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**REVENGE PORN OR CONSENT AND PRIVACY:  
AN ANALYSIS OF THE HARMFUL DIGITAL  
COMMUNICATIONS ACT 2015**

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*Abstract*

In response to the growing concern around the use of new technology to cause harm, Parliament passed the Harmful Digital Communications Act 2015. On target of the Act was the phenomenon of revenge porn, the non-consensual publication of intimate images. This paper analyses the amendments to pre-existing legislation and the new civil and criminal provisions created under the Act. This paper argues that the Act fails to provide adequate protection to victims of revenge porn. In critiquing the Act, this paper looks at the harm that is caused to victims of revenge porn and the gap within the pre-existing law that resulted in inadequate protection. This paper concludes that the Harmful Digital Communications Act does not effectively address the harm of revenge porn or bridge the gap left by the previous law. The failure to enact specific legislation, to target the non-consensual publication of intimate material, has resulted in an ineffective law in relation to revenge porn. In order to address the invasion of privacy and violation of consent, the provision should be founded on an expectation of privacy in the intimate content rather than the context or place in which it was taken.

Key words:

Revenge porn, non-consensual publication, Harmful Digital Communications Act 2015.

## *I Introduction*

In an ever-evolving world of technology and communication, where at the click of a button, online harassment can be shared with the world, it has become increasingly impossible to ignore the negative impacts that the internet can have. The digital age means communication is no longer simply with family, friends, neighbours and colleagues rather it can be with the world. Therefore, when used to cause harm, the effect is magnified.

Parliament recognised the use of the internet to bully and cause harm and, in response, enacted the Harmful Digital Communications Act 2015 (HDCA) in July 2015. The Act both amended existing legislation and created new civil and criminal regimes to deal with a number of offences relating to digital communication, targeting both individuals and content hosts.

This paper analyses whether the Act has the ability to effectively fill the gaps left by the pre-existing law in relation to the non-consensual dissemination of intimate photographs. The principal focus of this paper is where the content is originally obtained or taken with consent and then disseminated without consent, as this was the most common scenario that the pre-existing law failed to protect. However, the paper will briefly consider content that is both taken and distributed without consent.

This paper will consider the harm caused by revenge porn with the use of the internet and social media. It will then explain the law that existed before the HDCA and identify where the fundamental problems in that law lay. This paper will then introduce the HDCA in relation to the dissemination of intimate content without consent and argue that the Act fails to address some of the fundamental problems in the law. These failures result from enacting a broad provision, aimed at a varied range of conduct. In doing so, Parliament has failed to recognise that the harm of revenge porn relates to the lack of consent and the invasion of privacy. An effective law should have been modelled around these concepts focusing on an expectation to privacy in all intimate content.

## *II The problem: Revenge porn*

### *A Definition and harm*

Revenge porn, also referred to as non-consensual pornography, describes sharing images or video footage, sexual in nature, without the consent of the subject. Such a situation may originate in a number of ways: through non-consensual recording such as a hidden camera, through a consensual recording that is then stolen, for example computer hacking or a consensual recording that is then intentionally transmitted, without the consent of the subject.<sup>1</sup> The third scenario is commonly identified as revenge porn as most intimate images will be posted by a disgruntled ex-partner, who obtained the images with the consent of the subject during the course of a relationship and then later published them without consent, in pursuit of revenge.

‘Revenge porn’ can be misleading, as revenge is not always the motive; a person may act out of a desire to profit or provide entertainment or may involve a hacker distributing stolen content.<sup>2</sup> Revenge porn is not limited to the online world however, this is the medium of publication that this paper will focus as it is the internet that has changed the nature and intensity of harm, as will be discussed further in this paper.

This paper will predominately focus on the situation where content is taken or obtained with the consent of the subject but then later published without consent. When images are obtained without the consent of the subject, such as through hacking, two legal issues arise. One issue is the publication without consent and the other is how the image was obtained in the first place. The focus of this paper is not on how the image was taken or obtained but rather, the subsequent non-consensual distribution of the image.

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<sup>1</sup> Jenna K. Stokes “The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn” (2014) 29 Berkeley Tech LJ 929 at 929.

<sup>2</sup> Mary Anne Franks "Drafting An Effective ‘Revenge Porn’ Law: A Guide for Legislators” (August 17 2015) Social Science Research Network <[www.ssrn.com](http://www.ssrn.com)> at 2.

Non-consensual pornography is not a new phenomenon but its reach, prevalence and impact has exponentially increased with technology developments which have facilitated worldwide sharing of content.<sup>3</sup> The growth and normalisation of camera and video capable phones has provided a technology that allows people to take and share images immediately, without the need to go to a store to have photos developed, increasing the sense of privacy.<sup>4</sup>

Web 2.0, the second generation of the internet, allows content to be written by both internet users and webpage publishers.<sup>5</sup> Social media is the most prominent example with pages such as Facebook allowing every person with access to a computer to distribute material, providing an accessible medium for revenge porn. The online world is firmly entrenched into the daily life of New Zealanders' with over 90% of those aged 15-44 using the internet.<sup>6</sup> Half of Facebook's 1.49 billion active monthly users have more than 200 friends,<sup>7</sup> which helps to explain the viral effect of the internet. One person may post content to their Facebook friend list of 200, those 200 people are then able to share that content with their friend list and so on. Within a few moments, content can be shared to thousands of viewers. As well as social media, dedicated websites host revenge porn. The now defunct IsAnyoneUp site received 30 million views a month and included information that meant images would appear in a Google search of the subject's name.<sup>8</sup> Prior to the internet, publication of revenge porn was usually limited to a few friends but now sharing can be with the world and as a result, the harm associated with revenge porn has expanded.

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<sup>3</sup> Mary Anne Franks, above n 2, at 2.

<sup>4</sup> Taylor Linkous "It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization Of Revenge Porn" (2014) 20 Rich JL & Tech 14 at [2].

<sup>5</sup> Bryan Alexander "Web 2.0: A New Wave of Innovation for Teaching and Learning?" (January 1 2006) Educause Review <www.educause.edu>.

<sup>6</sup> Statistics New Zealand "New Zealanders' connection with the Internet" (2012) <www.stats.govt.nz>.

<sup>7</sup> Ami Sedghi "Facebook: 10 years of social networking, in numbers" *The Guardian* (online ed, United Kingdom, 4 February 2014).

<sup>8</sup> Emily Poole "Fighting Back Against Non-Consensual Pornography" (2015) 49 USF L Rev 181 at 182.

Empirical evidence indicates that women are the primary targets of revenge porn with one study suggesting that 90% of victims are women.<sup>9</sup> On one revenge porn website, female images appeared five times more often than males and were viewed almost ten times more often.<sup>10</sup> In addition, women tend to suffer more harm than their male counterparts. Women are generally viewed as immoral for engaging in sexually explicit photographs while a male's sexuality is generally a point of pride.<sup>11</sup> Like rape, domestic violence and sexual harassment, revenge porn belongs to a category of crime that denies women control over their body and violates equality.<sup>12</sup> It is a category of crime that is overwhelmingly perpetrated by men, that limits freedom and punishes women for engaging in activity that their male counterparts regularly undertake, with minimal negative consequences.<sup>13</sup> It is argued that the law against sexual assault preserves an essential feature of human autonomy, control over one's status and use as a sexual being.<sup>14</sup> Whilst non-consensual pornography does not cause physical harm, it causes the same objectification as sexual assault, with the perpetrator violating the victim's psychological integrity by disregarding their right to consent to the use of their body.<sup>15</sup>

Revenge porn has resulted in women losing jobs, receiving rape and death threats and cases of suicide have been reported.<sup>16</sup> A study showed that over 50% of victims, whose naked photograph appeared on a revenge porn website, had their full name and social network profile details appear next to the image and over 20% reported that their e-mail and telephone details appeared.<sup>17</sup> Victims express fear for their personal safety,<sup>18</sup>

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<sup>9</sup> Danielle Keates Citron and Mary Anne Franks "Criminalizing Revenge Porn" (2014) 49 Wake Forest L Rev 345 at 353.

<sup>10</sup> Emily Poole, above n 8, at 192.

<sup>11</sup> Danielle Keates Citron and Mary Anne Franks, above n 9, at 353.

<sup>12</sup> At 353.

<sup>13</sup> Mary Anne Franks "Adventures in Victim Blaming: Revenge Porn Edition" (1 February 2013) Concurring Opinions <[www.concurringopinions.com](http://www.concurringopinions.com)>.

<sup>14</sup> Carissima Mathen "Crowdsourcing Sexual Objectification" (6 August 2014) Social Science Research Network <[www.ssrn.com](http://www.ssrn.com)> at 541.

<sup>15</sup> At 541-542.

<sup>16</sup> Susanna Lichter "Unwanted exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters Jolt" (28 May 2013) Harvard Journal of Law and Technology <[www.jolt.harvard.edu](http://www.jolt.harvard.edu)>.

<sup>17</sup> Danielle Keates Citron and Mary Anne Franks, above n 9, at 350-351.

experience anxiety and panic attacks,<sup>19</sup> and have been inundated with harassing messages from strangers.<sup>20</sup> Many women experience a loss of liberty and feel that their freedom is restricted.<sup>21</sup>

A common response to the objectification of women is to blame the victim.<sup>22</sup> This view is evident in a number of media responses to revenge porn, where the suggestion is that if women do not want their naked images posted online, they should refrain from taking the image.<sup>23</sup> The only wrongful act in revenge porn is that of the person who disseminates the content and the blame for the crime lies not with the victim but with the criminal.<sup>24</sup> It is important that further harm is not done through society's response to victims. Jennifer Lawrence put it frankly: "...I don't have anything to say I'm sorry for. I was in a loving, healthy, great relationship for four years. It was long distance, and either your boyfriend is going to look at porn or he's going to look at you".<sup>25</sup>

The rationale that formulates the argument that the solution to revenge porn is for women to refrain from taking the image would suggest that women should not share any confidential information within a relationship that they do not wish to be shared outside of that relationship. A person that shares intimate images is no more blameworthy than any other person who suffers a breach of privacy in relation to content non-sexual in

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<sup>18</sup> Nina Bahadur "Victims Of 'Revenge Porn' Open Up on Reddit About How It Impacted Their Lives" (1 October 2014) Huffington Post <[www.huffingtonpost.com](http://www.huffingtonpost.com)>.

<sup>19</sup> Annamarie Chiarini "I was a victim of revenge porn. I don't want anyone else to face this" (19 November 2013) The Guardian <[www.theguardian.com](http://www.theguardian.com)>.

<sup>20</sup> Kelly McLaughlin "He ruined my life: Victims reveal how they were left suicidal after their naked photos were posted online by 'revenge porn' mastermind as he's finally jailed for 18 years" (5 April 2015) The Daily Mail <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

<sup>21</sup> See Mary Anne Franks "Unwilling Avatars: Idealism and Discrimination in Cyberspace" (2011) 20(2) Colum J Gender & L 224.

<sup>22</sup> Mary Anne Franks "How to Feel Like a Woman, or Why Punishment Is a Drag" (2014) 61 UCLA L Rev 566 at 583.

<sup>23</sup> For example see Last Week Tonight "Last Week Tonight with John Oliver: Online Harassment (HBO)" (21 June 2015) Youtube <[www.youtube.com](http://www.youtube.com)>.

<sup>24</sup> Peggy Drexler "Who's at fault over J-Law's nude photo hack?" (1 September 2014) Lexis Nexis <[www.lexisnexis.com](http://www.lexisnexis.com)>.

<sup>25</sup> Vanity Fair "Cover Exclusive: Jennifer Lawrence Calls Photo Hacking A "Sex Crime" *Vanity Fair* (online ed, November 2014).



nature. Differentiating the relationship of trust based on the sexual nature of the private information is an inconsistent approach. As Lena Dunham put it “the don’t take naked [pictures] if you don’t want them online argument is the she was wearing a short skirt of the web”.<sup>26</sup> The law must recognise that the nature of what is shared within a relationship of trust should not colour and shape the protection that is provided.

It has long been recognised that photographs are more intrusive than verbal or written descriptions.<sup>27</sup> Images provide a vivid and memorable expression of a person. Photographs capture every detail of a moment in a way that words cannot and can portray, not necessarily accurately, the personality and mood of the subject.<sup>28</sup> An image cannot be unseen; there can be no doubt as to the truth of it. A picture is inherently ‘true’. In *Campbell v MGN* Lord Nicholls said, “in general photographs of people contain more information than a textual description. That is why they are more vivid. That is why they are worth a thousand words”.<sup>29</sup> The validity of words can be questioned, they are easily forgotten and they provide no memorable image. Yet a picture will remain the memory of those who see it and there can be no question as to the involvement of the subject. For this reason sharing images is the ultimate breach of privacy and violation of trust.

### *B Rationale for protection of privacy*

Privacy is the ability to control your own information.<sup>30</sup> Inherent to privacy is the right to consent to the use of your image and information. The violation of this right in part, causes the harm of revenge porn. Human rights law has identified that private information is something that is worth protecting, as it forms an aspect of human autonomy and dignity.<sup>31</sup> In the leading privacy decision in New Zealand, Tipping J said “it is of the essence of the dignity and personal autonomy and wellbeing of all human

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<sup>26</sup> Alanna Vagianos “Famous Women Point Out Exactly Why Leaking Nude Photos Is So Very Wrong” (9 February 2014) The Huffington Post <[www.huffingtonpost.com](http://www.huffingtonpost.com)>.

<sup>27</sup> *Contostavlos v Mendahum* [2012] EWHC 850 (QB) at [25].

<sup>28</sup> *Douglas v Hello!* [2006] QB 125 (CA) at [106].

<sup>29</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [31].

<sup>30</sup> The Privacy Commissioner “Privacy Videos” (2015) The Privacy Commission <[www.privacy.org.nz](http://www.privacy.org.nz)>.

<sup>31</sup> *Campbell v Mirror Group Newspapers Ltd*, above n 29, at [50] per Lord Hoffman.

beings that some aspects of their lives should be able to remain private if they so wish”.<sup>32</sup> The publication of intimate images goes to the core of infringing upon dignity and autonomy, as it infringes on one’s ability to conduct their life in a manner of their choosing, free from invasion. To treat someone as something to be looked at, against their wishes, is to ignore a person’s right to respect and dignity and is a disregard for the effect on their wellbeing.<sup>33</sup>

Privacy allows for the development of relationships and intimacy, that would be impossible without an expectation of privacy, as it allows one to reveal themselves to some, more than they would to others, and to have moments where they can be themselves, promoting liberty of thought and action.<sup>34</sup> When a person’s intimate image is posted to the world, their privacy and right to consent is invaded. The objection to non-consensual publication is not just the publication of the image but the invasion into the private life of an individual, which in itself, is objectionable.<sup>35</sup> The importance of privacy requires the law to provide adequate protection to prevent privacy invasions and to provide effective remedies when an invasion does occur. At the click of a button, content can be shared with the world and the problem that New Zealand faces is ensuring the law develops alongside technology.

### *C How online harm differs*

When misused, technology has the ability to aggravate the harm associated with breaches of privacy and abusive communication. Perpetrators can be anonymous, disconnecting them from their victim and the consequences of their actions, at the same time creating a sense of helplessness for the victim.<sup>36</sup> It is this anonymity that causes the online disinhibition effect, causing people act, say and do things in the cyber-world that they

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<sup>32</sup> *Hosking v Runtig* [2004] NZCA 34, [2005] 1 NZLR 1 at [239].

<sup>33</sup> Nicole Moreham “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in Jeremy Finn and Stephen Todd (ed) *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (Lexis Nexis, Wellington, 2008) 231 at 236.

<sup>34</sup> At 233.

<sup>35</sup> *Douglas v Hello!*, above n 28, at [107].

<sup>36</sup> Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at [2.42].

would not do in a face-to-face world.<sup>37</sup> When people are able to separate their actions online from their in-person lifestyle and identity, they feel less vulnerable about acting out.<sup>38</sup>

Traditional forms of bullying are limited in the sense that a person is somewhat shielded in their home life. However, with online bullying, it is now not as simple as ‘walking away’. The internet means that bullying now invades every aspect of a person’s life.<sup>39</sup> In addition, it is easy for bystanders to become involved and for a ‘mob mentality’ to emerge, where there is little regard for the rule of law.<sup>40</sup> It is this mentality that results in victims of revenge porn being targeted by complete strangers.

The viral nature of the internet can result in content being shared with an infinite audience within moments.<sup>41</sup> The permanence of digital content and the ability to search the web means that damaging content can survive long after the event of publication, as it is difficult to prevent third parties saving the data.<sup>42</sup>

The internet has changed the landscape in which a breach of privacy, such as revenge porn, may occur and it is essential that the law develops with technology to provide adequate protection to prevent harm to individuals.

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<sup>37</sup> John Suler “The Online Disinhibition Effect” (2004) 7 *Cyberpsychology, Behavior and Social Networking* 321 at 321-322.

<sup>38</sup> At 322.

<sup>39</sup> Law Commission, above n 36, at [2.42].

<sup>40</sup> Andrew Murray *Information Technology Law: The law and society* (2nd ed, Oxford University Press, Oxford, 2013 at 7.2.1.

<sup>41</sup> Law Commission, above n 36, at [2.42].

<sup>42</sup> At [2.42].

### *III The law prior to the Harmful Digital Communications Act 2015*

#### *A Internet self-regulation*

Facebook will remove images of genitals or exposed buttocks and restricts images of female breasts exposing the nipple or images depicting sexual intercourse.<sup>43</sup> Facebook will also remove images shared in revenge or without the permission of those depicted.<sup>44</sup> Google has said despite its view that Search should reflect the whole web, revenge porn images are so emotionally degrading that the company will honour requests for the content to be removed from search results.<sup>45</sup> Web hosts regulation provides no protection when the image is disseminated beyond the domain of the content host and will not provide any remedy for dedicated revenge porn websites.

#### *B Tort Law*

Under the civil law, a victim of revenge porn may file a claim in tort for a breach of confidence or under the tort of privacy.<sup>46</sup>

##### *1 Breach of Confidence*

A successful claim for a breach of confidence requires that the information was confidential and not in the public domain, that the circumstances imposed an obligation of confidence and that there was an unauthorised use or disclosure of the information.<sup>47</sup> The Victorian Court of Appeal accepted that non-consensual publication by an ex-partner, of a sexual videotape with the plaintiff, amounted to a breach of confidence and awarded damages for the distress caused.<sup>48</sup> Again, in a recent decision of the Western Supreme Court of Australia, it was accepted that posting intimate photographs and videos

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<sup>43</sup> Facebook “Community Standards” (2015) Facebook <[www.facebook.com/communitystandards](http://www.facebook.com/communitystandards)>.

<sup>44</sup> Facebook, above n 43.

<sup>45</sup> Amit Singhal “Revenge Porn and Search” (19 June 2015) Google Public Policy Blog <[www.googlepublicpolicy.blogspot.co.nz](http://www.googlepublicpolicy.blogspot.co.nz)>.

<sup>46</sup> A claim under defamation is not relevant to revenge porn as the defence of truth would operate.

<sup>47</sup> *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

<sup>48</sup> *Giller v Procopets* [2008] VSCA 236, (2008) 24 VR 1.

of the plaintiff to a Facebook page amounted to a breach of confidence.<sup>49</sup> The Court held that intimate content shared within a relationship would ordinarily bear a confidential character and are implicitly provided on a condition that they not be shown to a third party.<sup>50</sup>

A court may restrain publication or further publication of information that breaches an obligation of confidence. Tugendhat J in *Contostavlos v Mendahum* recognised that it has long been recognised that details of a person's sexual life are high on the list of matters that may be protected by non-disclosure orders.<sup>51</sup> In *Douglas v Hello!* the Court noted that when the information has been published and is in the public domain, usually there will be no useful purpose in prohibiting further publication. However, the Court recognised that with photographs, which allow the viewer to focus on intimate personal details, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even a new intrusion when someone, who has previously seen the image, sees it again.<sup>52</sup>

A claim for breach of confidence for the non-consensual publication of intimate images would usually succeed in New Zealand. Yet, the lack of case law in both New Zealand and overseas jurisdictions suggests that the tort is ineffective in addressing the problem. As will be discussed, this is for a number of reasons including the inaccessibility of private law remedies due to time, knowledge and money constraints.

## 2 *Tort of Privacy*

In 2004, the Court of Appeal recognised a breach of privacy as a separate tort in New Zealand. There are two requirements; the existence of private facts to which there is a reasonable expectation of privacy and that publication of such facts would be highly offensive to the reasonable person.<sup>53</sup> The defence of legitimate public interest is

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<sup>49</sup> *Wilson v Ferguson* [2015] WASC 15.

<sup>50</sup> At [56].

<sup>51</sup> *Contostavlos v Mendahum*, above n 27, at [25].

<sup>52</sup> *Douglas v Hello!*, above n 28, at [105]-[107].

<sup>53</sup> *Hosking v Runting*, above n 32, at [117].

available.<sup>54</sup> Intimate images shared within a relationship would attract a classification of private facts to which there is a reasonable expectation to privacy. Highly offensive is something that is truly humiliating and distressful or otherwise harmful to the individual concerned.<sup>55</sup> This test would, in most cases, be satisfied by the publication of intimate pictures.

If the subject was a public figure, for example the prime minister, a defence of legitimate public interest could be raised. However, a genuine public concern and not mere curiosity is required and the level of public interest must outweigh the harm likely to be caused to the individual.<sup>56</sup> It is unlikely a court would conclude that intimate images are ever sufficiently in the public interest as to outweigh the harm and expectation to privacy, given the immensely private nature of the material and the significant harm involved. This would be true even in the case of a prime minister, who would attract one of the strongest arguments of legitimate public interest.

The court is reluctant to grant an injunction to stop publication given the restriction on freedom of expression. However, where there is evidence of highly offensive intended publication of private information, in which there is little public concern, an injunction may be granted.<sup>57</sup> This would usually be satisfied with intimate images. An award for damages may also be made. The tort of privacy will provide a means of redress for revenge porn but despite this, like with a breach of confidence, a private claim in tort is inaccessible and inefficient.

### *C Criminal Law*

The Crimes Act contains provisions that cover some types of sexually explicit material and the dissemination of offensive content. For example, it is an offence to publish intimate pictures of someone, taken covertly without that person's consent.<sup>58</sup> This

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<sup>54</sup> At [129].

<sup>55</sup> At [126].

<sup>56</sup> At [133]-[134].

<sup>57</sup> At [158].

<sup>58</sup> Crimes Act 1961, s 216I.

provision covers content taken without consent in circumstances that would reasonably be expected to provide privacy. Therefore, the provision will not protect a victim where the image was originally taken or obtained with consent and later published without consent. Nor would it provide protection if the recording was made in a place, which in the circumstances, would not reasonably be expected to provide privacy. For example, it may not cover a photograph of a person, whose skirt has blown up in a public place, exposing their genitals.

It is also an offence to distribute or exhibit indecent matter.<sup>59</sup> However, the focus of this provision is the nature of the material and whether the images are indecent. Revenge porn often involves content that may be offensive to the victim because of the circumstances of publication yet, is not ‘indecent’ for the purpose of the Act. For example, an image of a partially naked woman is unlikely to be considered indecent, despite publication without consent being objectionable, because the hyper-sexualisation of the internet means that partially naked images of women in themselves are not indecent.<sup>60</sup> A law to target revenge porn needs to focus on the nature of the material coupled with the circumstances in which the material was posted and the subsequent harm caused as opposed to the indecency of the content alone.

#### *D The gaps*

The law prior to the HDCA pre-dated the rise of social media and those who drafted and developed the law could not have foreseen the change in communication within the last 10 years.<sup>61</sup> A world where images can be disseminated en mass within seconds could not have been considered and therefore, the law had to be adapted to fit new and evolving situations. Significant changes in the nature of communication meant gaps existed in the law that had not been adequately bridged by pre-existing mechanisms.<sup>62</sup>

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<sup>59</sup> s 124.

<sup>60</sup> Law Commission, above n 36, at [4.92].

<sup>61</sup> At [4.53].

<sup>62</sup> Law Commission, above n 36, at [3.80].

One problem was there was no accessible source of redress for victims. Despite the availability of a claim under a breach of confidence or privacy, litigation is time consuming and requires thousands of dollars.<sup>63</sup> Many people do not have the money or the inclination to take a civil law claim. Even if a claim were pursued, court action takes time, by which point, the images have been viewed and a large amount of the damage is done.<sup>64</sup> The spread of the relevant law meant perpetrators did not appreciate the legal implications of their online activity nor were the remedies available understood by victims.<sup>65</sup> The inaccessibility of the civil law is evidenced by the lack of litigation for revenge porn.

The criminal law has also been inadequate. For example, the offence of distributing indecent material<sup>66</sup> was used to prosecute a man who had posted images of his ex girlfriend to social media.<sup>67</sup> The Law Commission suggested the judge had used a strained interpretation because of the difficulty in classifying partially naked images as 'indecent' given the hyper-sexualisation of the internet.<sup>68</sup> This case highlighted the lack of criminal provision available for cases of non-consensual pornography. While in the context, without the consent of the subject, the images were offensive and caused significant harm and distress, it was not the true purpose of the Act to capture such a scenario. The focus of the Act was the indecency of the content in isolation and the judge considering the context of publication frustrated the purpose of the Act. The pre-existing criminal law did not provide adequate provision for images impinging the dignity of a person.<sup>69</sup> A provision to combat revenge porn should not be centralised around the indecency of a naked photograph but rather around the lack of consent and the invasion of privacy.

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<sup>63</sup> Steven Price "Harmful Digital Communications Bill Submission" (11 February 2014) Media Law Journal <[www.medialawjournal.co.nz](http://www.medialawjournal.co.nz)>.

<sup>64</sup> The Beehive "FAQs – Harmful Digital Communications Bill" <[www.beehive.govt.nz](http://www.beehive.govt.nz)> at 3.

<sup>65</sup> Law Commission, above n 36, at [4.45].

<sup>66</sup> Crimes Act, s 124.

<sup>67</sup> Law Commission, above n 36, at [4.42].

<sup>68</sup> At [4.92].

<sup>69</sup> At [4.29].



Another problem in the law was the lack of deterrence for offenders. Criminal liability imposes sanctions, which operate as a deterrent to prevent future offending.<sup>70</sup> Once an image is online, it can be viewed worldwide instantly and preventing saving or sharing in other locations is difficult. Therefore, prevention is crucial. The opinion of the Law Commission was that the reported level of online publication involving intimate visual recordings warranted creating criminal liability for publishers.<sup>71</sup>

The essence of revenge porn is that it invades the privacy of the victim and violates their right to consent to how their image and body is used. The law as it stood failed to address these fundamental concepts.

#### *IV The Harmful Digital Communications Act 2015*

##### *A History*

In recognition of the growing concern around the use and development of new communication technology to cause harm, the Law Commission provided a report addressing the adequacy of the current law and regulatory environment in dealing with digital communications by citizens.<sup>72</sup> This report highlighted the gaps within the law that meant that some online behaviour was not being adequately dealt with under the law. The report was accompanied by a draft Bill and addressed issues with online communication not previously dealt with in New Zealand.<sup>73</sup> The HDCA was given royal assent on 2 July 2015.

The Commission provided a number of recommendations, including amendments to the Privacy Act and the Harassment Act. The most significant recommendation was the creation a new civil and criminal avenue for harm caused through digital communication. The civil regime was intended to provide a quick and accessible route for victims to get

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<sup>70</sup> A P Simester and W J Brookbanks *Principles of Criminal Law* (3<sup>rd</sup> ed, Brookers, Wellington, 2007) at 1.2.2.

<sup>71</sup> Law Commission, above n 36, at [4.49].

<sup>72</sup> At 5-6.

<sup>73</sup> (3 December 2013) 695 NZPD 15164.

content removed with the criminal offence aimed toward deterrence. The criminal offence under ss 22-25 of the Act are now in force and the civil regime will become effective on a date as appointed by the Governor-General by Orders in Council or 2 years after the date of royal assent.<sup>74</sup>

The HDCA followed other jurisdictions enacting similar legislation. Currently, revenge porn is a criminal offence in half the states of America.<sup>75</sup> The United Kingdom enacted legislation in early 2015.<sup>76</sup> These jurisdictions chose specific provisions targeting the distribution of intimate material and in failing to do the same, as will be discussed; this paper argues that for a number of reasons, these new provisions do not provide adequate protection for the non-consensual distribution of intimate material.

### *B Aims*

The purpose of the HDCA is to deter, prevent and mitigate harm caused to individuals by digital communications and to provide victims of harmful digital communications with a quick and efficient means of redress.<sup>77</sup> In doing so, it was recognised that the Act had to strike a balance between the freedom of speech and providing protection for those vulnerable to online harm.<sup>78</sup> The Act was aimed at mitigating harm and ensuring the law was accessible and easily understood to ensure that people were able to understand their rights and their duties when undertaking activity online.<sup>79</sup>

### *C Legislative changes*

#### *1 Amendment to the Privacy Act 1993*

Prior to the enactment of the HDCA, despite a number of revenge porn complaints, the Privacy Commissioner was unable to investigate because s 56 of the Privacy Act 1993

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<sup>74</sup> Harmful Digital Communications Act 2015, s 2.

<sup>75</sup> For a full list of states see C. A. Goldberg "Revenge Porn is Illegal in Half the Country!" (9 July 2015) C.A Goldberg Law <[www.cagoldberglaw.com](http://www.cagoldberglaw.com)>.

<sup>76</sup> Criminal Justice and Courts Act 2015 (UK), s 33.

<sup>77</sup> Harmful Digital Communication Act, s 3.

<sup>78</sup> (3 December 2013) 695 NZPD 15164; Law Commission, above n 36, at [4.4].

<sup>79</sup> Law Commission, above n 36, at 14.

provided that all information in relation to domestic affairs was exempt from the Act.<sup>80</sup> The HDCA has amended the Privacy Act so that this exemption ceases to apply if the personal information that is collected, disclosed or used would be highly offensive to the ordinary reasonable person.<sup>81</sup> The highly offensive standard reflects the tort privacy, requiring the material to be objectively offensive. This amendment now allows the Privacy Commissioner to investigate an individual, who posts revenge porn, for interfering with the privacy of another.<sup>82</sup>

The HDCA also added a caveat to principles 10 and 11 of the Privacy Act. Principle 10 is that information may not be used for a different purpose other than the purpose it was collected for and principle 11 says that agencies or individuals cannot disclose personal information that they hold about an individual.<sup>83</sup> Both principles allowed already publicly available information to be used or disclosed. The caveat restricts the use of publicly available information to only when use or disclosure would not be unfair or unreasonable.<sup>84</sup> This means that a third party may now breach the Privacy Act by disseminating content that has already been posted by another person. Previously, this action did not breach the Act because the content was already in the public domain. Now, further dissemination would probably be both unfair and unreasonable.<sup>85</sup>

## *2 Amendment to the Harassment Act 1997*

Prior to the HDCA, the meaning of harassment required that there be a pattern of behaviour directed against another person. This required a specified act to be done, on at least 2 separate occasions within a 12-month period, before liability could be found under

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<sup>80</sup> Sam Grover “Closing Revenge Porn Loopholes” (9 July 2015) The Privacy Commission <[www.privacy.org.nz](http://www.privacy.org.nz)>.

<sup>81</sup> Harmful Digital Communications Act, s 41.

<sup>82</sup> See s 66 of the Privacy Act 1993. An act is an interference with the privacy of another if the act breaches one of the privacy principles under s 6 of the Act. In the case of non-consensually posting intimate images of another, principle 10, using information for a purpose other than it was collected and principle 11, that information about an individual should not be disclosed, would likely be breached.

<sup>83</sup> s 6.

<sup>84</sup> Harmful Digital Communications Act, s 40.

<sup>85</sup> Sam Grover, above n 80.

the Act.<sup>86</sup> Therefore, even when an image was posted online, which caused ongoing harm given the continuing nature of the image, a person could not be held liable under the Harassment Act unless publication happened twice. This was inconsistent given that a single internet post, which continued for a lengthy period, had the potential to cause more damage and distress than two discrete acts.<sup>87</sup> The HDCA amended the Harassment Act so that a person now harasses another if they engage in a single protracted act.<sup>88</sup> This includes placing material in any electronic media, which remains for an extended period.<sup>89</sup>

The Harassment Act allows for a restraining order to be granted to prevent the respondent from doing or threatening to do any specified act to the person for whose protection the order is made.<sup>90</sup> This amendment will help to address the harm caused by revenge porn by providing an ability for victims to obtain an order to stop further images being published. However, this will only become applicable once a specified act has been committed. Therefore, the Act will only provide a remedy to stop further action, once images have already been shared and thus will not prevent revenge porn or the associated harm from occurring in the first place.

### *3 A new civil regime*

The primary concern for most victims of revenge porn is how far the images will spread and the most important action is to get the content removed quickly, to limit the potential audience. The civil regime is aimed at providing a quick and efficient means of redress to remove content, which as discussed, was missing in the pre-existing law.

The HDCA provides that an approved agency, yet to be appointed, will receive and assess complaints about harm to individuals through digital communication and use

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<sup>86</sup> Harassment Act 1997, s 3.

<sup>87</sup> Law Commission, above n 36, [4.110].

<sup>88</sup> Harmful Digital Communications Act, s 32 Harassment Act, s 3(3).

<sup>89</sup> Harassment Act, s 3(4).

<sup>90</sup> s 19.

advice, negotiation, mediation and persuasion to resolve complaints.<sup>91</sup> If, given a reasonable opportunity to act, the agency is unable to resolve a complaint, then an application may be made to the District Court for a takedown order.<sup>92</sup>

If the District Court is satisfied there has been a serious breach or a threat of a serious breach of at least one communication principle under s 6 of the HDCA and the breach has caused or is likely to cause harm to an individual,<sup>93</sup> then the District Court may make an order for the removal of content by an individual or online content host.<sup>94</sup> Communication principle one is that a digital communication should not disclose sensitive facts about an individual and principle three is that communication should not be grossly offensive to a reasonable person, in the position of the affected individual.<sup>95</sup> The non-consensual publication of intimate material would usually breach both of these principles and it is likely a court would find that harm would be caused by the publication. Therefore, the criteria for a takedown order is appropriate and would allow for an order to be made for the removal of intimate material.

Despite appropriate criteria, the Act fails to provide a quick and efficient means of redress. This is because every complaint must first go through the appointed agency who must assess and attempt to resolve the issue.<sup>96</sup> Only after this may an order be made by the District Court. The appointed agency will not have any legal power to seek the removal of content. This will slow the process of having content removed, by which time, the victim will have suffered a significant amount of the harm of the images being online. The agency process was recommended as a filter to deal with less serious offending.<sup>97</sup> Although an important mechanism to reduce the workload of the courts, in instances where the content complained of involves intimate recordings, the offending will almost

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<sup>91</sup> The Harmful Digital Communications Act, s 8.

<sup>92</sup> s 12.

<sup>93</sup> s 12(2)(a) & (b).

<sup>94</sup> ss 18-19.

<sup>95</sup> s 6.

<sup>96</sup> s 12(1).

<sup>97</sup> Law Commission, above n 36, at [5.44].

always be serious enough to warrant an immediate order from the District Court for removal.

Cyber-bullying in the form of words is much less likely to attract the ‘viral’ effect that is often seen with photos and videos and it is therefore less crucial, in those circumstances, that the content be removed immediately. It is undeniable that rapid removal of intimate images will substantially limit the harm to the victim. Had the Act provided for a specific provision relating to intimate images, where the agency process could be bypassed, the civil remedy would provide a much quicker and therefore effective remedy. However, under the broad provision that has been implemented, there will be significant delay in obtaining an order for content to be removed.

By enacting one broad civil provision designed to target many types of behaviour, Parliament has missed a vital opportunity to crack down on revenge porn and provide a meaningful remedy for victims. While the civil regime will be accessible because it is cheap and readily available, it fails to provide a quick and effective path for removal of revenge porn, thus failing one of the express purposes of the Act. A better approach would have been to create an express take down provision for non-consensually published intimate material, to allow the District Court to issue a legally enforceable take down order to the publisher or content host, without requiring the agency to investigate first. The nature of non-consensual pornography is so offensive and serious that there should be no need for a prolonged agency process and a court order should be available immediately. The instance of intimate photographs being online is significantly different to and more serious than other types of cyber-bullying such as harmful words and therefore warrants a specific provision.

A specific take down regime should provide protection for all intimate images published online without the subject’s consent. As discussed, the covert filming provision within the Crimes Act does not include recordings if the place in which they were taken would not reasonably be expected to be private. Therefore, the scenario of recordings of a skirt being blown up in public, exposing buttocks or genitalia, may not fall within the covert

filming provision, as a public place would be unlikely to be classified as having an expectation of privacy. It would seem against the purpose of the HDCA that such an image may be allowed to stay online. Therefore, the focus should be on consent and the invasion of privacy and a take down notice should be able to be utilised for the non-consensual publication of all intimate images, no matter the context in which they were taken.

#### *4 A new criminal regime*

The HDCA makes it a criminal offence to cause harm by posting a digital communication.<sup>98</sup> A person will be liable for a prison term not exceeding 2 years or a fine not exceeding \$50,000 if they post a digital communication with the intention that it cause harm to the victim, the communication would cause harm to an ordinary reasonable person in the position of the victim and posting the communication actually causes harm to the victim.<sup>99</sup> The hallmark of the criminal offence should be to focus on the nature of the content and lack of consent and the violation of the victim's privacy.

A report into the Bill said that intent may be implied or inferred by the courts.<sup>100</sup> If a defendant does not confess to having the relevant intent, the prosecution will have to prove the relevant state of mind, where proof that the harm was a natural consequence or that the defendant foresaw the outcome, will support an inference of intent.<sup>101</sup> Actual intent would be unworkable as unless the defendant admitted intent, the court would not have the ability to make an interference, thus most defendants would escape liability.<sup>102</sup> The intent to cause harm need not be the only intention of the offender.<sup>103</sup> For example, a defendant may intend to provide entertainment as well as cause harm. In Washington State, the legislature has just passed an amendment to the Washington Criminal Code that

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<sup>98</sup> Harmful Digital Communication Act, s 22.

<sup>99</sup> s 22(1).

<sup>100</sup> Ministry of Justice *Harmful Digital Communications Bill: Departmental Report for the Justice and Electoral Committee* (April 2014) at [252].

<sup>101</sup> A P Simester and W J Brookbanks, above n 70, at 2.3.2.

<sup>102</sup> Ministry of Justice, above n 100, at [252.2].

<sup>103</sup> At [252].

does not require intent to cause harm.<sup>104</sup> Therefore, the offender's motive does not matter. It is argued that this is a better formulation as the focus is on the harm to the victim and not the motive of the offender, which does not change the consequence to the victim.<sup>105</sup> Eliminating the intent requirement supports the view that anyone who disseminates or looks at non-consensual pornography is just as guilty as the original publisher.<sup>106</sup> Arguably, to stop the viral nature of the internet, third parties to the original relationship in which the content was obtained should be liable if they further disseminate material, despite their intention.

The Law Commission recommended that the criminal offence should only apply to publication by the person who created the image meaning publication by a third party, such as a person who saw the content on Facebook or a disgruntled wife posting images of her partner's lover, would not be caught under the act.<sup>107</sup> However, there appears to be no mechanism within the Act to prevent liability for a publisher, who was a third party to the original relationship in which the image was obtained. The intent requirement means that a third party who disseminates the image, but does not intend to cause harm to the victim, will not be liable. For example, a third party who does not know the victim, but shares an image that they received on their Facebook newsfeed, is unlikely to be liable as they are unlikely to have the necessary intent to cause harm to the victim.

Rather than focusing on the relationship between the publisher and subject, the HDCA focuses on the intent of the offender. Therefore, the original creator of content and a third party may be liable, if their intention was to cause harm. This suits the purpose and aim of the Act as if a third party intends to cause harm then there is no reason for them to avoid criminal liability. However, it is not the role of criminal law to prevent the spread of material by holding third parties liable where they do not possess the relevant intent.

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<sup>104</sup> Washington Rev Code § 9A.44 (Substitute House Bill 1272).

<sup>105</sup> C. A. Goldberg "Revenge Porn is Illegal in Half the Country!" (9 July 2015) C.A Goldberg Law <[www.cagoldberglaw.com](http://www.cagoldberglaw.com)>.

<sup>106</sup> See for example Jennifer Lawrence's comments in Sam Kashner "Both Huntress and Prey" *Vanity Fair* (online ed, November 2014).

<sup>107</sup> Law Commission, above n 36, at [4.98].



Rather, the civil law should be utilised effectively to prevent the spread of the content. A criminal offence must be reserved for offending that is reprehensible, where the intent is to harm another; otherwise there is a serious risk of infringing on the fundamental human rights that underpin the justice system. Therefore, the intent requirement achieves the correct balance by holding a third party liable if they possess the intent to cause harm.

One rationale for excluding third party liability is that there is a higher level of trust and an expectation of confidence between the image's creator and the subject than between the subject and a third party. It is this rationale that underlies the tort of breach of confidence that requires circumstances imparting an obligation of confidence. The relationship of trust and expectation of confidence is important however; the offence of disseminating intimate images of a person should not rest on whether there was a relationship of trust. The preferable approach is to focus on whether there was a reasonable expectation to privacy in the content and not exclude third party liability based on the relationship of the parties. This approach reflects the rationale behind the tort of privacy, where the focus is not on the relationship imparting confidence but rather that there was a reasonable expectation to privacy in the circumstances. Focusing on the nature of the content supports the argument that all intimate material shared without consent should be covered by the Act.

An intimate visual recording includes photographs, videotapes or digital images that show a person in a place that would reasonably be expected to provide privacy and the individual is naked or has their genitals, buttocks or female breasts exposed or partially exposed or clad solely in undergarments and includes a person engaged in sexual activity or personal activity that involves dressing or undressing.<sup>108</sup> This definition excludes recordings taken in a public place, as a public area is not expected to provide privacy. Therefore, the criminal provision would not cover the example of recordings where a woman's genitals are exposed by a skirt that has blown up in a public place, creating the same gap that existed under the previous law. Rather than requiring that the place provide an expectation to privacy, a better formulation is for the expectation to privacy to be

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<sup>108</sup> Harmful Digital Communications Act, s 4.

based on the nature of the content. If an image depicts an intimate part of a person's body, then it should be held that there is an expectation it will remain private. A person in control of another's intimate content should be expected to recognise that the nature of some content attracts an expectation of privacy and a requirement of consent before it is shared. This formulation would provide protection for all intimate images shared without consent, rather than just those taken in a place where there is an expectation to privacy, a focus that better combats the harm that the lack of consent and invasion of privacy can cause.

A criminal offence for digital communication has a punitive function that will be a strong deterrent for offenders.<sup>109</sup> In recommending the creation of a new offence for digital harm, the Law Commission said that they felt that the focus of the criminal law in relation to intimate pictures and recordings should be on whether publication was consensual rather than whether the image was taken or obtained with consent.<sup>110</sup> The Law Commission's original recommendation was to amend the covert filming provision within the Crimes Act, to extend the offence to publishing intimate material without consent, even if it was originally taken with consent.<sup>111</sup> Instead, Parliament enacted one broad provision, for causing harm by posting digital communication, to remedy three distinct areas of the criminal law. The first was to cover the gap in the previous law that did not provide protection in relation to threats, intimidation and offensive messages, which inflict emotion distress or mental harm.<sup>112</sup> The second was to ensure malicious impersonation of another person could be prosecuted.<sup>113</sup> The third purpose was to cover the instances of revenge porn.<sup>114</sup> Other jurisdictions have chosen to enact specific legislation targeting revenge porn. For example in the United Kingdom, it is an offence for a person to disclose a private sexual photograph without consent and with the

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<sup>109</sup> Susanna Lichter, above n 16.

<sup>110</sup> Law Commission, above n 36, at [4.93].

<sup>111</sup> At [4.94].

<sup>112</sup> Ministry of Justice, above n 100, at [2.43].

<sup>113</sup> At [2.44].

<sup>114</sup> At [2.45].

intention of causing an individual distress.<sup>115</sup> 25 states in the United States of America have adopted specific revenge porn offences, despite having cyber-harassment law, because it was argued that general cyber-stalking statutes were inadequate.<sup>116</sup> In adopting one broad offence to remedy three distinct failings in the pre-existing law, each providing different considerations, Parliament failed victims of revenge porn. In creating such a broad offence, revenge porn has not effectively been addressed as there are still wide gaps in the law for the publication of intimate material such as those left by the covert filming provision. The Act does not successfully protect the right to consent and privacy.

It is the breadth of the Act has resulted in a high standard of harm to ensure criminal prosecution for only serious offending. This has limited the effectiveness of the offence in relation to revenge porn. Harm is defined within the act as meaning serious emotional distress.<sup>117</sup> For a person to be liable under the criminal offence, it must be shown that they intended to cause harm, that the victim has suffered harm and that harm would be caused to the ordinary, reasonable person.<sup>118</sup> The Human Rights Commission questioned the need for subjective harm given that it can be difficult to establish that a person has actually suffered harm, resulting in cases going unpunished due to lack of evidence.<sup>119</sup> In addition, as with most sexual offences, experience shows that victims are often caused extreme distress by providing evidence in court and are often reluctant to do so.<sup>120</sup>

With most cyber-bullying, proof of subjective harm is important to ensure criminal liability is only imposed in serious cases, where the victim has suffered actual harm. However, revenge porn is an exception that is so inherently offensive and distinctly different from the use of words, that the subjective harm requirement is not necessary.

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<sup>115</sup> Criminal Justice and Courts Act, s 33.

<sup>116</sup> Sarah Bloom “No Vengeance for ‘Revenge Porn’ Victims: Unravelling Why This Latest Female-Centric, Intimate-Partner Offense is Still Legal, And Why we Should Criminalize It” 2014 42 Fordham Urb LJ 233 at 259.

<sup>117</sup> Harmful Digital Communications Act, s 4.

<sup>118</sup> s 22(1)(a)-(c).

<sup>119</sup> Ministry of Justice, above n 100, [2.54].

<sup>120</sup> See Elisabeth McDonald and Yvette Tinsley “Reforming the rules of evidence in cases of sexual offending: thoughts from Aotearoa/New Zealand” (2011) 15 Int’l J Evidence & Proof 311 at 312.

Revenge porn will almost always cause serious emotional distress to the victim yet, there may not be sufficient evidence to present to the court. Had Parliament drafted a specific revenge porn offence, it may have been appropriate to allow a court to infer that the victim had suffered harm, rather than requiring proof of subjective harm. Other jurisdictions with a criminal offence for non-consensual pornography do not require actual harm to be proven. Under the United Kingdom provision, proof of actual harm is not required, lack of consent and intent to cause an individual stress are the only requirements to impose liability.<sup>121</sup> Likewise, there are state laws in America that have taken a similar approach. For example the recent enactment in Washington only requires that the offender knew harm would be caused.<sup>122</sup> This is a better approach, as it does not require proof of actual harm to the victim, broadening the scope of the law. In New Zealand, fewer cases will be prosecuted due to the difficulty of proving harm. Victims will be forced to provide evidence, which for many will intensify the harm by causing further embarrassment. For others, this may result in a choice to abandon pursuing the complaint entirely.

The HDCA provides that in deciding whether a post would cause harm, the court may consider the extremity of the language, the age and characteristics of the victim, whether the communication was anonymous, repeated and the text of the circulation, whether the communication was true or false and the context in which it appeared.<sup>123</sup> This provides a court with the necessary discretion to ensure that the criminal offence is only utilised for serious conduct. However, like the requirement of evidence of actual harm, these factors decrease the effectiveness of the offence in dealing with revenge porn. The publication of intimate images should never be considered to be less offensive based on a factor such as the age or characteristic of the victim. Having your naked body exposed to the world, without your consent, may be equally distressing for any victim. Like sexual offending, the damage lies in the lack of control and lack of consent and a person's characteristics should not lessen the seriousness of the offence. An example is Jennifer Lawrence, who

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<sup>121</sup> Criminal Justice and Courts Act, s 33.

<sup>122</sup> Washington Rev Code § 9A.44 (Substitute House Bill 1272).

<sup>123</sup> Harmful Digital Communications Act, s 22(2).

has posed a number of times in her underwear on magazine covers.<sup>124</sup> An argument could be made that the characteristics of the victim consideration means that posting intimate images of Jennifer Lawrence is less serious because she already has photos in the public domain of her in underwear. However, this misses the rationale underlying the offence of non-consensual pornography. Intimate pictures invade a person's private life and violate one's right to consent and privacy. Revenge porn is not solely about the image of one's body being exposed but it is the lack of control and the deep invasion into one's autonomy. As the Court said in *Douglas v Hello!*, the objection to publication of unauthorised photos is not simply that the images disclose secret information or the impressions are unflattering, it is that they disclose information that could be reasonably expected to remain private and the intrusion into the private domain of the claimant is, of itself, objectionable.<sup>125</sup> Therefore, the offence should be formulated in a way to reflect that the issue is the lack of consent and the invasion of privacy rather than allowing an argument that the offence may be less serious based on factors of the victim.

## *V Conclusion*

The enactment of the HDCA has provided some course of redress for victims of revenge porn but the Act has failed to recognise the core principles underlying the harm caused by revenge porn. These are the lack of consent and the invasion of privacy. The failure to enact a specific offence for revenge porn is the fundamental reason that the requirements under the Act do not effectively address the problem. Parliament has missed a vital opportunity to address the harm caused by the non-consensual disclosure of intimate content. The focus of the Act is an expectation to privacy based on the place in which the recording was taken which has resulted in a failure to cover all intimate content. Therefore, a problem that existed in the law pre-dating the HDCA remains under the new law. In order to address the invasion of privacy and violation of consent, the provision should be founded on an expectation of privacy in the intimate content rather than the context or place in which it was taken. This would ensure that all intimate material, published without consent, is covered by the Act. In failing to take this approach, the

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<sup>124</sup> For example GQ "Jennifer Lawrence" (2 September 2011) GQ <[www.gq.com.au](http://www.gq.com.au)>.

<sup>125</sup> *Douglas v Hello!*, above n 28, at [107].

HDCA fails to provide an adequate source of protection to victims of non-consensual pornography.

***Word count***

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,964 words.

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