

# YouthLaw Aotearoa

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

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# Introduction

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## Who We Are

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are a charity and part of the nationwide network of twenty-four community law centres. Our service provides free legal advice and advocacy specifically for children and young people under 25 years of age. We help children and young people facing issues with harmful communications in a couple of ways:

- Our lawyers support children and their families with information and advice to help them navigate harmful digital communications. We advise and assist both victims and offenders of crime. As a note, we will not assist victims and offenders involved in the same matter in accordance with our obligations under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
- We run legal education workshops about criminal law, cyber-bullying, and sex and consent for children and young people or those supporting them.
- We publish youth-friendly information resources, undertake research, and make submissions on law and policy affecting children and young people.

This submission is informed by YouthLaw Aotearoa's insights from working with children and young people across New Zealand for over thirty years. The submission has been prepared by Kimberley Gee, law reform volunteer, Sarah Butterfield, a solicitor on our legal team and our YouthLaw staff and board.

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# YouthLaw Aotearoa Submission

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We support the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill, as it: recognises the harm of “revenge porn”, removes the unfair criteria of proving harm under section 22, and better aligns with New Zealand’s international obligations and te Tiriti.

However, we are concerned about the lack of statutory protection against “deep fakes”, the limits of police and Netsafe’s powers, and the limitations of sex and consent education.

## “Revenge Porn” harm

YouthLaw Aotearoa support the amendments, as they recognise the significant harm of non-consensual online posting of intimate recordings or “revenge porn”.<sup>1</sup> We have supported victims of “revenge porn” and we know first-hand the harm that online postings of intimate pictures and videos can cause. The posting of “revenge porn” can result in serious consequences for victims, such as psychological effects, mental health issues, damage to job prospects, and damage to social connection and trust.

We are particularly concerned that online based sexual harm is an issue that significantly affects young people.<sup>2</sup> We are also concerned about the disproportionate numbers of Asian and Māori victims of online sexual abuse compared with other ethnic groups.<sup>3</sup>

We support the increase of the maximum penalty from two to three years, as it brings the seriousness of the offence more in line with the maximum penalty of three years under section 216J of the Crimes Act 1961, for the publishing of intimate visual recordings.

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<sup>1</sup> We adopt the definition of “intimate recordings” under the Harmful Digital Communications Act 2015, section 2. We adopt the definition of ‘revenge porn’ from Dr Claire Meehan, “Revenge porn is sexual abuse” (25 February 2019) The University of Auckland <

<https://www.auckland.ac.nz/en/news/2019/02/25/revenge-porn-sexual-abuse.html>>

<sup>2</sup> Edgar Pacheco, Neil Melhuish And Jandy Fiske *Image-based Sexual Abuse: A Snapshot of New Zealand Adults’ Experiences* (Netsafe January 2019) at 1.

<sup>3</sup> At 5.

## Proving “Harm” Under Section 22

Currently, for a charge to be laid under section 22 of the Harmful Digital Communications Act 2015, the digital communications must cause harm to the victim. This is an unfair standard, particularly in the case of revenge porn.

We submit that harm should not need to be established before a charge can be laid. Putting victims in this position is unnecessary and may cause further distress. We have also been told by victims that the current standard of “proving harm” is a barrier to the police laying charges against their abusers.

The proposed section 22A prohibits posting of an ‘intimate visual recording’ that is unauthorised. This change means that the victim is no longer required to prove they have experienced harm. Instead, the focus is on whether the victim consented to the posting. YouthLaw Aotearoa strongly support this change as it protects victims and shifts the focus onto the offender’s unauthorised posting. This amendment promotes a culture in which people take more responsibility for what they post, especially in the case of intimate recordings.

We also support the current definition of intimate visual recording under section 4 of the Harmful Digital Communications Act 2015, as it applies to recordings that are made with or without the consent of the subject individual. This definition recognises that individuals who consent to being the

subject of an intimate visual recording, may not necessarily consent to the posting of that recording. The definition shifts the balance from victim-blaming and victims establishing harm, to deterrence of irresponsible and harmful behaviour.

**We recommend that the proposed section 22A progress to the second reading and beyond.**

## Te Tiriti o Waitangi

We must acknowledge that we are not experts in te Tiriti and should not be treated as such. However, we are committed as an organisation to holding the Crown to account in relation to its te Tiriti obligations. If our views differ from the views of iwi and other Māori law experts, we submit that greater weight should be given to their contribution over ours.

Evidence indicates that threats of internet-based sexual assault are more commonly experienced by Māori compared with other ethnic groups.<sup>4</sup> The government has an obligation to address this disparity.

**We recommend that the government undertake a consultation with Māori about harmful digital communications.**

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<sup>4</sup> Edgar Pacheco, Neil Melhuish And Jandy Fiske *Image-based Sexual Abuse: A Snapshot of New Zealand Adults' Experiences* (Netsafe January 2019) at 5.

## United Nations Convention on the Rights of the Child

The amendments better align with New Zealand's international obligations under the United Nations Convention of the Rights of the Child ("UNCROC"). In particular, the changes align with articles 16, 19 and 34.<sup>5</sup> The proposed changes lower the threshold for finding liability where there is unauthorised posting of intimate recordings. This provides greater protection for the privacy of young people, which aligns with Article 16.

The criminalisation of unauthorised posting of intimate recordings also aligns with Article 19, which is concerned with freedom from abuse, and Article 34, which relates to freedom from sexual exploitation.

<sup>5</sup> United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 16, 19, 34.

# Our Concerns

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The Bill is a significant improvement on the current law, but we are concerned that the Bill fails to recognise or provide for the harms of advancing technology, the limitations of police and Netsafe's powers, and sex and consent education in New Zealand.

## **New Harms Arising From Advances In Technology**

YouthLaw Aotearoa submit that any new legislation in the sphere of online harm, must consider the variety of different contexts in which harmful digital communications arise and may arise in the future.

We are particularly concerned that the bill does not recognise the threat of “deepfake” technology. Creators of ‘deepfakes’ manipulate videos to make their subjects say and do things that never happened in real life.<sup>6</sup> Of concern, “deepfake” creators can impose a victim’s face onto the body of an individual in a pornographic video.<sup>7</sup> Unfortunately, “synthetic” intimate visual recordings are relatively easy to make, as there are already widely available technologies that can be used by people without any special knowledge or skill.<sup>8</sup> All that is needed to create “deep-fakes” is the technology and a photograph of the subject.

Research shows this technology is already causing substantial harm and discouraging participation in public life, particularly for women.<sup>9</sup> “Deepfake” pornographic videos could cause significant harm to victims, particularly if those videos become

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<sup>6</sup> Curtis Barnes Tom Barraclough “Perception Inception - Preparing for deepfakes and the synthetic media of tomorrow” (Brainbox, 2019) at 5.  
<sup>7</sup> At 15.

<sup>8</sup> At 9.

<sup>9</sup> Brainbox “Submission to Justice Committee on the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill 2021” at 2.

permanently accessible on the internet through re-posting or onto sites that will not remove the content. We are concerned that the posting of a convincing deepfake may result in the same or similar damaging impacts on a victim as the posting of a real intimate visual recording of the victim.

YouthLaw Aotearoa submit that the bill should afford the same protection to victims of “deepfake” pornography, as it does the victims of “revenge porn”. Whilst there is some scope for “deepfakes” to be covered under the current section 22, we are concerned that the focus would be on the requirement of ‘harm’ to the victim rather than the non-consensual posting of the pornographic “deepfake” itself. A possible solution may be to change the definition of “intimate visual recordings” in section 4 of the Act. The interpretation section could be amended to include situations where video manipulation technology has been used to create intimate images of victims. Another option could be the creation of a specific section about pornographic “deepfakes” and the unauthorised posting of such content.

**We recommend that the government consult with experts about the risk of “deep-fakes” and consider whether law change is required.**

## **Limitations of Police and Netsafe**

YouthLaw Aotearoa is also significantly concerned about the limits of Netsafe’s and the Police’s powers to redress online harm. We have been told by clients that Netsafe and the Police are effectively powerless in specific online harm situations. The limitations that we have been told about and recognised are that:

- It can be very difficult or even impossible for Netsafe and the Police to act against anonymous users. Whilst an ‘unmasking’ order can be applied for in the District Court, it may not be possible for the content host to provide the users real details (for example, if an anonymous email or false details have been used). It is also possible for one person to create many anonymous accounts and persistently post harmful digital communications. We have been contacted about situations where anonymous accounts are taken down but are instantly replaced by even more anonymous accounts that harass the victim.
- Online content hosts that have been deliberately created to allow users to post anonymously.
- Online content hosts that allow users to post anonymously and may request payment for content to be removed.



- Many online content hosts are not based in New Zealand, which can make it difficult for Netsafe and the police to interact with them.
- Many users are not based in New Zealand, which limits the Police and Netsafe's powers.

## **Need for sex and consent education**

YouthLaw Aotearoa submit that there is a need for significant and continuing investment into the education of children and young people about healthy relationships, consent, sexual violence prevention and online safety.

**We recommend that the government invest in sex education and consent, and introduce compulsory education about the risks of creating intimate recordings and the harm and illegality of posting recordings without consent.**

## **Overall recommendation**

**We recommend that the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill progress to the second reading and beyond.**

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