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**DIGITAL DOMESTIC VIOLENCE: ARE  
VICTIMS OF INTIMATE PARTNER CYBER  
HARASSMENT SUFFICIENTLY PROTECTED  
BY NEW ZEALAND'S CURRENT  
LEGISLATION?**

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### *Abstract*

This paper examines the issue of intimate partner cyber harassment and how effectively the issue is dealt with by New Zealand's legislation. It argues that while not completely futile, the current legislation does not provide sufficient protections for victims. A suite of legislative amendments to the Domestic Violence Act 1995, the Harassment Act 1997 and the Harmful Digital Communications Act 2015 is therefore recommended. The paper begins by outlining the nature of the behaviour constituting intimate partner cyber harassment and its prevalence and impacts on victims. From this, it is argued that effective protections must be established. The current legislation as it stands fails to fully appreciate the complex issue and protections for victims lie behind procedural barriers. Amending existing legislation is the most desirable solution as it enables pre-existing protections to be utilised to more effectively apply to and thus protect victims of intimate partner cyber harassment.

### *Key words*

Intimate partner cyber harassment, Domestic Violence Act 1995, Harassment Act 1997, Harmful Digital Communications Act 2015.

## *I Introduction*

Technology is becoming an increasingly integral component of everyday life. Not only does it shape and inform the way we work, shop and carry out other daily activities, it affects the way we interact with one another and build relationships. Intimate partner relationships are no different. With the increase of new communication and surveillance technologies, it is increasingly easy to both contact and monitor the whereabouts of an intimate partner. While this can enhance personal connection, it presents a new and complex set of dangers.

Levels of domestic violence in New Zealand are staggeringly high. Intimate partner cyber harassment represents a new form of domestic violence made possible by new technology and our increasing reliance on it. Further, as technology is being used in the formation and development of relationships and personal boundaries, there is a risk that intimate partner cyber harassment will become “normalised.” Due to the complex and harmful nature of the issue, New Zealand’s legislative regime must adequately protect victims.

This paper directly addresses the effectiveness of New Zealand’s legislation in protecting victims of intimate partner cyber harassment. While such an issue requires wider societal changes, this discussion will focus on the legislative response. Behaviour constituting intimate partner cyber harassment is considered within the context of both intimate partner violence and cyber harassment. The necessity for protection is subsequently established in light of the unique nature of the issue and its tendency to be overlooked and minimised. To conclude, this paper makes suggestions for legislative reform to ensure victims are more effectively protected.

## *II The nature of the problem*

Throughout the literature, the issue is interchangeably referred to as intimate partner cyber stalking or intimate partner cyber harassment. The term intimate partner cyber harassment will be used in this discussion. While stalking behaviours

are included within the ambit of the issue, intimate partner cyber harassment is a more inclusive definition. It ensures behaviours outside the narrow understanding of stalking are addressed. Further, it enables the issue to be more effectively located in the legislation, as a specific offence of stalking does not exist in New Zealand.

### *A The behaviour*

Behaviour amounting to intimate partner cyber harassment has two distinct elements. First, it must occur within the context of an intimate partnership. Discussion on this element will naturally draw on domestic violence and intimate partner stalking literature. Second, the behaviour must be perpetrated through the use of technology. Cyber harassment definitions and concepts will be utilised to explore this element. In order to more comprehensively understand the nature of the problem, both elements must be analysed. The elements do not equate to two distinct issues however and should ultimately be assessed in conjunction.

It is important to note that intimate partner cyber harassment is a sub-set of a wider category of “digital domestic violence.” Digital domestic violence can include other behaviours that do not qualify as intimate partner cyber harassment such as revenge porn and posting information on social media to humiliate or shame a victim. Such behaviours fall outside the scope of this paper, as they do not entail stalking or harassment behaviours, which will be defined in the following discussion.

#### *1 The intimate partner violence element*

Intimate partner harassment entails stalking or harassment behaviour directed towards a current or former intimate partner. An intimate partnership is narrowly construed and refers to a spouse or partner (i.e. boyfriend/girlfriend).<sup>1</sup> Unlike the concept of a “close personal relationship” under the Domestic Violence Act 1995 it does not include children or any other family members.<sup>2</sup> Intimate partner stalking is the most common form of stalking. A United States study shows that former or current partners perpetrate upwards of 60 per cent of stalking

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<sup>1</sup> Pauline Gulliver and Janet Fanslow Family Violence Indicators: Can National Administrative Data Sets be Used to Measure Trends in Family Violence in New Zealand (Families Commission, Research Report 3/13, December 2013) at 70.

<sup>2</sup> Gulliver and Fanslow, above n 1 at 16.

incidents.<sup>3</sup> It is chronic as opposed to acute.<sup>4</sup> It is therefore persistent and long term in nature. While literature on intimate partner stalking in New Zealand is scarce, a statistical study in the United States demonstrates that it lasts on average just over two years<sup>5</sup>- double the average duration of stranger stalking.<sup>6</sup>

Intimate partner harassment is a form of intimate partner violence. Four distinct typologies of intimate partner violence exist. Namely intimate terrorism, violent resistance, situational couples violence and mutual violent control.<sup>7</sup> Intimate partner violence in this paper will refer to “intimate terrorism.” Intimate terrorism is characterized by coercive control; a term introduced to develop understandings of intimate partner violence as more than just a ‘fight.’<sup>8</sup> It involves a cycle or pattern in which the abuser utilizes psychological intimidation, often paired with physical victimization to create dependence, isolation and a climate of fear.<sup>9</sup> This form most closely resembles the common understanding of intimate partner violence. While the other forms of intimate partner violence involve aggressive behaviour, self-defence and violence, only intimate terrorism is typified by coercive control. Accordingly, behaviours constituting intimate partner cyber harassment are behaviours that play into the abusive cycle and exacerbate coercive control. In a relationship where intimate terrorism is present harassment behaviours tend to co-occur alongside other forms of abuse.<sup>10</sup>

## 2 *The cyber harassment element*

Not only must the conduct occur within an intimate partnership, it must also be facilitated by technology. Accordingly, intimate partner cyber harassment entails behaviours that qualify as intimate partner harassment (as above) and are perpetrated or facilitated by technology.<sup>11</sup> Intimate partner cyber harassment is an

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<sup>3</sup> Cindy Southward and others “A High-Tech Twist on Abuse: Technology, intimate partner stalking and advocacy” (paper commissioned for National Network to End Domestic Violence, 2005) at 3.

<sup>4</sup> Lauren Bennett and others “Describing Intimate Partner Stalking Over Time: An Effort to Inform Victim-Centered Service Provision” (2011) 26(17) *Journal of Interpersonal Violence* 3428 at 34232.

<sup>5</sup> Bennett and others, above n 4 at 3432.

<sup>6</sup> Cynthia Fraser and others “The New Age of Stalking: Technological implications for stalking” (2010) 61(4) *JFCJ* 39 at 50.

<sup>7</sup> Justine A Dunlap “Intimate Terrorism and Technology: There’s an App for That” (2012) 7 *UMass L Rev* 10 at 14.

<sup>8</sup> Evan Stark “Coercive Control” in Nancy Lombard and Lesley McMillan *Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violation, and Exploitation* (Jessica Kingsley Publishers, 2013) 17 at 17.

<sup>9</sup> Cynthia Southworth and others “Intimate Partner Violence, Technology and Stalking” (2007) 13 *Violence Against Women* 842 at 843.

<sup>10</sup> Bennett and others, above n 4 at 3429.

<sup>11</sup> Laurence Miller “Stalking: Patterns, motives, and intervention strategies” (2012) 17 *Aggression and violent Behavior* 495 at 501.

extension of an existing pattern of behaviours in society, rather than an entirely new phenomenon. As Ellison and Akdeniz assert, “While the Internet tends to produce extreme versions of problems, it rarely produces genuinely new ones.”<sup>12</sup> Stalkers are simply employing new methods to instil fear and assert control over their victims.

Technology is an attractive tool for a multitude of reasons. It is a readily available and relatively inexpensive way to contact and control a victim.<sup>13</sup> The increasing reliance on technology, coupled with its speed ensures stalkers are more easily able to access the victim.<sup>14</sup> Further, it increases the likelihood that a stalker will avoid detection, apprehension and ultimately prosecution.

Intimate partners or former partners engage in varied forms of cyber harassment. These include acts such as sending threatening or abusive messages, sending false messages as if from the victim, monitoring communications or gathering personal information about the victim.<sup>15</sup> Harassers’ predominately use everyday technologies already in use of the victim. While both the technologies and methods employed can vary, two main forms of technology are most frequently utilised. These are new communication technologies and technologies of surveillance.

Communication technologies refer to technology employed by harassers in order to repeatedly contact a victim against their wishes. Such behaviour can be in the form of excessive text messages, phone calls, voice mails, emails and social media messages.<sup>16</sup> The content is often abusive and threatening.<sup>17</sup> The content, coupled with repetition, has the effect of intimidating the victim and making them fearful. While motives vary from case to case, new communication technologies are often employed as a means with which to harass, punish and control the victim.<sup>18</sup> A study of college students’ perception of intimate partner cyber harassment in the

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<sup>12</sup> Louise Ellison and Yaman Akdeniz “Cyber-stalking: the Regulation of Harassment on the Internet” (1998) *Dec Crime, Criminal Justice and the Internet* 29 at 29.

<sup>13</sup> Fraser and others, above n 6, at 41.

<sup>14</sup> Andrew King-Ries “Teens, Technology, and Cyberstalking: The domestic violence wave of the future?” (2010) *20 Texas Journal of Women and the Law* 131 at 137.

<sup>15</sup> Miller, above n 11, at 501.

<sup>16</sup> Fraser and others, above n 6, at 42.

<sup>17</sup> Ellison and Akdeniz, above n 12, at 30.

<sup>18</sup> Miller, above n 11, at 501.

United States found constant unwanted contact to be a form of intimate terrorism.<sup>19</sup> One student in particular noted, "...it's...a really big intimidation thing... ['] I'm always in your inbox or your Facebook or whatever, telling you things or messaging you or texting you ['] or whatever it might be...It's another way to control people too."<sup>20</sup>

Surveillance technologies on the other hand are technologies used by harassers to track and monitor a victim's whereabouts and actions. To gain access to a victim's whereabouts, location technologies commonly found on mobile phones, GPS devices and hidden cameras are most commonly used.<sup>21</sup> Additionally, spyware and keystroke software can monitor and survey a victim's computer usage.<sup>22</sup> An example of surveillance technology stalking appears in a California case whereby a stalker activated the GPS tracker on a cell phone and hid it in the victim's car.<sup>23</sup> The stalker was able to determine the whereabouts of the victim at any given time. Further, in Illinois, a spyware attachment could be installed onto a victim's computer simply through the victim opening a link sent to her email address.<sup>24</sup> The spyware enabled the stalker, her ex-partner, to track and monitor her computer usage. Both cases speak to the fundamental aspect of coercive control.

### *B The prevalence*

As research on intimate partner cyber harassment is in its infancy, statistics speaking to its prevalence are scarce.<sup>25</sup> Furthermore, due to its personal nature it is chronically under-reported. It is also a complex issue, which can take a multitude of different forms often proving problematic to detect.<sup>26</sup> Information about its prevalence will likely gravely underestimate the reality. This is particularly so in New Zealand. Conclusions therefore must be drawn from United States data, as well as New Zealand statistics on both intimate partner violence and use of technology.

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<sup>19</sup> Lisa Melander "College Students' Perceptions of Intimate Partner Cyber Harassment" (2010) 13(3) *Cyberpsychology, Behavior and Social Networking* 263 at 265.

<sup>20</sup> Melander, above n 19, at 265.

<sup>21</sup> Fraser and others, above n 6, at 44.

<sup>22</sup> Fraser and others, above n 6, at 45.

<sup>23</sup> Fraser and others, above n 6, at 45.

<sup>24</sup> Fraser and others, above n 6, at 45.

<sup>25</sup> King-Ries, above n 14, at 137.

<sup>26</sup> King-Ries, above n 14, at 137.

Intimate partner violence is staggeringly prevalent in New Zealand. Between 2000 and 2010 the number of reported incidents of intimate partner violence were higher in New Zealand than any other OECD country.<sup>27</sup> As of 2015, 55 per cent of New Zealand women report facing intimate partner violence at least once in their lifetime.<sup>28</sup> The Law Commission's ministerial briefing paper, addressing harmful digital communications outlined a number of factors that suggest harassment via technology is also a significant problem. In one survey it was found that five per cent of 20-29 year olds and seven per cent of 15-19 year olds had received texts containing threatening or harassing content within the past year.<sup>29</sup> The use of technology is increasing at extreme rates. Over 90 per cent of New Zealanders between the age of 15 and 49 own and regularly use mobile phones. In 2011, 1.9 million New Zealanders had active Internet connections on said mobile phones. It therefore becomes obvious that in a culture with such a prevalence of both intimate partner violence and technology use, intimate partner cyber harassment will be a significant issue.

The demographic most vulnerable to intimate partner cyber harassment is young females. While both intimate partner violence and cyber harassment are gender-neutral crimes, statistics clearly show that females are more likely to be victimized. The National Violence Against Women Survey in the United States found that 78 per cent of stalking victims are female and 87 per cent of offenders are male.<sup>30</sup> Such a conclusion is consistent with the fact that violence against women is the most common form of intimate partner violence throughout the world.

The use of technology among the millennial generation is extensive, suggesting the issue is likely to worsen. In the United States of America 93 per cent of those aged 18-28 own a mobile phone and are regular users of the Internet. A further 72 per cent regularly use social media sites. New Zealand demonstrates similar statistics. In 2014 approximately 90 per cent of young people aged 20-24

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<sup>27</sup> Denise Wilson and others "Becoming Better Helpers: Rethinking Language to Move Beyond Simplistic Responses to Women Experiencing Intimate Partner Violence" (2015) 11(1) Policy Quarterly 25 at 26.

<sup>28</sup> NZ Family Violence Clearing House "Data Summaries 2015: Snapshot" (2015) New Zealand Family Violence Clearing House <[https://nzfvc.org.nz/sites/nzfvc.org.nz/files/data-summaries-snapshot-2015\\_0.pdf](https://nzfvc.org.nz/sites/nzfvc.org.nz/files/data-summaries-snapshot-2015_0.pdf)>.

<sup>29</sup> Law Commission Harmful Digital Communications: The adequacy of the current sanctions and remedies (NZLC MB3, 2012) at 33.

<sup>30</sup> Southward and others, above n 3, at 3.

were on Facebook.<sup>31</sup> More frequent exposure to and reliance on technology amongst young adults leads to technology being incorporated into intimate relationships at a young age. Through pervasive use of technology in adolescent relationships, controlling and monitoring behaviour is normalized.<sup>32</sup> Intimate partner cyber harassment is therefore a serious issue that will intensify over time, so effective protections are required.

### *C The harm*

The impacts of enduring intimate partner harassment are significant emotionally, psychologically and often physically. Continual harassment, especially post separation contributes to feelings of hopelessness, humiliation, fear and distrust.<sup>33</sup> Often, such feelings will lead to a diagnosable mental illness. Research shows when stalking variables are introduced as predictors of depression and PTSD (post traumatic stress disorder), physical violence variables are no longer significant.<sup>34</sup> Intimate partner cyber harassment, even in the absence of physical violence is demonstrably a strong and unique predictor of both depression and PTSD. Statistics show that up to 85 per cent of victims of IPV in the form of stalking develop PTSD.<sup>35</sup> This is higher than women with histories of other criminal victimization including sexual violence.<sup>36</sup> Further, the PTSD suffered by these victims is chronic, with symptoms persisting for longer than one year.<sup>37</sup> As harassment is a repetitive offence, each specified act has the potential to trigger a victim into a crisis state, which may develop into hyper vigilance and a chronic state of crisis.<sup>38</sup> Other well-documented, distressing effects include suicidality, substance abuse, lowered sense of self worth, diminished physical health, social withdrawal and increased sense of isolation.<sup>39</sup>

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<sup>31</sup> Grant "Facebook Demographics – New Zealand Age Distribution and Gender" (2014) First Digital <<http://www.firstdigital.co.nz/blog/2014/09/10/facebook-demographics-new-zealand-age-distribution-gender/>>.

<sup>32</sup> King-Ries, above n 14, at 155.

<sup>33</sup> Mindy B Mechanic, Terri L Weaver and Patricia A Resick "Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse" (2008) 14(6) *Violence Against Women* 634 at 635.

<sup>34</sup> Mechanic, Weaver and Resick, above n 33, at 649.

<sup>35</sup> Mechanic, Weaver and Resick, above n 33, at 649.

<sup>36</sup> Mechanic, Weaver and Resick, above n 33, at 649.

<sup>37</sup> Mechanic, Weaver and Resick, above n 33, at 648.

<sup>38</sup> Emily Spence-Diehl "Stalking and Technology: The Double-Edged Sword" (2003) 22(1) *Journal of Technology in Human Services* 5 at 14.

<sup>39</sup> Jan H Kamphuis and Paul MG Emmelkamp and Anna Bartak "Individual differences in post-traumatic stress following post-intimate stalking: Stalking severity and psychosocial variables" (2003) 42 *British Journal of Clinical Psychology* 145 at 145.

Evidence of the effects of cyber harassment is scarcer, however among the studies conducted there is consensus that the damaging consequences of cyber and offline harassment are similar.<sup>40</sup> Intrusional, threatening and persistent behaviours are still experienced. Studies conducted in the United States show this similarly leads to a significantly deteriorated mental well-being among victims compared to non-victims.<sup>41</sup>

While the impacts of intimate partner cyber harassment are enough to warrant protection on their own, the link to physical violence is important. It is widely acknowledged that intimate partner harassment is identified as an extremely significant risk factor for severe violence or homicide.<sup>42</sup> Of women murdered by intimate partners or former partners, 75 per cent were stalked preceding the femicide.<sup>43</sup> It is important to note however that the statistics are likely to vary somewhat in relation to cyber harassment. Perpetrators of cyber harassment exist who would not harass others in the outside, non-virtual world.<sup>44</sup> Further, physical separation between offender and victim decreases the likelihood of femicide. Protections to ensure the safety of the victim from current and future behaviours from the offender are therefore necessary.

### *III Why do We Need Effective Protections for Victims?*

#### *A The unique challenges posed by intimate partner cyber harassment*

As the preceding discussion demonstrates, intimate partner cyber harassment is a unique form of stalking or harassment. Any effective legislative regime must appreciate the unique challenges posed by the issue brought about by its two distinct elements.

First, it occurs within the context of a current or previous intimate partnership. Accordingly, a victim's personal knowledge of the perpetrator, coupled

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<sup>40</sup> Harald Drebing and others "Cyberstalking in a Large Sample of Social Network Users: Prevalence, Characteristics, and Impact Upon Victims" (2014) 17(2) *Cyberpsychology, Behaviour and Social Networking* 61 at 61.

<sup>41</sup> Drebing and others, above n 40, at 61.

<sup>42</sup> Mechanic, Weaver and Resick, above n 37 at 636.

<sup>43</sup> Judith McFarlane, Jacquelyn Campbell and Kathy Watson "Intimate Partner Stalking and Femicide: Urgent Implications for Women's Safety" (2002) 20 *Behav Sci Law* 51 at 52.

<sup>44</sup> Drebing and others, above n 40, at 61.

with relationship history heightens feelings of fear and intimidation – the basis of criminal harassment.<sup>45</sup> Behaviour that may not objectively appear to induce fear may subjectively do so to the victim due to vulnerabilities arising from previous patterns of abuse. The perpetrator has intimate knowledge of the victim, enabling more intrusive action to be taken.<sup>46</sup> Examples of this are knowledge of one’s cyber security details, vulnerabilities and close friends and loved ones. Second, the element of technology enables a stalker to be omni-present. Despite physical separation between partners a stalker is still able to harass and maintain control. Communication and control is no longer limited by time or distance. It can penetrate all aspects of the victim’s life. Stalkers are able to quickly and effectively monitor their partner or former partner with little risk of detection.<sup>47</sup>

### *B Overlooked and minimised*

The dangerous and complex nature of intimate partner cyber harassment is often minimized. It has also been a long-standing and engrained phenomenon to treat intimate partner violence with indifference. Historically, it was treated “as an intractable interpersonal conflict, unsuited for police attention and inappropriate for prosecution and substantive punishment.”<sup>48</sup> While this is now changing, the aforementioned perspective contributed to a long-standing belief that intimate partner violence against women should be kept out of the public eye.<sup>49</sup> Further, the population also treats the issue of stalking with ambivalence.<sup>50</sup> It has even been suggested, “Some victims state a wish for their stalker to physically attack them, in order that they be taken seriously.”<sup>51</sup> It can be said that intimate partner cyber harassment in particular is viewed with ambivalence somewhat due to the “cultural construction of romantic and passionate love.”<sup>52</sup> Such a construct portrays obsession and mad pursuit in the name of love as heroic and amorous. Stalking and harassment have therefore been located “somewhere at the nebulous nexus of

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<sup>45</sup> Jennifer Lynn Truman “Examining Intimate Partner Stalking and Use of Technology in Stalking Victimization” (PHD philosophy, University of Central Florida, 2009) at 3.

<sup>46</sup> Truman, above n 45, at 12.

<sup>47</sup> King-Ries, above n 14, at 133.

<sup>48</sup> Jeffrey Fagan “The Criminalisation of Domestic Violence: Promises and Limits” (paper presented at the criminal justice research and evaluation conference, January, 1996) at 8.

<sup>49</sup> L Stalans and A Lurigio “Responding to Domestic Violence Against Women” (1995) 41(4) *Crime and Delinquency* 387 at 389.

<sup>50</sup> Brian H Spitzberg and William R Cupach “What mad pursuit? Obsessive relational intrusion and stalking related phenomena” (2003) 8 *Aggression and Violent Behaviour* 345 at 346.

<sup>51</sup> LP Sheridan and T Grant “Is cyberstalking different?” (2007) 13(6) *Psychology, Crime & Law* 627 at 637.

<sup>52</sup> Spitzberg and Cupach, above n 50 at 346.

privacy and possessiveness, courtship and criminality [and] intrusion and intimacy.”<sup>53</sup> Finally, as noted earlier, digital domestic violence is becoming increasingly prevalent in adolescent relationships.<sup>54</sup> Adults tend to minimize or at least misunderstand the importance of “young love” or “puppy love,” which can lead to ambivalence towards important issues such as intimate partner cyber harassment.<sup>55</sup>

In recent Parliamentary documents surrounding the Harmful Digital Communications Act 2015 (“HDCA”) there is virtually no discourse addressing digital domestic violence. In 2012 the Law Commission released a ministerial briefing paper entitled “Harmful Digital Communications: The adequacy of the current sanctions and remedies.” Cyber-bullying appears to be the focus of harmful digital communications.<sup>56</sup> Cyber-bullying is given a narrow meaning, “intentionally harmful communication which occur[s] within the context of adolescent relationships.”<sup>57</sup> Harmful digital communication has a much wider meaning. It is defined in the paper as, “the spectrum of behaviours involving the use of digital technology to intentionally threaten, humiliate, denigrate, harass, stigmatize or otherwise cause harm to another person.”<sup>58</sup> Intimate partner cyber harassment not only qualifies as, but in some ways typifies ‘harmful digital communication.’ The issue however was left out of the discussion. When explaining harmful digital communications, the Law Commission touches on specific issues and case studies. These include posting explicit sexual content, revenge porn, ‘cat-fishing’ (creating a fake social media profile to lure unknowing victims), mob-like behaviour and cyber-bullying.<sup>59</sup> Digital domestic violence was overlooked. The oversight can be somewhat attributed to the social and political context of the time. The ‘Roast-busters’ scandal had just taken place, in which male secondary-school students uploaded filmed footage of young intoxicated females being sexually offended against to a Facebook page.<sup>60</sup> Peoples’ attention was subsequently focussed on publicly posted, sexual and offensive content. Due to the private and personal nature

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<sup>53</sup> Spitzberg and Cupach, above n 50 at 345.

<sup>54</sup> King-Ries, above n 14, at 160.

<sup>55</sup> King-Ries, above n 14 at 160.

<sup>56</sup> Law Commission, above n 29, at 21.

<sup>57</sup> Law Commission, above n 29, at 25.

<sup>58</sup> Law Commission, above n 29, at 31.

<sup>59</sup> Law Commission, above n 29, at 37.

<sup>60</sup> Lynley Bilby “Warnings for Roast Busters II” *The New Zealand Herald* (New Zealand, 8 November 2015), at 1.

of intimate partner violence, media coverage is extremely limited, unless physical violence or homicide is involved. With little media attention, the issue was not at the forefront of political thinking. While addressing these aforementioned, shocking events was necessary; focussing on such a narrow manifestation of harmful digital communications overlooks the important issue of intimate partner cyber harassment.

Politicians' concept of harmful digital communications was even narrower than that of the Law Commission. Throughout Parliamentary debates the Harmful Digital Communications Bill was often referred to as the 'cyber-bullying Bill.' While a few politicians understood the wider implications of harmful digital communications, the expression was predominately used in terms of non-intimate relationships between adolescents and school children.<sup>61</sup> Concerns raised surrounded the possibility of criminalising children<sup>62</sup> and how children and teenagers are to navigate the legislation. In the three readings of the Bill only once was the issue of intimate partner cyber harassment raised. During the first reading, David Clendon stated:<sup>63</sup>

People in abusive relationships might establish some physical space between themselves and abusers, but the electronic abuse can continue. I think we need to keep in mind that it is not only about young people.

Clendon's statement was neither addressed by another member of parliament, nor subsequently touched on. Discussion regarding harmful digital communications was narrowly construed and the issue of intimate partner cyber harassment was therefore not in contemplation of Parliament. The lack of awareness of intimate partner cyber harassment manifests itself in the limitations of the HDCA, as addressed in the following discussion.

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<sup>61</sup> (24 March 2015) 704 NZPD 2542.

<sup>62</sup> (24 March 2015) 704 NZPD 2542.

<sup>63</sup> (3 December 2013) 695 NZPD 15173.

## *IV Current Legislative Landscape*

As the nature of intimate partner cyber harassment and the need for effective protections for victims has been established, the next step is assessing how effective the current legislative landscape is in providing said protections. Such a discussion will inform subsequent dialogue regarding recommended legislative amendments. There are four key pieces of legislation that may be of assistance to victims. Each will be evaluated in light of the complex nature of the issue.

### *A Crimes Act 1961*

The Crimes Act 1961 may offer some protections for victims of intimate partner cyber harassment. Due to the nature of the Act however, protections are limited to instances of one-off conduct. As intimate partner cyber harassment covers a range of behaviours constituted of repeated acts, the Crimes Act 1961 will only be of assistance in a small minority of cases. Such cases will arise where behaviours are able to fit within specific provisions of the Crimes Act 1961. The four potentially useful offences provided by the Act are relatively varied. They deal with crimes against personal property, crimes involving computers, and threatening, conspiring and attempting to commit offences.

The first offence fits within Part 9A of the Act, crimes against personal property. Anyone who “intentionally intercepts any private communication by means of an interception device” can be liable to a term of imprisonment.<sup>64</sup> The second offence falls under part 10; crimes involving computers. Section 150 covers damaging or interfering with a computer system, specifically; causing a computer system to deny access to authorised users<sup>65</sup> and interfering with any data or software in a computer system.<sup>66</sup> The final and arguably most applicable possible offences fall within threatening, conspiring and attempting to commit harm. Section 306 covers threats to kill or do grievous bodily harm to another person. Sending or causing to be received any writing containing such threats is also covered. Offenders are liable for a term of imprisonment not exceeding seven years. Section

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<sup>64</sup> Crimes Act 1961, s 216B(1).

<sup>65</sup> Crimes Act 1961, s 250(c)(ii).

<sup>66</sup> Crimes Act, s 250(2)(a).

307 relates to threatening to destroy property. The maximum penalty for this offence is three years imprisonment. All of the aforementioned behaviours may qualify as intimate partner cyber harassment.

Evidently, specific behaviours that constitute digital domestic violence may be crimes under section 150, 216, 306 and 307 of the Crimes Act 1961. The Act is of fairly limited application however as there are a significant number of behaviours that constitute intimate partner cyber harassment that are not covered. Further, sentencing an offender for one isolated act ignores the fundamental and repetitive patterns of behaviour and the wider context of control, intimidation and fear that typify intimate partner cyber harassment. Moreover, often, harassing behaviours consist of repeated acts that on their own may not amount to a specified offence.<sup>67</sup> The Crimes Act 1961, while not completely inapt, is not enough to provide all victims sufficient protection. Accordingly, further legislation must be relied upon.

#### *B Harmful Digital Communications Act 2015*

The HDCA is the most recent piece of legislation of potential assistance to victims of intimate partner cyber harassment. It was introduced to “deter, prevent, and mitigate harm caused to individuals by digital communications; and provide victims of harmful digital communications with a quick and efficient means of redress.”<sup>68</sup> The question becomes whether this Act fulfils this purpose in regards to victims of intimate partner cyber harassment.

Section 4 defines a digital communication as “any form of electronic communication; and includes any text message, writing, photograph, picture, recording or other matter that is communicated electronically.”<sup>69</sup> Such a wide definition ensures that all forms of electronic communication are covered. Texts, emails, phone messages, social media posts and other such forms of communication commonly employed by harassers will be covered. The scope of the digital harm however is immediately narrowed, as intimate partner cyber harassment behaviours

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<sup>67</sup> Lynne Roberts “Jurisdictional and Definitional Concerns with Computer-mediated Interpersonal Crimes: An analysis on cyber stalking” (2008) 2(1) International Journal of Cyber Criminology 271 at 280.

<sup>68</sup> Harmful Digital Communications Act 2015, s 3.

<sup>69</sup> Harmful Digital Communications Act 2015.

that do not involve communication do not fall within the scope of this legislation. Such behaviours include surveillance methods such as GPS tracking and monitoring a victim's computer use. These behaviours make up a significant portion of intimate partner cyber harassment and should be protected against consistently with communication technologies.

The HDCA establishes two avenues through which to pursue redress for a harmful digital communication, namely a civil enforcement regime and a new criminal offence.

### *1 Civil enforcement regime*

The civil enforcement regime created by the HDCA is comprised of complaints directed towards an approved agency and proceedings in the District Court. The legislation provides that the affected individual, a parent or guardian, the professional leader of a school or the police, may make bring a complaint.<sup>70</sup> While assistance is provided to victims of intimate partner cyber harassment, the regime has limitations, which restrict both access to and the effectiveness of certain statutory protections.

An application to the approved agency is intended to be the first filtering step in the complaints process. The agency may be any person, organisation department or crown entity, as appointed by the Governor-General on the recommendation of the Minister.<sup>71</sup> They are charged with hearing and assessing complaints about harmful digital communications.<sup>72</sup> The function of the agency is relatively limited, as they have no real enforcement powers or duties. Instead, where appropriate, advice, negotiation, mediation and persuasion are to be used to resolve complaints.<sup>73</sup> Additionally, the approved agency has wide discretion. It may opt to cease investigation of a complaint, or outright refuse to investigate should they consider the complaint to be inappropriate.

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<sup>70</sup> Section 11.

<sup>71</sup> Harmful Digital Communications Act 2015, s 7.

<sup>72</sup> Harmful Digital Communications Act 2015, s 8.

<sup>73</sup> Harmful Digital Communications Act 2015, s 8.

The aforementioned features of the approved agency may restrict the ability of victims of intimate partner cyber harassment to gain effective protections in certain circumstances. First, it seems apparent that Parliament contemplated such applications to the approved agency being made in the context of cyber-bullying (using the narrow definition). Complainants are limited to an affected individual, parents, guardians, school leaders and the police. A representative of the victim who does not fit within the above categories is unable to apply, as per section 11(a). Second, the statutory dispute resolution methods are likely to be inappropriate in the context of intimate partner violence. As the underlying motive is to intimidate and control the victim, negotiation and mediation may be ineffective in certain situations, including those of cyber-bullying not in the context of intimate partner cyber harassment. As the approved agency has no remedial powers beyond these, their protections will be inadequate in extreme cases. Finally, while discretion is necessary to the effective functioning of any agency, it may be dangerous in certain cases involving intimate partner cyber harassment. As previously discussed, communication that may appear trivial to an objective third party, not aware of or affected by the pattern of abuse, may in actual fact constitute extremely harmful digital communication. This is exacerbated by the current failure to recognise the seriousness of intimate partner cyber harassment. Accordingly, appropriate training should be provided to ensure intimate partner cyber harassment is not considered ‘inappropriate.’

If an individual is dissatisfied with the approved agency’s response, they may bring proceedings in the District Court. An affected individual may only bring proceedings provided the approved agency has received the complaint and had reasonable opportunity to consider it.<sup>74</sup> Unlike the approved agency, the District Court provides effective protections for victims in the form of orders. The limitations however, lie in procedural barriers to attaining these orders.

The application to the District Court is for an order. Section 19 establishes a range of orders of which the Court may grant one or more. Orders can be made against a defendant, an online content host or an IPAP (Internet protocol address

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<sup>74</sup> Harmful Digital Communications Act 2015, s 12.

provider).<sup>75</sup> Any breach of an order amounts to a criminal offence and is punishable by a term of imprisonment not exceeding six months or a fine of up to \$5,000.<sup>76</sup> The most effective order against a defendant is section 19(1)(b), ‘an order that the defendant cease or refrain from the conduct concerned.’ Many other orders concern remedies inappropriate for harassing behaviours such as publishing corrections and right of replies.<sup>77</sup> Section 19(1)(b) however would require intimate partner cyber harassment behaviours to immediately cease, thus proving an effective response. In terms of orders against an online content host, the only applicable order is “that the identity of the author of an anonymous or pseudonymous communication be released to the Court.”<sup>78</sup> Such an order may be of limited application as in most cases a victim will know that their partner or former partner is the offender.

While said orders are a desirable outcome for victims, procedural limitations may restrict their availability and effectiveness. As the complaint must first be received by the approved agency, complainants able to apply for an order are correspondingly restricted. Additionally, the District Court has high levels of discretion, akin to the approved agency. Further, section 5 establishes factors to be taken into account when considering whether or not to grant an order. While various factors speak to the context in which the communication was made, the relationship between offender and victim is not a relevant consideration.<sup>79</sup> Moreover, repeated communication and past behaviours are omitted. In respect of intimate partner cyber harassment, the relationship and past behaviours are of the utmost importance to place the conduct in a meaningful context. To ignore these considerations is to ignore the cyclic nature and pattern of abuse. Instead, the HDCA runs the same risks as the Crimes Act 1961, addressing simply one act, rather than the broader cycle of abuse.

## 2 *New criminal offence*

The HDCA also creates a new criminal offence. A person commits an offence if they post a digital communication with the intention to cause harm. The

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<sup>75</sup> Copyright Act 1994, s 122A.

<sup>76</sup> Section 21(2)(a).

<sup>77</sup> Section 19.

<sup>78</sup> Section 19(2)(b).

<sup>79</sup> Harmful Digital Communications Act 2015, s 5.

communication must cause actual harm to the victim and “would cause harm to an ordinary reasonable person in the position of the victim.”<sup>80</sup> The offence is punishable by a prison sentence of up to two years or a fine not exceeding \$50,000.<sup>81</sup>

Initially, behaviours that amount to intimate partner cyber harassment appear to be criminalised under this section. Intention to cause harm, reasonable expectation of harm and actual harm would easily be satisfied. However, due to the narrow definition of “posts a digital communication,” only some such behaviour would be caught. ‘Posts a digital communication’ means:<sup>82</sup>

- (a)...transfers, sends, posts, publishes, disseminates, or otherwise communicates by means of a digital communication –
  - (i) any information, whether truthful or untruthful, about the victim; or
  - (ii) an intimate visual recording of another individual;and
- (b) includes an attempt to do anything referred to in paragraph (a)

Distressing text messages, constant communication and other methods employed by harassers would not be considered ‘posted’ unless they contained information about the victim. While many communications would contain information about the victims, the relatively narrow definition of posting means not all harassing communication would qualify. The definition would have to be amended in order to bring all intimate partner cyber harassment within the concept of posting a digital communication.

As previously established, the HDCA does not recognise intimate partner cyber harassment as constituting behaviours to be addressed under this piece of legislation. The definitions and discussion around the Act have been narrowly construed. As echoed throughout the literature, this Act was a reactive response to

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<sup>80</sup> Harmful Digital Communication Act 2015, s22(2).

<sup>81</sup> Section 22(4).

<sup>82</sup> Harmful Digital Communications Act 2015, s 4.

significant and highly publicised instances of cyber abuse but dealt with the issue in a far from exhaustive manner. While the HDCA does provide some recourse for victims of intimate partner cyber harassment, restrictions and limitations exist meaning the level of protection required will often not be provided.

### *C Harassment Act 1997*

The Harassment Act 1997 provides the legal definition of criminal harassment in New Zealand. The Act covers the issue of intimate partner cyber harassment very well and appreciates its challenges and nuances. A large procedural barrier exists however, as victims of domestic violence are excluded from applying for protection orders.

Under section 8 of the Harassment Act 1997 every person commits an offence that harasses another person. Harassment is defined as:<sup>83</sup>

A pattern of behaviour that is directed against [another] person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

The Act defines as a “specified act” behaviour that both (subjectively) causes the person being harassed to fear for their safety and would (objectively) cause a reasonable person in the specific circumstances to fear for their safety.<sup>84</sup> Behaviour becomes criminal harassment as opposed to civil harassment when the harasser knows and intends that the person to whom their behaviour is directed will likely fear for their safety.<sup>85</sup> Section 8(2) stipulates “every person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 2 years.”

First, establishing that it must be a pattern of behaviour aligns with intimate partner cyber harassment. It does not criminalise one act of many, it recognises the

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<sup>83</sup> Harassment Act 1997, s 3(1).

<sup>84</sup> Harassment Act 1997, s 4(f).

<sup>85</sup> Harassment Act 1997, s 8(1).

acts as a whole. Second, the definition of specified act is extremely wide. It covers any act that causes a person to fear for their safety if a reasonable person in their particular circumstances would fear for their safety. Making contact, interfering with property and giving offensive material are other specific acts.<sup>86</sup> Such a definition speaks to the uniqueness of intimate partner harassment that has often been a challenge to identify. Considering the victim's particular circumstances enables acts that may not constitute harassment to an objective third party, to qualify. While GPS tracking and other surveillance stalking behaviours are not explicitly covered, they would fall within section 4(1)(f). Further, in 2015 section 4(1)(d) was amended by the HDCA so that a specified act now includes making contact with a person (whether by telephone, correspondence, electronic communication or in any other way).<sup>87</sup> A further paragraph was inserted stating “giving offensive material to a person by placing the material in any electronic media, where it is likely that it will be seen by, or brought to the attention of, that person” qualifies as a specific act.<sup>88</sup> Such amendments better align intimate partner cyber harassment with the legislation.

Additional to establishing a criminal offence, the Harassment Act 1997 also provides restraining orders for victims of harassment.<sup>89</sup> A restraining order stipulates the offender must refrain from carrying out specified acts against the victim.<sup>90</sup> The court may also impose any additional conditions it deems necessary given the circumstances to further protect the victim.<sup>91</sup> While the effectiveness of said restraining orders is fit for further discussion, such a regime aims to provide on-going protections to victims in regards to the specific offending. Immediate recourse is available in the form of an imprisonable offence if a restraining order is breached.<sup>92</sup>

The purpose of the Act however is to provide protections for people who do not fit within the Domestic Violence Act 1995. Section 9(4) states “a person who is or has been in a domestic relationship with another person may not apply under this

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<sup>86</sup> Harassment Act 1997, s4(1).

<sup>87</sup> Harassment Act 1997, s 4(1)(d).

<sup>88</sup> Harassment Act 1997, s 4(1)(ea).

<sup>89</sup> Harassment Act 1997, s 6(2)(b).

<sup>90</sup> Harassment Act 1997, s19(1).

<sup>91</sup> Harassment Act 1997, 20(1).

<sup>92</sup> Harassment Act 1997, s25.

Act for a restraining order in respect of that other person.” An intimate partnership qualifies as a domestic relationship and is therefore excluded from the restraining orders provided in this Act. The distinction is echoed throughout materials surrounding the Act. The Ministry of Justice’s ‘Report on the Harassment and Criminal Associations Bill,’ states “[persons] covered by domestic violence legislation cannot apply for an order [under the Harassment Act 1997] but should instead use that regime.”<sup>93</sup> While the policy basis for this distinction is relatively unclear, it appears to originate from the focus of parliament and the timing of the legislation. The Harassment Act 1997 was introduced as part of the wider Harassment and Criminal Associations Bill 1997. The bill was introduced to prove that “the government is very serious about dealing with gangs.”<sup>94</sup> Accordingly, focus was placed directly on gang activity and stranger harassment. Further, the Harassment Act 1997 was introduced after the Domestic Violence Act 1995 as a form of response, as opposed to an addition to it. Reports stated that the Domestic Violence Act 1995 already had increased protections for victims of domestic violence.<sup>95</sup> Instead, concerns were raised about the inadequacies of the law to deal with stranger harassment.<sup>96</sup> Accordingly, the Harassment Act was introduced to cover the deficiencies of the Domestic Violence Act 1995 as opposed to working alongside it.<sup>97</sup>

In sum, the offence of criminal harassment is sufficient to prosecute offenders of intimate partner cyber harassment. Excluding victims of domestic violence from applying for restraining orders however means the Act falls short of providing additional effective protections for those victims.

#### *D Domestic Violence Act 1995*

Of the legislation as it stands, the Domestic Violence Act 1995 is of the most assistance to victims of intimate partner cyber harassment. An intimate partnership easily falls within the definition of a domestic relationship under section

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<sup>93</sup> Ministry of Justice “Report on the Harassment and Criminal Associations Bill” (CL 17/01 jh945cri 21, 17 June 1997), at 11.

<sup>94</sup> (20 November 1997) NZPD Consideration of Report of Justice and Law Reform Committee, Hon. D Graham [16].

<sup>95</sup> *Report by the Privacy Commissioner to the Minister of Justice on the Harassment and Criminal Associations Bill (other than provisions dealing with interception warrants)* (23 January, 1997), at [2.8].

<sup>96</sup> (20 November 1997) NZPD Consideration of Report of Justice and Law Reform Committee, Hon. P Goff [12].

<sup>97</sup> Jane Mountfort “The Civil Provisions of the Harassment Act 1997: A Worrying Area of Legislation?” (2001) 32(4) *VUWLawRw* 999, at 1018.

4(1)(a) or (d). Generally, the acts amounting to cyber harassment will fall within the definition of domestic violence under section 3(2)(c)(i)(ii) and (iv). Such provisions cover psychological abuse including (but not limited to) intimidation, harassment and threats. The term ‘psychological abuse’ however, may prove to be an obstruction. In light of this term, the threshold for establishing domestic violence is higher than establishing harassment, as actual psychological harm is required. Potter J asserts in *Beadle v Allen*.<sup>98</sup>

[The Harassment Act 1997] has a broader ambit than the Domestic Violence Act...harassment under the Act may but need not, harm or put at risk physical or mental well-being...it is not limited, as is harassment in [section] 3 of the Domestic Violence Act to situations of psychological abuse.

It may prove more difficult to qualify acts as domestic violence than harassment, even if the behaviours are identical. Seemingly, in order to warrant protection, a victim who is, or was in a domestic relationship with an offender must evidence behaviour of higher severity than a victim who is not. Again, the exclusion of victims of domestic violence from the Harassment Act 1997 proves an issue. While domestic violence warrants a high threshold of behaviour, requiring victims of harassment who are in a domestic relationship with the offender to prove a higher level of harm defies logic.

Further, the Act fails to fully appreciate the complex and unique nature of intimate partner cyber harassment, or even digital abuse as a form of domestic violence. There is no specific reference to digital domestic abuse or cyber harassment in the Act, which can be understood given the legislation was passed in 1995. The amendment Act in 2013 however did not address this problem. Each form of domestic violence except digital domestic violence is covered in section 2; physical abuse, sexual abuse, psychological abuse (including but not limited to – intimidation, harassment, threats, property damage and financial abuse). While the current conception of harassment, threats and intimidation can cover patterns of

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<sup>98</sup> *Beadle v Allen* [2000] NZFLR 639 (HC) at [18].

behaviour that amount to cyber abuse, omitting to specifically recognise the effect of systematic cyber abuse may prove problematic. Perhaps the most concerning implication is that, as has been noted, victims tend to avoid reporting cyber abuse because they do not recognise that it amounts to an offence.

In instances where victims are able to overcome the aforementioned definitional barriers, the Domestic Violence Act 1995 provides a framework of protections suitable for intimate partner cyber harassment. Under section 7, a victim of domestic violence is able to make an application for a protection order. The court has discretion to make a protection order if there has been domestic violence (subject to aforementioned definitional requirements) and an order is necessary to protect the victim.<sup>99</sup> The conditions of a protection order are established in section 19. Of particular relevance, the offender must not: engage or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person.<sup>100</sup> Once a protection order is granted, when the protected person and the respondent are not living on the same premises, the respondent is prohibited from making contact with the protected person.<sup>101</sup> All electronic methods of contact are covered. A breach of a protection order qualifies as an offence and is punishable by up to three years in prison.<sup>102</sup>

Additionally, where the court makes a protection order, the applicant can request that a safety programme be authorised.<sup>103</sup> These programmes will provide practical and useful information about how the protection order works. They also provide skills and tools aimed at re-building confidence, coping with the effects of abuse and ensuring safety.<sup>104</sup> Such protections and programmes are significant steps forward in recognising the specialised protection needed for domestic violence survivors. Discussion surrounding the effectiveness of such orders and programmes fall outside the scope of this paper.

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<sup>99</sup> Domestic Violence Act 1995, s 14(1).

<sup>100</sup> Domestic Violence Act 1995, s 19(2)(e).

<sup>101</sup> Domestic Violence Act 1995, s 19(2)(e).

<sup>102</sup> Domestic Violence Act 1995, s 49(3).

<sup>103</sup> Domestic Violence Act 1995, s 51C.

<sup>104</sup> Ministry of Justice "Programmes and Services" (2016) Family Justice <<http://www.justice.govt.nz/family-justice/domestic-violence/support-programmes>>.

The Domestic Violence Act 1995 therefore provides specifically designed protections for victims of intimate partner violence and thus intimate partner cyber harassment. Issues arise however in the definitional barrier and failure to fully appreciate digital domestic violence.

## *V Legislative changes*

Intimate partner cyber harassment evidently warrants effective protection for victims. New Zealand's current legislation, while not wholly ineffectual, falls short of providing adequate protection. Accordingly, legislative changes are recommended to ensure this occurs. The most effective response is a suite of amendments to existing legislation. Existing legislation provides established protections for victims, which, if amended to better cover intimate partner cyber harassment would prove sufficient.

The creation of a new offence, specifically for intimate partner cyber harassment is not a desirable solution. Legislating to target one specific issue is dangerous. Issues can expand or evolve. New, related issues that may not have been in contemplation may arise. A specific offence designed to tackle one issue may therefore not be flexible enough. Such a concern is exacerbated by the nature of intimate partner cyber harassment. Crimes involving technology such as this can change rapidly. A new criminal offence, while explicitly recognising the issue, fails to provide proactive and effective protections for the victim. It could be said to be acting as "ambulance at the bottom of the cliff." Additionally, there may be little practical value in creating a new offence. The current offence of criminal harassment provides a vehicle for prosecution of offenders. Prosecuting offenders, while may be necessary for victims to feel justice will not provide additional, on-going protection.

## A *Recommended amendments*

### 1 *Domestic Violence Act 1995*

First, the Domestic Violence Act 1995 should be amended to better incorporate understandings of intimate partner cyber harassment. The Domestic Violence Act 1995 is of vital importance as it has been specifically designed to deal with intimate partner violence. By including intimate partner cyber harassment, victims are entitled to both the protection orders and safety programmes contained in this Act. Further, amending the Domestic Violence Act 1995 has the potential to boost the understanding of digital domestic violence, specifically intimate partner cyber harassment. The definition in the Act not only determines who has access to protection orders and safety programmes; it also sets the tone for the general discourse surrounding domestic violence. Campaigns and information websites define domestic violence as it is defined in the statute.<sup>105</sup> Widening the definition to include digital domestic violence would alter how people saw the issue and encourage victims to seek help and be taken seriously. These consequences are vital, additional to introducing clarity to the act.

Psychological abuse, as per section 3(2)(c), should explicitly include cyber harassment. Such an inclusion would need to be accompanied by a definition in the interpretation section. The amended provision would read as follows:

- (2) In this section **violence** means-
- (a) Physical abuse:
  - (b) Sexual abuse:
  - (c) Psychological abuse, including but not limited to –
    - (i) Intimidation
    - (ii) Harassment
    - (iii) Damage to property
    - (iv) Threats of physical abuse [...]
    - (v) Financial or economic abuse [...]
    - (vi) [Child abuse]

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<sup>105</sup> Are you Okay “The Law” (2016) It’s Not Okay <<http://areyouok.org.nz/family-violence/thelaw/>>.

*(vii) Cyber harassment*

An appropriate definition of cyber harassment to include in the interpretation section would be:

Using any electronic device (including but not limited to mobile phone, computers and other technology) to repeatedly or persistently surveil and/or communicate with another person, such as would cause fear to a reasonable person in person B's circumstances.

Intimate partner cyber harassment is a form of psychological abuse and therefore fits within that category. A direct reference to this form of abuse provides guidance to what constitutes abuse, which would be helpful in such a nuanced area. Further, victims are able to recognise cyber harassment as a significant form of abuse, akin to intimidation, threats and other forms of harassment. Labelling cyber harassment as a form of psychological abuse would enable campaigners and education providers to present it as its own form, cementing the seriousness of it. Including digital abuse as a wider paragraph under section 3(2), alongside physical, sexual and psychological abuse is undesirable. While a non-exhaustive list of examples of digital abuse, akin to psychological abuse (including intimate partner cyber harassment) could be provided, such an amendment would be inappropriate. In order to include digital domestic violence, the term 'violence' would be widened which would have serious implications. Instead, the existing framework should be adhered to.

While amendments to the Domestic Violence Act 1995 are evidently necessary, amendments to further legislation must be made to fully address the issue. The definitional hurdle still exists, meaning psychological abuse must be established for harassment to qualify as domestic violence. Accordingly, changes to the Harassment Act 1997 must also be made in order to dissolve this arbitrary definitional boundary.

## 2 *Harassment Act 1997*

The Harassment Act 1997 should be amended to include victims of domestic violence. As previously established, the exclusion of domestic violence from protection orders provided by the Harassment Act 1997 creates large issues. Further, the policy basis for such a distinction is arbitrary. Section 9(4) should be removed to ensure the same threshold of harassment is applicable to all victims whether in a domestic relationship with the harasser or not. Including victims of domestic violence within the Harassment Act 1997 covers certain situations that are currently omitted. For example, at present cyber harassment between intimate partners that does not amount to psychological abuse, although rare, would not warrant a protection order. A protection order is desirable to prevent the behaviour on its own accord, or to ensure it does not escalate to cause psychological abuse. Additionally, it would allow relationships that may fall within the ‘grey area’ of a domestic relationship (such as dating or informal sexual relationships) to be covered without ambiguity. Rules and provisions would be necessary to ensure only one protection order is granted, but discretion should be given to the applicant as to which would better suit their circumstances.

## 3 *Harmful Digital Communications Act 2015*

The final amendment in the suite of changes is an amendment to the HDCA. The civil enforcement regime should be amended so that protection orders are more accessible to victims. Changes to procedure may be enacted to better accommodate victims of intimate partner cyber harassment. Section 11(1) should be amended so that a representative of the victim may apply for an order. Such cases could be limited to where a person is unable to personally apply due to fear of harm or another sufficient purpose (consistent with the Domestic Violence Act 1995).<sup>106</sup> Further mandatory considerations the Court must assess in making an order could be added to section 19(5). Such considerations could be: “the relationship between the affected individual and the defendant,” and “previous patterns of behaviour directly related to the communication.” These factors directly address intimate partner violence.

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<sup>106</sup> Domestic Violence Act 1995, s 12.

It is important to note however, that even after these amendments, the HDCA would still be relatively limited due to the narrow definition of “posting a digital communication.” Widening the definition to include "any threatening, abusive or other content which in the context in which it is used constitutes harassment," is a possible solution. It would however, generate greater problems than solutions. Such a definition falls outside the intended scope of the HDCA. Intimate partner cyber harassment was not in contemplation of Parliament and as such, the Act was not designed to address the complexities of the issue. Amending a definition exclusively to accommodate one issue is dangerous. In this case, various other possibly un-contemplated situations may arise involving harassment. Such situations are best dealt with, and are currently sufficiently dealt with under the Harassment Act 1997.

## *VI Conclusion*

The current legal position in New Zealand enables perpetrators of intimate partner cyber harassment to be prosecuted for criminal harassment under the Harassment Act 1997. While it may be said that justice is therefore done, it can leave victims relatively out in the cold. As intimate partner cyber harassment is a chronic set of behaviours that has lasting and damaging effects, effective protections need to be put in place.

The most effective way to ensure such protections are provided is to amend the Domestic Violence Act 1995, the Harassment Act 1997 and Harmful Digital Communications Act 2015. Including cyber harassment within the Domestic Violence Act 1995 would ensure that victims of intimate partner cyber harassment are entitled to protection orders and safety programmes specifically tailored for victims of domestic violence. Moreover, amending the Harassment Act 1997 would ensure that victims of intimate partner cyber harassment were entitled to the same protections and procedural processes as victims of stranger harassment. Finally, changing the Harmful Digital Communications Act 2015 will ensure wider access to orders provided by the District Court.

### ***Word count***

The text of this paper (excluding table of contents, abstract, footnotes, and bibliography) comprises approximately 7999 words.

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Cindy Southward and others "A High-Tech Twist on Abuse: Technology, intimate partner stalking and advocacy" (paper commissioned for National Network to End Domestic Violence, 2005).

Jennifer Lynn Truman “Examining Intimate Partner Stalking and Use of Technology in Stalking Victimization” (PHD philosophy, University of Central Florida, 2009).

## ***H Internet Resources***

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<<http://www.firstdigital.co.nz/blog/2014/09/10/facebook-demographics-new-zealand-age-distribution-gender/>>.

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<<http://www.justice.govt.nz/family-justice/domestic-violence/support-programmes/>>.

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<[https://nzfvc.org.nz/sites/nzfvc.org.nz/files/data-summaries-snapshot-2015\\_0.pdf](https://nzfvc.org.nz/sites/nzfvc.org.nz/files/data-summaries-snapshot-2015_0.pdf)>.

## ***I Newspaper Articles***

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