



23 April 2021

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

InternetNZ submission to Justice Committee

Who we are and what we stand for

1. InternetNZ is a not-for-profit that is the home and guardian for the .nz domain. Our work includes the technical side of running .nz, funding Internet research and community projects, hosting events like NetHui to bring together the Internet community, and doing policy work to support an Internet for all and an Internet for good.
2. We welcome the opportunity to submit on the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill (the Bill).

InternetNZ supports the intent of this Bill

3. We support the intent of this Bill, which aims to reduce harm to individuals from unauthorised posting of intimate visual recordings (IVRs) online.
4. To serve this aim, the Bill proposes a new offence provision based on a clearer and broader definition of an unauthorised posting of intimate visual recording. This proposed offence would focus on the consent of the person depicted, rather than a test of the poster's intent, making it clear that a person's consent is needed to share an intimate recording depicting them. The Bill also reduces the barriers faced by victims seeking access to justice under the current law as applied by the court system and the Police.
5. To ensure that the intent is realised, we recommend the Committee seeks advice from officials on the drafting and potential unintended impacts of the Bill.
6. Below we set out some specific areas where this advice maybe useful, including:
 - a. How to consider synthetic images as IVR;
 - b. Remedies for content take down for anonymous posting; and
 - c. Engagement with potentially impacted communities.

How to ensure law on digital communications is fit for purpose

7. This Bill has been introduced in order to clarify that consent is vital for the online sharing of intimate recordings and to enhance a victim's access to justice. In this spirit, it is important to ensure that the Bill covers all possible avenues for harm, while avoiding unintended impacts on people who use and benefit from the Internet.

8. The evolving nature of digital communications presents particular challenges that must be considered in designing effective regulatory responses.

Synthetic images, or ‘deepfakes’, of real people should be considered IVR

9. As discussed in the submission of the Brainbox Institute,¹ it is not clear if the creation and dissemination of synthetic images depicting an individual would be a crime under this Bill.
10. To achieve the intent of the Bill that consent of a person depicted be required for sharing of an IVR online, we recommend that relevant definitions are amended to include posting a manipulated or synthetic IVR that depicts an individual who has not consented to the posting. To balance the broader application resulting from this change, we think a defence should be available to avoid an over-broad application to material where the intent is artistic or satirical and where no one is harmed.

Enabling remedies when a post cannot be attributed to a poster

11. Civil remedies under the HDCA focus on removal, apology, or a right of reply. In relation to IVR material the remedy of removal is particularly important.
12. Some abusive posting of IVR material will be anonymous. In these situations a prosecution may or may not be possible, but it should still be easy for people to access a remedy of removal. We think it may be useful to consider an expedited process for removal where a content host refuses to remove non-consensual posting of IVR material, or where evidence needed for a prosecution is unavailable.

Enabling remedies for re-sharing without consent

13. We support the idea expressed at proposed s 22A(5) that consent to share an IVR in one context is not consent to share in another context.
14. We think that this consent approach should extend to the resharing of public or paywalled content in other contexts as well. IVR may have been shared on a closed, but technically public online content host, or it may have been shared in a specific context or on a platform with limited reach. Sharing content in these contexts should not be taken as consent to post the IVR more widely.
15. Posting IVR outside of its original context without express consent should be considered “reckless” as per s22A(1)(b).

Maintain current notice and take-down rules for online content hosts

16. It’s a strength of the HDCA that the liability rules for online content hosts in s 23-s 25 encourage content hosts to take the content down as soon as practicable and issue a notice in respect of content posted by a user. With

¹ Brainbox, “SUBMISSION TO PARLIAMENT ON THE HARMFUL DIGITAL COMMUNICATIONS (UNAUTHORISED POSTING OF INTIMATE VISUAL RECORDING) AMENDMENT BILL (305-1)” (21 April 2021) <<https://www.brainbox.institute/deepfakeivr>>

these current liability rules in place, the Bill can improve the ability of victims to access justice without creating a risk of over-broad liability on content hosts that negatively impacts New Zealanders.

Listening to those who may be negatively impacted by this Bill

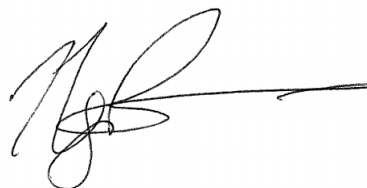
17. InternetNZ believes this Bill will have its intended effect in supporting victims of unauthorised posting of IVRs.
18. But we also encourage you to consider how this Bill may inadvertently impact the people it was written to protect.
19. Many people make their own intimate visual recording for both personal and commercial use. Platforms like OnlyFans, Patreon and other subscription services have provided avenues for people to earn money from this work with agency, control, and safety.
20. There is a stigma attached to the sex work industry that makes it difficult for sex workers and producers of explicit content to advocate for themselves, so it is important to proactively seek the views of the people who are most knowledgeable about the likely effects of law in this area and who have most to lose if the law gets it wrong.
21. Our recommendation is to listen to those who may have an alternative perspective. Globally, sex workers and educators have seen the unintended repercussions of other laws intended to protect victims, and they will be positioned to help you craft this Bill in a way that protects everybody's right to safe sexual expression online.

This Bill is a step in the right direction for online safety

22. We thank the Committee for its consideration of this submission.
23. InternetNZ supports this endeavour to enhance protection for victims of unauthorised posting of IVR. Comments in the House show everyone is behind the goals of this Bill, so let's make sure it does the job we intend it to do.



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