

23 July 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill

Purpose

1. We have considered whether the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression). Our analysis is set out below.

The Bill

3. The Bill amends the Harmful Digital Communications Act 2015 ('the principal Act') to make it an offence for a person to post an intimate visual recording without consent of the subject(s) of the recording ('the victim'). This is also called "revenge pornography". The Bill aims to prevent and mitigate harm caused to individuals by this form of sexual exploitation and to assist in the elimination of all forms of violence against women.
4. Currently, under s 22 of the principal Act, it is an offence to cause harm by posting a digital communication if:
 - a. the person posting the communication has intention to harm the victim;
 - b. posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
 - c. posting the communication causes harm to the victim.
5. If prosecuted for this offence, penalties can be a fine of up to \$50,000 or up to two years' jail for an individual, and up to \$200,000 for a body corporate.
6. The offence proposed in the Bill differs from current s 22 of the principal Act because it does not require a victim to show that they have been harmed or to prove that the person posting the material intended to harm the victim.
7. The Bill provides that for the commission of the new proposed offence, the person posting the digital communication must either have known that the victim had not expressly consented to the posting or have been reckless as to whether the victim had done so. Consent must be shown to be express, voluntary, and informed. The penalty for an individual is a fine of up to \$50,000 or imprisonment for a term not exceeding three years. For a body corporate, the penalty is a fine not exceeding \$200,000.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

8. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.¹
9. Clause 4 of the Bill inserts proposed new s 22A into the principal Act to make it an offence for a person to provide information by posting a digital communication that is an intimate visual recording. The person posting the digital communication must know that the victim has not expressly consented to it being posted or been reckless as to whether the victim has consented to it being posted. This is a *prima facie* limit on the right to freedom of expression.
10. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.²
11. Clause 4 seeks to ensure that victims are not subject to the harmful effects of revenge pornography. We understand that the personal cost of the public humiliation of revenge pornography can be immense, particularly if the victim's name and contact details are also published with the recordings. Some victims have attempted or committed suicide, and many experience mental health issues as a result. Socially, victims can be harmed irreparably and can be exposed to the threat of being stalked, attacked, bullied, and stigmatised. As stated in paragraph 3, the Bill aims to prevent and mitigate harm caused by sexual exploitation and to assist in the elimination of violence against women. Therefore, we consider that the Bill achieves a sufficiently important objective.
12. We consider that the limit on the right is no more than is reasonably necessary and proportionate to the achievement of the Bill's objective. The Bill only restricts the ability for a person to post an intimate visual recording that the victim has not consented to. In doing so, the offence aims to prevent serious harms described above that a victim may experience through the posting of such intimate material.
13. For these reasons, we conclude that any limits on the right to freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

Conclusion

14. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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