

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

### Introduction

The National Collective of Independent Women's Refuges (NCIWR) is a non-governmental organisation delivering services to women and children affected by family violence in New Zealand. NCIWR receives over 50,000 crisis calls per year (nearly 140 per day), and provides support, advocacy, legal, and health services to over 26,000 clients annually.

NCIWR recognises technology-facilitated abuse, including the non-consensual sharing of intimate content, as a gendered crime that is often associated with intimate partner violence. Accordingly, we support this Bill and endorse the definition of consent that it provides.

We further submit that the Bill may be strengthened by a concurrent focus on amending how these crimes are investigated and by amending the schedule of offences that entitle victims to therapy through the ACC Sensitive Claims scheme to encompass technology-facilitate sexual abuse, including the non-consensual sharing of intimate content.

Please note we wish to appear before the Select Committee for this Bill.

### The need for this Bill

NCIWR supports this Bill. The non-consensual sharing of intimate content is a form of gendered violence, and should be treated comparably to other forms of intimate partner violence. In this submission, we set out why this Bill is a necessary amendment that will facilitate greater access to justice for victims of image-based sexual abuse (IBSA). However, we also set out its limitations in regard to both scope and accessibility of justice avenues for victims. Specifically, we submit that to combat technology-facilitated abuse, including the non-consensual sharing of intimate content, there must be:

- a) A clear and coherent definition of prohibited behaviours;
- b) Investigative capacity that removes the onus on victims to find evidence of their own victimisation;
- c) Specialist support and advocacy (including legal advocacy) for victims; and
- d) Access to funded therapy for victims.

In the context of family violence, perpetrators use the threat of sharing intimate content as an effective means of maintaining control over their victim's decisions and behaviours. In both our 2019 research into intimate partner stalking and our 2021 research into young women's experiences of technology-facilitating intimate partner abuse, participants identified this as a key barrier to them feeling able to seek support to end the relationship with an abuser. The following example illustrates how an abuser's non-consensual sharing of a victim's intimate content can be used as tactic to control and degrade them:

He would also force me to have sex and do sexual things with him even if I didn't want to, especially if we had a fight or something. He would also take photos/videos without my knowledge of us doing this stuff and threaten to send it to family, friends etc if I ever did or said anything or if I upset him. A lot of the time he would show it to his friends anyway as a means of bragging or something.

One commented that "[He] compulsively backed up every single interaction and photograph of me, including nudes, online and offline, and had all that information with which to spam me". Another participant tried to end her relationship with an abuser and in doing so, was made aware of the steps he had taken in advance to discourage her leaving, saying "[He] sent me secret recordings of us having sex from during our relationship, I didn't know that they existed". Less commonly, victims are unaware that this material is posted, but find out much later. One of our participants had suspected that her ex-partner had taken photographs of her without her consent, but he denied it. Six months after the relationship ended, she discovered that he had posted numerous nude photos of her online.

These examples are rarely the sole tactic used by the perpetrator; consequently, victims' experiences of the legal processes involved with addressing the sharing of their intimate content are often shaped by the cumulative weight of a pattern of abuse, rather than by the standalone tactic of sharing intimate content online. This cumulative pattern is largely disregarded in the design of civil and criminal responses. For example, since the introduction of the HDCA, there have been numerous examples of harmful subjectivity and inconsistency in judicial decision-making, which is applied based on judges' impressions of whether victims were 'severely emotionally distressed', rather than whether an offence against their reputations had been committed. This has led to instances of women who are depressed or in treatment as a result of nude images being circulated, yet who are managing to maintain a calm public persona, being deemed insufficiently distressed for the non-consensual distribution of their nude images to be deemed a crime.<sup>1</sup> This Bill would effectively progress an objective criminal threshold (predicated on genuine consent) for the non-consensual sharing of intimate content online, bringing that threshold onto par with in-person perpetration of sexual crimes. This is an overdue and much-needed amendment, given the parallels between the emotional and interpersonal harm experienced by image-

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<sup>1</sup> Whyte, A. 'I've never hated myself more in my life' - Revenge porn law, does it really protect the victim? Retrieved from <https://www.tvnz.co.nz/one-news/new-zealand/ive-never-hated-myself-more-in-my-life-revenge-porn-law-does-really-protect-victim>

based sexual abuse and in-person sexual crimes. However, the potential for improved justice responses to victims that this Bill represents is limited unless the other components of a justice response are progressed simultaneously.

### **The onus on victims and need for investigative capacity**

We submit that the proposed amendment would be given greatest effect if they are in conjunction with amendments to how the HDCA is administered. There are two components of the current administration of the HDCA that impede victims' access to safety and justice; namely, the onus for investigation and the provision of direct support.

Currently, a victim of non-consensual posting of sexual images or recordings must almost entirely drive the investigation of her own victimisation. Images and recordings are rarely uploaded onto only one platform. The first discovery of recordings that they feature in (and did not consent to the sharing of) is a significant initial violation, which is typically then followed by them having to go online and search other pornographic web platforms to try to ascertain where else these recordings have been shared. For example, one of our research participants was notified that recordings of she and her partner having sex had been seen on a pornography website, and spent weeks searching for others. This involved her having to seek out and view content that she experienced as degrading and confronting, even before she found confirmation of the recordings featuring her on multiple other sites.

The unfair onus to evidence their own victimisation and contain the extent to which it continues is not an expectation put on other victims of sexual crimes. It is also not a process that victims are supported in by State actors; they may be advised that their victimisation may have occurred in multiple digital spaces, but the process of seeking confirmation of that sequence of violation is navigated alone. This Bill, while clarifying criminal culpability, does not make any progress in shifting that monumental gap in the State's response to these victims. We submit that victims are best served by legislation that acknowledges technology-facilitated crimes such as IBSA as both gendered and violent in intent, and directs police, rather than individuals, to identify and investigate the extent of someone's victimisation online.

### **Gaps in support for victims**

Victims of image-based sexual abuse do not have any avenue for specialist, funded support. Research participants who have had intimate content non-consensually shared described debilitating emotional impacts, including symptoms of post-traumatic stress disorder, that were associated with their discovery of this content. The impacts to participants' lives extended beyond those that could be easily explained to others, and into domains of their lives that meant they suffered multiple losses. The impacts to their mental health, trust and intimacy within their relationships with others, employment stability and prospects, and involvement in digital spaces were felt long after the event(s) occurred. However, despite them experiencing this online violation as tantamount to the in-person assaults those same partners

had subjected them to, there was little support available for them. This was a significant factor in which options they perceived as viable; without support, some women reported that they could not face the civil or criminal processes that would need to be involved. One victim stated that:

There was evidence and I had a statement taken about the digital underage revenge porn and blackmail and stalking. But they told me I had to go back in to give more evidence and I did not want anymore of my time to be wasted on thinking about [him] so nothing ever happened. The police didn't make it easy for him to be prosecuted. He came back five minutes after a protection order was given despite me telling the police officers that I was sure he would do so.

Those that approached Netsafe found that while they got good advice, they did not get support in navigating the process involved with having the content removed, and could not identify a means of therapeutic or personal support. Of those who also explored the possibility of making a police complaint, few proceeded, perceiving it as an intimidating prospect without therapeutic support and advocacy.

Victims of sexual violence perpetrated in person are eligible for fully-funded long-term quality therapy under the Accident Corporation and Compensation (ACC) Sensitive Claims scheme. In the absence of ACC coverage, victims are therefore left without the necessary therapeutic support. However, our clients who have been subjected to image-based sexual abuse as part of intimate partner violence are not entitled to coverage for therapy through the ACC sensitive claims pathway, which is only accessible to people subjected to one or more of a prescribed list of sexual offences. Given that the accessibility of this support is often instrumental in victims' willingness to pursue justice pathways, we recommend that the schedule of ACC offences determining eligibility for a Sensitive Claim be updated at the same time as this Bill's amendments take effect, and that forms of technology-facilitated sexual violence (including non-consensual sharing of intimate content) be added to this schedule. Finally, we recommend that given the context of intimate partner violence that non-consensual sharing of intimate content is perpetrated within, strengthening of the HDCA will be more effective if victims are also offered dedicated advocacy and support (including access to legal advice) that extends beyond administrative and procedural support. This is a current gap in the service for victims.

### **A need for an equivalent focus on IPV perpetrated online**

As stated above, we support this Bill and applaud its specific attention to a threshold for consent that clearly defines non-consensual sharing of intimate content as a prohibited act. However, we urge the Committee to consider other forms of technology-facilitated intimate partner violence and the need for legislation relating to digital behaviour to account for these forms of harm. Increasingly, victims of family violence are constrained in their capacity to seek safety by their abusers' use of technology for the purposes of surveillance and monitoring. This is predominately perpetrated using everyday technology, and is insufficiently legislated against.

He would tell me [he was watching me]. [The] majority of the stalking happened while we were separated and he wouldn't take no for an answer. It would usually come out in arguments, or confrontations about where I had been and who I had been with. He would sometimes call me to inform me he knew my exact whereabouts and who I had been with over a period of time. He would often demand explanations of why I had been to 'X' place with specific people. I felt like he had no right to the information because we weren't together, but he would wind me up until I felt I had to explain, as his scenarios were so far-fetched and painted me in a bad light when the actual truth was usually very innocent. I hated him making me feel like my life was under a microscope constantly. He would call daily, beg to meet with me, [and] would turn up randomly if I refused to see him or tried to not answer his calls.

Victims of IPV involving technology-facilitated monitoring, surveillance, and harassment reported having to remain vigilant in order to continually circumnavigate their ex-partners' opportunities to contact them, intimidate them, or otherwise interfere with the normal functioning of their life, including their home safety, their relationships with others, and their professional standing. For some, feeling unable to cope with the impacts of ongoing stalking was the key precipitant to their decisions to return to an abuser. In our research into stalking, victims of technology-facilitated intimate partner violence stated that ending a relationship did not seem viable, because there was no effective mechanism to stop the behaviour.

Most reported that police had limited options to help, and that their experiences, even taken collectively, did not constitute a crime. As a result, they were forced to either stay in the relationship or tolerate the behaviour, which typically extended for years after separation. Participants focused in particular on the limitations of protection orders and police safety orders when these orders are not enforced following reports of digital breaches. Protection orders were referred to by one woman as offering a "false sense of safety". Another common complaint was the onus on victims to proactively manage the potential for further abuse, rather than any onus on law enforcement to investigate the abuser. This was likened to a full-time job; it required victims to constantly engage with the abuser through a battle of technical access.

In order for women impacted by IPV to live free from the constraints imposed by abusers' harmful use of technology, both criminal legislation (either through the Harassment Act 1997 or the HDCA) and civil legislation (such as protection orders) need to explicitly label behaviours that constitute abuse and disallow these, with consequences comparable to in-person perpetration of abuse tactics. At present, abusers use technology to keep victims on a digital leash, and victims are left without any effective means of disrupting those abusers' control over their lives, even after separation. Until the significance of digital tactics to an abuser's pattern of violence is recognised, victims cannot access safety. We therefore encourage the Committee to focus on technology-facilitated harm as a form of family violence, and to consider further legislative reform that strengthens the judicial response to these victims.