

Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill: Submissions on behalf of the Classification Office

About us

The Classification Office Te Mana Whakaatu is an independent Crown entity responsible for classifying publications that may need to be restricted or banned (an independent media regulator at arm's length from Government).

Our work includes examination and decisions on both commercial and criminal content, and research, outreach and education (including a public inquiries and complaints service). We receive a large number of submissions from the Police, for instance, that contain child sexual abuse material and non-consensual and/or trending intimate visual recordings.

As an office we are proud to work alongside and learn from [young people](#). We understand from them that sending and sharing intimate visual recordings is very common. We are also lucky enough to work with experts like Dame Sue Bagshaw who advise us on [brain development](#) and how this relates to making decisions without analysing risks.

Te Mana Whakaatu welcomes the opportunity to comment on the proposed changes to the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill.

Background

This Bill seeks to introduce a new offence section into the existing Act. The new section will be 22A.

The proposed new section seeks to specifically address non-consensual posting of intimate visual recordings. The intention is to address the issue of image-based sexual abuse, which can be previously consented-to sexual images but also situations where people are filmed or photographed without their knowledge. Examples of the latter include images taken of people in changing rooms or toilets.

Under the current Act, an intimate visual recording is defined as:

intimate visual recording—

(1) means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—

- (a) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is—

- (i) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or
- (ii) engaged in an intimate sexual activity; or
- (iii) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
- (b) an individual's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—
 - (i) from beneath or under an individual's clothing; or
 - (ii) through an individual's outer clothing in circumstances where it is unreasonable to do so.
- (2) that is made and transmitted in real time without retention or storage in—
 - (a) a physical form; or
 - (b) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing.

Pursuant to the proposed s22A, a person commits an offence if an intimate visual recording is posted without the subject's express consent, or where they have been reckless as to whether consent has been given or not.

For the purposes of the proposed s22A, **express consent** requires that consent is given voluntarily and in the full knowledge of how the visual recording will be used.

The prosecution does not have to prove any specific harm has resulted from the publication, or that any specific harm was intended by a defendant. This is a contrast to the existing s22 offence where both intent to harm and the harm itself must be established.

Issues for consideration

This proposed legislation invites the consideration of some wider issues.

1. The proposed amendment is supported by the Classifications Office as it promotes online safety. A shift to establishing a lack of consent, rather than the intent of the poster (defendant) to cause harm is a welcome one. This new section clearly accepts that the posting of intimate visual recordings are inherently harmful given the significant breaches of trust and of privacy.

It is likely there will be public support for this amendment. It is submitted that there is also support for a wider review of media regulation in respect of harmful material.

2. A concern does arise, however, about unintended consequences of this section. It is important that young people (those aged 25 years and younger) are not unduly criminalised for behaviour seen as normal by them. The taking of nude images, sending them to other young people and retaining such images on a device is not uncommon. Consent may have been initially given but subsequently withdrawn. The context of potential offending will be particularly critical in cases involving young offenders.

Given their age and brain development it is submitted that education should be a primary focus. We anticipate that the context of offending, and the circumstances and

age of offenders, will be taken into account in any sentencing of young people for this category of offence, as it normally is in the sentencing process. Given the particular issues around young people's behaviours and use of technology potentially presented by the proposed offence, we submit that consideration of a separate sentence regime (lower than the standard penalties of three years imprisonment or a fine of \$50,000) could be considered for those in this age group, at least in respect of first offences.

3. Does the proposed s22A impact on the offences pursuant to the FVPC Act?

Part 8 of the FVPC Act does not appear to be impacted by this proposed section. It may well be possible for a defendant to face charges of non-consensual publication of an intimate visual recording, as well as charges of making and distributing objectionable publications.

Police or other enforcement agencies are likely to refer some of the intimate visual recordings for classification, even where they have charged under s22A. It is likely that some of the intimate visual recordings will be classified (or classifiable) as objectionable.

This crossover is already occurring where someone is charged under the Crimes Act 1961 – ss216G-216N in respect to intimate visual recordings. The same recording may well be referred for classification and further charges laid for making, possessing or distributing an objectionable image etc.

Pursuant to s22A, the intimate visual recording does not have to be objectionable and accordingly has a broader application.

We are happy to answer any questions or provide further information on this submission.