a digital communication that is an intimate visual recording, without the consent of the person who is the subject of that recording. The effect of the bill is that the intent to cause harm to the subject is implied simply by posting the recording. Currently, the offence of causing harm by posting a digital communication that is in the Act requires the intention of causing harm to be proven.

The bill proposes a maximum penalty of 3 years' imprisonment for the new offence. The maximum penalty for the current offence is 2 years' imprisonment.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Intimate visual recordings to be excluded from the existing section 22 offence

Currently, someone who posts an intimate visual recording without the consent of the subject could be prosecuted under section 22 of the Act. Section 22 requires that an intention to cause harm to the person who is the target of the posting be established to determine whether someone has committed an offence.

The bill would insert new section 22A to create a new offence specific to intimate visual recordings, without any requirement to prove an intent to cause harm. The intent to cause harm would be implicit in the non-consensual posting of an intimate visual recording.

We are concerned that if intimate visual recordings are not specifically excluded from section 22 of the Act, this could create uncertainty about which section would apply to an offence of this nature. We consider that offending involving intimate visual recordings should be prosecuted under proposed section 22A.

To address this concern, we recommend inserting clause 3D into the bill, to replace section 22(4). Our section 22(4) would state that section 22 does not apply if the posted digital communication is an intimate visual recording.

Removing the harm element from the offence creates potential for over-criminalisation

We are concerned that removing the requirement to prove an intent to harm might open up the offence to include a wider range of contexts in which intimate visual recordings could be posted for legitimate purposes. For example, they might be posted for educational, legal, medical, scientific, or law enforcement purposes.

We do not consider that the bill intends to criminalise posting an intimate visual recording for the purposes specified above. We therefore recommend amending clause 4 to allow an exception for scenarios in which posting an intimate visual recording may be necessary. This would be done by inserting the words “without reasonable excuse” into section 22A(1).

The nature of consent

As introduced, section 22A(1)(a) would make it an offence if someone posted an intimate visual recording without “express consent” from the person who is the subject of the recording. Section 22A(4) provides a definition for express consent. Section 22A(5) makes it clear that a victim consenting to the posting of an intimate visual recording on one occasion does not mean that consent is given in any other circumstance.

We are concerned that specifically requiring “express consent” might create inconsistencies with existing legislation. While existing legislation does not generally define what “consent” is, we note that a significant body of case law on consent has devel-

oped over time. Creating a new standard of “express consent” may imply something different and could undermine existing interpretations of consent if different levels of consent are introduced.

We recommend amending clause 4 so that section 22A(1) refers only to consent, not “express” consent. We do not consider that a definition needs to be provided for “consent” as it is covered by case law. Accordingly, we recommend removing proposed subsections (4) and (5), which relate to express consent, from clause 4.

Age of consent

The bill does not set a minimum age for someone to provide consent for an intimate visual recording to be posted. We note that existing legislation prevents someone under 16 years of age from legally consenting to sexual activity. We also note that section 3 of the Films, Videos, and Publications Classification Act 1993 defines “objectionable publication” to include visual images of “children or young persons who are nude or partially nude”, where the images are “reasonably capable of being regarded as sexual in nature”. “Children or young persons” refers to people under 18 years of age.

We are concerned how young people might be affected by the posting of intimate visual recordings of which they are the subject. We consider that a minimum age should be included in the bill to make it clear that a person must be a certain age to be able to provide consent.

We recommend amending clause 4 to insert new section 22A(1A). This subsection would state that someone under 16 years of age cannot consent to the posting of an intimate visual recording of which they are the subject. We note that although this would allow a 16 or 17 year old to consent to the posting of an intimate visual recording, it could still be considered “objectionable” under the Films, Videos, and Publications Classification Act.

Level of maximum penalty

Proposed section 22A(2)(a) would introduce a maximum penalty of 3 years’ imprisonment for a person convicted of an offence under that section. The existing section 22 of the Act provides for a maximum penalty of 2 years’ imprisonment for the offence of causing harm by posting a digital communication, and requires proof that:

- the person posting intended to cause harm
- the offence would cause harm to an ordinary person
- the offence actually caused harm to the victim.

We are concerned that the bill proposes a higher penalty for an offence with a lower level of culpability than is currently provided for in the Act. We recommend that proposed section 22A(2)(a) be amended to replace the maximum penalty of 3 years’ imprisonment with 2 years’ imprisonment. We believe this would be more consistent with the existing penalty in section 22.

Extending court orders to include interim orders

In the bill as introduced, section 22A(3), to be inserted by clause 4, stipulates the type of order that a court could make. For consistency and accessibility, we recommend deleting proposed section 22A(3) and instead inserting section 22B to cover all court orders.

We believe that the court should also be able to make interim orders while an application for an order is pending that last for the duration of the proceedings. Our proposed new section 22B(1)(a) and (2) would allow the court to make the following interim orders:

- an order to take down or disable material
- an order that the defendant cease or refrain from the conduct concerned
- an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual.

New section 22B(1)(b) would allow the court to make certain orders if a defendant is proven to have committed an offence. The orders that the court could make would be outlined in new section 22B(3) and replicate those that are available to the District Court under section 19(1).

New section 22B(4) sets out three ways that a defendant could be “proven to have committed an offence” in order to ensure that the civil orders would apply whenever a defendant is proven to have committed the offence. This is wider than just when a defendant is convicted of the offence, as it can also include when a defendant is discharged without conviction or when an offence is proven but the defendant is discharged in the Youth Court.

Definition of “victim”

We note that “victim” is defined in section 22 of the Act as “the individual who is the target of a posted digital communication”. New section 22A, inserted by clause 4 of the bill, also includes a definition of “victim”, defining it for the purpose of this section as “the individual who is the subject of the intimate visual recording”. We consider that both definitions should be included in the interpretation section of the Act, section 4, as the term is used in various places and the interpretation section can be clear about which definition applies.

We therefore recommend, through new clause 3A, including the definition of “victim” in section 4 of the Act. We consider that this would be more appropriate and would make the legislation more accessible.

Proposed amendments by Louisa Wall MP

The member in charge of this bill, Louisa Wall MP, also recommended the bill provide for intimate visual recordings that have been digitally altered or created. This would essentially treat synthetic intimate visual recordings as another type of intimate visual recording. Submissions highlighted that the harm caused by synthetic images is no different to the harm caused by intimate visual recordings that have not been

altered and occur without the consent of the person who is the subject of the recording, as a form of image-based sexual abuse. We were unable to agree to this recommendation.

Appendix

Committee process

The Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill was referred to the committee on 10 March 2021.

The closing date for submissions on the bill was 23 April 2021. We received and considered 74 submissions from interested groups and individuals. We heard oral evidence from 22 submitters.

We received advice on the bill from the Ministry of Justice. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Ginny Andersen (Chairperson)

Hon Simon Bridges

Simeon Brown

Dr Emily Henderson

Harete Hipango (until 1 September 2021)

Hon Mark Mitchell (from 1 September 2021)

Nicole McKee

Willow-Jean Prime

Vanushi Walters

Arena Williams

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

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Louisa Wall

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

Member's Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Act **2020**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

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3 Principal Act

This Act amends the Harmful Digital Communications Act 2015 (the **principal Act**).

3A Section 4 amended (Interpretation)

- (1) In section 4, insert in their appropriate alphabetical order: 5
- post**, in relation to a digital communication,—
- (a) means to transfer, send, publish, disseminate, or otherwise communicate by means of a digital communication—
- (i) any information, whether truthful or untruthful, about the victim; or 10
- (ii) an intimate visual recording of a victim; and
- (b) includes an attempt to do anything referred to in **paragraph (a)**
- victim** means,—
- (a) in relation to the posting of a digital communication that is an intimate visual recording, an individual who is the subject of the recording; or 15
- (b) in relation to the posting of any other digital communication, an individual who is the target of a posted digital communication.
- (2) In section 4, repeal the definition of **posts a digital communication**.

3B Section 20 amended (Court may vary or discharge order)

In section 20(1) and (2), replace “18 or 19” with “18, 19, or **22B**”. 20

3C Section 21 amended (Offence of non-compliance with order)

In section 21(1), replace “18 or 19” with “18, 19, or **22B**”.

3D Section 22 amended (Causing harm by posting digital communication)

Replace section 22(4) with:

- (4) This section does not apply if the posted digital communication is an intimate visual recording. 25

4 New sections 22A and 22B inserted (Posting an intimate visual recording without consent)

After section 22, insert:

22A Posting an intimate visual recording without consent 30

- (1) A person commits an offence if the person, without reasonable excuse, posts a digital communication that is an intimate visual recording of a victim—
- (a) knowing that the individual who is the subject of the recording (the **victim**) victim has not expressly consented to it being so posted the posting; or 35
- or

- (b) being reckless as to whether the victim has ~~so~~ consented to the posting.
- (1A) An individual under the age of 16 years cannot consent to the posting of an intimate visual recording of which they are the subject.
- (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 32 years or a fine not exceeding \$50,000;
- (b) in the case of a body corporate, a fine not 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.~~ 10
- ~~(4) For the purposes of this section, **express consent** requires that consent is given voluntarily and in full knowledge of how the intimate visual recording will be used.~~
- ~~(5) To avoid doubt, the fact that a victim 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 express consent on any other occasion or in any other manner.~~ 15
- 22B Court may make civil order during proceedings for offence under section 22A** 20
- (1) On application under this section and if the court considers it desirable to do so, the court conducting the proceedings for an offence under **section 22A** may make,—
- (a) during the proceedings, 1 or more of the interim orders set out in **subsection (2)** against the defendant for the duration of the proceedings; 25
- and
- (b) if the defendant is proven to have committed the offence, 1 or more of the orders set out in **subsection (3)** against the defendant.
- (2) The following interim orders are available to the court under **subsection (1)(a)**: 30
- (a) an order to take down or disable material:
- (b) an order that the defendant cease or refrain from the conduct concerned:
- (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual.
- (3) The following orders are available to the court under **subsection (1)(b)**: 35
- (a) an order to take down or disable material:
- (b) an order that the defendant cease or refrain from the conduct concerned:
- (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:

- (d) an order that a correction be published:
- (e) an order that a right of reply be given to the affected individual:
- (f) an order that an apology be published.
- (4) In this section, a defendant is **proven to have committed** an offence under **section 22A** if— 5
- (a) the defendant is convicted of the offence; or
- (b) the defendant is found guilty of, or pleads guilty to, the offence, but is discharged without conviction under section 106 of the Sentencing Act 2002; or
- (c) the Youth Court makes an order under section 282 of the Oranga Tamariki Act 1989 discharging the charge relating to the offence after finding that the offence was proved. 10

Legislative history

2 July 2020
10 March 2021

Introduction (Bill 305–1)
First reading and referral to Justice Committee