INTIMATE WITH THE INTERNET: DOES NEW ZEALAND'S LAW PROVIDE ADEQUATE PROTECTION IN CASES OF NON-CONSENSUAL PORNOGRAPHY?

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A different concern, though, is that the uncensored and often extreme character of internet publication may over time affect the public perception of what is acceptable, and that that perception may permeate into the mainstream media. Community standards change over time, and the internet, unless it can somehow be kept in check, has the potential to change them for the worse.

- Law Commission[1]

[1] Law Commission *Privacy Concepts and Issues: Review of the law of Privacy Stage 1* (NZLC SP19, 2008) at 203.

[2] Daniel J Solove "Conceptualizing Privacy" (2002) 90 CLR 1087 at 1142.

INTRODUCTION

Rapidly advancing technology has changed our social practices and expectations surrounding the recording of digital information and the communication of information online. This has, in turn, had a profound effect upon our expectations of privacy. The legal responses to the technologies of the 20th Century are no longer sufficient because they are now based on old and outdated concepts of privacy.[2] The grave harm caused by the practice of non-consensual pornography necessitates a legal response.

This dissertation aims to assess the adequacy of the New Zealand law's response to the practice of non-consensual pornography. Part One outlines the context in which this assessment takes place. First, it is important to understand what is meant by "non-consensual pornography" and the harms it causes. Part One sets out four typical scenarios of recording and sharing intimate images that occur in non-consensual pornography cases. These scenarios form the basis for the assessment of whether the existing legal responses are adequate. The digital context must also be considered for its impact on the occurrence and harms of non-consensual pornography.

Non-consensual pornography cases involve the interference with individuals' privacy interests. Part Two seeks to identify the value of privacy that the law protects. It begins by considering several theories of privacy, then considers how the privacy value, and harm from interference with privacy, are recognised in New Zealand law.

Part Three analyses the current legal responses to non-consensual pornography ranging from Copyright to the new criminal offence in the Harmful Digital Communications Act 2015.[3] It sets out key civil actions and criminal offences that are often employed to regulate the collection and publication of information and

[2] Daniel J Solove "Conceptualizing Privacy" (2002) 90 CLR 1087 at 1142.

[3] Harmful Digital Communications Act 2015, s 22.

considers whether these responses would cover the range of archetypal non-consensual pornography scenarios.

Part Four then assesses whether the existing laws are an appropriate response to non-consensual pornography. This analysis shows to what degree the current laws are directed at protecting the privacy interest that is interfered with in scenarios of non-consensual pornography. Part Four discusses how concepts of privacy need to be updated in the digital context to provide better protection. It concludes with the recommendation that the covert filming offence and breach of privacy tort be extended so that the law can adequately respond to non-consensual pornography.

A generalised approach to privacy would require the impossible task of providing a universally applicable definition to "private information".[4] Even the discussion of "privacy" as a general right is detrimental to the evolution of privacy law. Attempts to develop privacy law without defining the specific context are stifled on the basis that general protections of privacy unacceptably restrict competing rights. In the context of non-consensual pornography there is very little legitimate public concern in publication and the competing interest of freedom of expression is very low, therefore it is appropriate for privacy protections to develop.

When it recognised the breach of privacy tort, the majority of the Court of Appeal expressly stated that it was not establishing a general cause of action for all conduct that could be considered an invasion of privacy.[5] A piecemeal approach to privacy is appropriate as it allows for the weighing the competing factors at play in specific contexts.[6]

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[4] Helen Nissenbaum *Privacy in context* (Stanford Law Books, Stanford, 2010) at 238.

[5] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [16], [45] per Gault P and Blanchard J.

[6] Law Commission *Privacy Concepts and Issues: Review of the law of Privacy Stage 1* (NZLC SP19, 2008) at 69.

Privacy law is needed to address interferences with privacy values causing harm to victims in certain contexts.[7] A legal response to non-consensual pornography must protect the individual's right to control information about themselves in the context of recording and sharing intimate images. The usurpation of control over the extent and context of recording and disclosing an individual's intimate images causes serious emotional harm.[8]

[7] Solove, above n 2, at 1129; *Hosking v Runting*, above n 5, at [94] per Gault P and Blanchard J.

[8] The importance of protecting privacy in the body by maintaining control over it is reflected in the development of practices to keep our bodies secret and guarded from others, see Solove, above n 2, at 1135.

PART ONE: NON-CONSENSUAL PORNOGRAPHY

The term non-consensual pornography describes the harmful practice of recording and sharing "intimate images" without consent. Most often it involves the publication of women's naked images to social media sites.[9] Victims of non-consensual pornography are left feeling humiliated, distressed and, in extreme cases, afraid for their physical safety.[10] Non-consensual pornography can destroy significant relationships and has resulted in victims losing their jobs.[11] In recognition of the harm that is caused, it is important to understand the application of law to the now common practice of recording and publishing images of other people without consent.[12]

The naked and intimate self is closely connected to human dignity; the non-consensual interference with a person's dignity causes severe, and sometimes debilitating humiliation and loss of self-esteem.[13] The humiliation and emotional distress caused by the distribution of an intimate image is inflated by the ability to infinitely copy, edit and share digital images online.[14] This harm continues with each non-consensual publication of intimate images, regardless of the consent to record or possess the image in the first place. The instances of harm from non-consensual pornography are multiplied by the ease of access to cameras, the connectivity of social media and the commercialisation of non-consensual pornography websites creating demand for such images.[15]

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[9] Danielle Keats Citron and Mary Anne Franks "Criminalising Revenge Porn" (2014) 49 Wake Forest L Rev 345 at 346, 348, 353.

[10] Citron and Franks, above n 9. Where the victim's contact details are published, they are often harassed for their association with pornography and threatened with rape or assault, see Danielle Keats Citron "Opinion: Make 'revenge porn' a crime in US" (16 January 2014) CNN.com http://edition.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html.

[11] Citron and Franks, above n 9, at 350.

[12] The posting of content about others on one's Web page is a 'near universal practice', see Nissenbaum, above n 4, at 60.

[13] Solove, above n 2, at 1149.

[14] Law Commission *Intimate Covert Filming* (NZLC SP15, 2004) at 7; Danielle Keats Citron "Mainstreaming Privacy Torts" (2010) 98 CLR 1805 at 1808.

[15] Law Commission, above n 14, at 7; Jessica Roy "Revenge-porn King Hunter Moore Indicted on Federal Charges" (23 January 2014) Time.com <http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/>.

Non-consensual pornography has arisen from our recently developed ability to record digital images and publish them on the internet. Both technology and the law play a crucial role in preventing this anti-social behaviour.[16] Archetypal cases of non-consensual pornography include the following scenarios:[17]

- The victim is recorded without their consent or knowledge in a private place.[18]
- The victim records an intimate image of himself or herself and does not consent to publication. It may be hacked from their email or published by a "jilted lover".[19]
- The victim consents to his or her sex-partner recording his or her intimate image. Their images are then published and shared further without their consent.[20]
- The victim is recorded while engaged in an intimate activity in a public place.[21]

For the purpose of assessing the application of the law to cases of non-consensual pornography, "intimate images" has been given the follow meaning: "Image" includes all digital representations of a person, whether in a photograph or video. Whether images are "intimate" is considered on a case-by-case basis with regard to the social and cultural context in which they appear. The test may be expressed as "whether the individual has a reasonable expectation in exercising control over the disclosure of

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16 Law Commission, above n 6, at 122.

17 The scenarios involving sex-partners are commonly referred to as "revenge porn", see Erica Goode "Victims Push Laws to End Online Revenge Posts" (23 September 2013) The New York Times <http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?pagewanted=all&_r=1>; Citron and Franks, above n 1, at 345, 346.).

18 *C v Holland* [2012] NZHC 2155.

19 "This Revenge Porn Creep Is Going to Prison" Weird Internet <http://internet.gawker.com/this-revenge-porn-creep-is-going-to-prison-1683714592>; Alan Duke "FBI, Apple investigate nude photo leak targeting Jennifer Lawrence, others" (2 September 2014) CNN.com <http://edition.cnn.com/2014/09/01/showbiz/jennifer-lawrence-photos/>.; In a New Zealand case of non-consensual pornography. An ex-boyfriend uploaded a photograph of his ex-girlfriend naked to her facebook page after they broke up. He was sentenced under s 124 of the Crimes Act for the Distribution or exhibition of indecent matter. The Dominion Post "Naked photo sends jilted lover to jail" (13 November 2010) Stuff.co.nz <http://www.stuff.co.nz/national/crime/4341191/Naked-photo-sends-jilted-lover-to-jail>.

20 Danielle Keats Citron "Opinion: Make 'revenge porn' a crime in US" (16 January 2014) CNN.com <http://edition.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html>.

21 Charles Mabbett "Sharing images and not caring" (3 February 2015) Office of the Privacy Commissioner <https://privacy.org.nz/blog/sharing-images/>.

the image".[22] This test considers the individual's desire to exercise control over the information and whether it is appropriate to protect such information from disclosure according to prevalent social standards.[23]

Individuals expect to control information related to certain aspects of the body and bodily functions. Social norms require that such information is concealed from the wider public to maintain an individual's dignity and civility.[24] A good reference point of current standards is the statutory definition of "intimate visual recording":[25]

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

However, in the area of privacy law a definition involving an exhaustive list of the specific images, which are currently "intimate images", is inappropriately restrictive.

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[22] This is a more specific expression of the first element of the breach of privacy tort, recognising that the privacy interest being protect is the right to control information about oneself. See *Hosking v Runting*, above n 8, at [119] per Gault P and Blanchard J.

[23] Solove, above n 2, at 1111.

[24] Daniel J Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477 at 537.; For example, the popular New Zealand advert "Undies, undies, togs" declared the commonly accepted standard that once someone is no longer in sight of the water speedo togs are considered undies and are no longer acceptable to wear on their own. Andrea Vance "MP Nick Smith caught out in his togs" (11 March 2011) Stuff.co.nz <http://www.stuff.co.nz/national/politics/4755272/MP-Nick-Smith-caught-out-in-his-togs>.

[25] Crimes Act 1961 s 216G; Harmful Digital Communications Act 2015, s 4.

Privacy depends upon the social and cultural context in which it is being considered. Social norms and common practices are rapidly changing with the introduction of new technologies. The law must remain flexible enough to keep up with the rapid development of technology and changing privacy norms.[26]

In response to recent digital developments, the law protecting privacy must be reassessed to address new harmful practices.[27] Alongside the greater connectivity and expression that comes with using the internet, is also the risk of supervision and exposure. Disclosing intimate images hampers individuals' abilities to make decisions about their own lives and to act freely. The fear of being judged by others and developing bad reputations leads people to self-censor their behaviour even in private.[28]

I. The Digital Context

In the early 20th Century, Warren and Brandeis were concerned that the invention of the 'snap camera' and gossip magazines threatened to make public the details of their private lives.[29] Now, much of our social and professional lives is conducted in the online environment, the exact parameters of which remain ill-defined:[30]

> The internet has a number of notable characteristics that make it difficult to control, or to trace the flow of data within it. It has no borders – it is not physically located in any one state and can be accessed from anywhere. It is not centrally owned or controlled. It is

[26] Solove, above n 2, at 1146.; Law Commission, above n 6, at 57.; Defamation is a similar action dependant upon changing social and cultural context. There is no one definition of 'defamation' instead one must have regard to the common law cases and examples of defamation that arise as the cases are heard. See Stephen Todd and others *The law of torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [16.3.01], [16.3.02], [16.3.04].

[27] *Hosking v Runting*, above n 5, at [3] per Gault P and Blanchard J.

[28] Daniel J Solove *The digital person* (New York University Press, New York, 2006) at 34.

[29] SD Warren and LD Brandeis "The Right to Privacy" [1890] 4 Harv L Rev 193 at 210–211. cited in Solove, above n 24, at 532.

[30] Law Commission *Invasion of privacy: penalties and remedies: review of the law of privacy stage 3* (NZLC R113, 2010) at 18.

> interactive and dynamic. As a result, the internet has given rise to new and difficult privacy issues.

Camera phones and the internet allow for the recording and sharing of images at any time, in any place.[31] The ability to permanently capture and share information has never before been as widely accessible.[32] On the internet, an image can be published in mere seconds. Once published, online images take on a permanent and persistent existence as they are copied, cached and continually represented out of context.[33] This means that an impulsive decision to record and share an "intimate image" may impact on individuals for the rest of their life.[34]

Search engines and social media sites enable even those with limited technical knowledge to find and share people's images, including those who, without choosing to be online themselves, have information about them uploaded by others.[35] The internet plays a central role in our 21st Century lives. Associated with access to the internet is the ability to pursue our fundamental rights, such as the right to freedom of expression.[36] We use the internet for education, trade and commerce, and keeping in touch with friends and family.

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[31] Solove, above n 29; Law Commission, above n 9, at 142; Sam Grover "Harmful Digital Communications Act closes Privacy Act loophole" (6 July 2015) Office of the Privacy Commissioner <https://privacy.org.nz/news-and-publications/statements-media-releases/harmful-digital-communications-act-closes-privacy-act-loophole/>.

[32] Nissenbaum, above n 6, at 52.

[33] Law Commission, above n 6, at 18, 132; Citron, above n 14, at 1813. ("While public disclosures of the past were more easily forgotten, memory decay has largely disappeared.")

[34] Law Commission, above n 6, at 112.

[35] Nissenbaum, above n 12, at 59; Law Commission, above n 6, at 112, 124.

[36] New Zealand Bill of Rights Act 1990 s 14; Nissenbaum, above n 12, at 197–198.

PART TWO: WHAT IS PRIVACY?

An analysis of the law must be based upon the proper conceptualisation of the subject matter.[37] This part sets out several theories of privacy, which outline the interests that privacy law protects. It then examines how privacy has been recognised in New Zealand law, the values in need of protection and the harms that will warrant a legal response.

Theoretical discussions of privacy make it clear that "privacy" denotes several distinct values and interests. While theory cannot conclusively define what "privacy" is, it can guide the discussion of which values and interests the law should protect.[38] Existing law recognises privacy as the individual's ability to exercise of control over certain information about themself and the right to be let alone. The law protects these values to varying extents as it protects different kinds of information in specific contexts.

The information requiring legal protection in the case of non-consensual pornography is a person's "intimate image".[39] The privacy value in controlling access to one's intimate image is supported by the secrecy, intimacy and exposure theories. In accordance with existing social norms, individuals expect to conceal their intimate images from the wider public. The ordinary New Zealander restricts those who see them undress or engage in certain activities. That is, we change in dressing rooms, close our curtains and sleep in separate bedrooms from our parents because intimate images, as dictated by social norms, contain information about the individual that should be revealed to only a limited audience.

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[37] Solove, above n 28, at 6; Solove, above n 2, at 1128.

[38] Solove, above n 2, at 1118.

[39] For the meaning given to "intimate image" see Part 1.

I. Theories of Privacy

The philosophical debate about the meaning of privacy is yet to produce a clear, generalized concept of privacy that encompasses all of the things we intuitively consider private. The New Zealand Law Commission accepted that, "any attempt to provide a comprehensive definition of privacy is doomed to failure".[40] Indeed, some commentators have expressed the view that privacy is so vague and elastic it defies definition and is an unsatisfactory term because it has "a protean capacity to be all things to all lawyers".[41] To support the value of privacy and the interests that privacy protects Part 2 discusses some of the most relevant theories.[42] It is beyond the scope of this dissertation to review all of the theories conceptualising privacy.

1. Secrecy

Privacy in information is often recognised as protecting the concealment of secrets.[43] Secrecy underlies the desire of individuals to conceal information about themself. We value the ability to control the selective disclosure of information about ourselves to protect our public image and reputation.[44] The law protects this interest by providing redress where others have disclosed our secrets.[45] The legal remedies of breach of confidence, the tort of intrusion into seclusion and the right to freedom from unauthorised search and surveillance all protect this interest.[46]

Privacy in secret information is limited to protecting total secrecy; in determining whether information is secret the court considers whether the information is public or

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[40] Law Commission, above n 6, at 52.

[41] For a broader discussion of the conceptual difficulty recognised by many commentators when defining the values or interests denoted by 'privacy', see Solove, above n 2, at 1089.

[42] For a review of the different theoretical constructs of privacy, see Law Commission, above n 6; Solove, above n 2.

[43] Solove, above n 2, at 1106.

[44] At 1106.

[45] Solove, above n 24, at 497, 498.

[46] See Stephen Todd and others, above n 26; *C v Holland [2012] NZHC 2155*, above n 18; New Zealand Bill of Rights Act 1990.

private.[47] Information that is not previously hidden from public knowledge cannot be a secret and secrecy is lost when the information is disclosed: therefore there is no liability for further publication.[48]

Secrets are only one class of information that is intuitively considered private; some private information is secret, but not all secret information is private.[49] The secrecy conception of privacy is criticised for being too narrow.[50] It fails to protect privacy in information that is known by others and fails to recognise the interest individuals have in controlling the extent and circumstances of the disclosure of their information.[51]

2. Intimacy

Privacy is also expressed as a theory of intimacy. Intimacy is often connected with information about the human body, emotions and sexuality. Theories of intimacy, which focus on the formation of relationships and feelings between individuals, are criticised for being too narrow.[52] Like secrets, intimate information is a sub-set of private facts and does not cover everything one would consider private. For example, financial records are private but would not be considered intimate information about an individual.[53]

Intimacy theory supports that access to certain information about individuals should be restricted.[54] Privacy-as-intimacy theorist, Julie Innes, defined privacy as, "the state of the agent having control over decisions concerning matters that draw their

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[47] Solove, above n 24, at 540; Solove, above n 2, at 1107.

[48] Solove, above n 24, at 497, 540–541.

[49] Solove, above n 2, at 1108–1109. ("[S]ecrecy is certainly not coextensive with privacy; secret information is often not private (for example, secret military plans) and private matters are not always secret (for example, one's debts).")

[50] At 1108.

[51] At 1109.

[52] Law Commission, above n 6, at 39; Solove, above n 2, at 1122–1124.

[53] Law Commission, above n 6, at 39.

[54] See Solove, above n 2, at 1123.

meaning and value from the agent's love, caring, or liking".[55] Innes argues, intimacy "is not static across time or culture". Information is not inherently intimate but assumes a quality of intimacy arising from the context and the individual's motives.[56] When deciding what information can reasonably be regarded as intimate we should consider the kind of information people seek to restrict access to. Not every publication of nudity is an instance of non-consensual pornography. Such images are often the subject of art, films or the consensual pornography industry. By not consenting to publication, the image subject expresses their desire to restrict access to their intimate images.

3. Exposure

It is considered indecent to publish images of nudity, people defecating or people cleaning themselves, despite the fact that these matters are common to all humans.[57] Daniel Solove explains that the objection to such publication stems from the exposure of physical and emotional attributes about a person that should be kept concealed in accordance with social norms.[58]

The ability to conceal distasteful aspects of one's life is closely related to maintaining dignity.[59] Exposure does not reveal new information, but causes the subject to be embarrassed and humiliated because it goes against social practice and expectations.[60] The extent to which individuals must rely on privacy to prevent exposure changes according to accepted social practices across time and culture.[61]

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55 Julie C Inness Privacy, Intimacy, and Isolation (Oxford University Press, New York, 1992) at 78 cited in Solove, above n 2, at 1122.

56 Julie C Inness Privacy, Intimacy, and Isolation (Oxford University Press, New York, 1992) at 49, 92 cited in Law Commission, above n 6, at 39.

57 Solove, above n 24, at 536.

58 At 536.

59 At 537.

60 At 537.

61 At 536, 537.

Public knowledge of information is often fatal to securing a remedy for wrongful publication.[62] A legal response based on exposure would provide a remedy for the publication of certain information regardless of how publicly available it was. Exposure occurs everytime information, which should remain concealed from others in accordance with social norms, is published.[63]

4. Control

Privacy as "control over information" is the concept underlying data protection statutes such as the Privacy Act 1993.[64] Alan Westin defines the control theory, as "the claim of individuals, groups or institutions to determine for themselves, when, how and to what extent information about them is communicated to others."[65]

"The right to control information" presupposes that information is a commodity capable of being controlled. However, information is not a tangible object capable of possession to the exclusion of others. Nevertheless, the law regulates its collection, disclosure and use in some instances.[66]

The control theory is critiqued for being too vague and individually focused. Privacy is a product of living in societies. When deciding what information should be controlled, and protected by privacy, we must take into account wider social interests in sharing and having access to information.[67] Courts balance competing interests in

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[62] At 534.

[63] At 539.

[64] Law Commission, above n 6, at 35; Solove, above n 2, at 1110.

[65] Solove, above n 2, at 1109, 1110.

[66] Law Commission, above n 6, at 36.; The information privacy principles of the Privacy Act 1993 apply to information held in a person's memory (*Case Note 37930* [2002] NZPrivCmr 10).; This dilemma is recognised in intellectual property law, which protects the tangible expressions of intangible ideas to enforce the owner's ability to exercise control (Solove, above n 2, at 1113.).

[67] Solove, above n 2, at 1111.

the circumstances of the case using tests, such as "reasonable expectation of privacy" and "legitimate public concern".[68]

Control is a means of protecting private information as opposed to a description of what information is private.[69] Individuals exercise control over the dissemination of information by withholding consent for publication. The ability to control the release of information about oneself protects "the right to be let alone". This privacy interest, recognised by Warren and Brandeis, supports respect for human dignity and autonomy.[70] Legal protection of these values is essential to protect an individual's creativity, self-development and social relationships.[71]

II. Privacy in New Zealand

Privacy interests have traditionally been protected as an ancilliary consequence in actions defending related interests in property and contract.[72] The enactment of the New Zealand Bill of Rights Act 1990 and data protection legislation; the creation of criminal offences protecting privacy; along with the development of several privacy torts, illustrates that privacy is now expressly recognised as a value worthy of protection in New Zealand.[73]

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[68] *Hosking v Runting*, above n 5, at [116] per Gault P and Blanchard J, [230] and [236] per Tipping J; *Brooker v Police* [2007] NZSC 30 at [153], [163], [212] per Thomas J.

[69] Law Commission, above n 6, at 37.; See discussion of "intimate image" in Part 1.

[70] Warren and Brandeis, above n 29, at 193; Citron, above n 14, at 1807.

[71] Citron, above n 14, at 1832, 1833.

[72] Privacy was protected by other common law actions, such as assault, negligence, trespass, and nuisance, see Law Commission, above n 6, at 12–13.; Privacy in documents and sensitive information has also been protected by breach of confidence and contract, see *Hosking v Runting*, above n 5, at [200].; For a more in depth overview of the development of privacy law in New Zealand see Law Commission, above n 4, at 12; *Hosking v Runting*, above n 5, at [77]–[116].

[73] Law Commission, above n 6, at 68. ("Privacy is an "important and indispensable value in modern society.")

1. Privacy Values

The New Zealand Bill of Rights Act 1990 does not protect a general right of privacy, but affords statutory recognition to the privacy in one's body, home and possessions by the right to be secure against unreasonable search and seizure.[74]

The introduction of the Privacy Act 1993 expressly recognised the need to protect individual's information against other "agencies".[75] The Act's information privacy principles protect "information about an identifiable individual" by providing clear rules for the collection, use, disclosure and storage of personal information.[76]

Criminal offences related to covert filming and, the new offence of posting a harmful digital communication, apply to "intimate visual recordings".[77] The criminalisation of intimate visual recordings protects against unauthorised intrusions into intimate personal spaces.[78] Such intrusions violate "the arguably fundamental desire of human beings to control exposure of their own body".[79]

In developing the common law and equity, the Courts have also recognised the need to protect privacy values. In his Honour's minority judgment, Thomas J of the Supreme Court stated:[80]

> Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons. This zone of privacy is imperative if our personal identity and integrity is

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[74] New Zealand Bill of Rights Act 1990 s 21; *R v Williams* [2007] NZCA 52 at [48], [113].; A general right of privacy was considered too vague and uncertain plagued by issues of definition, scope of protection and relationship with other societal values. *Hosking v Runting*, above n 5 at [77], [92]; Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985) at 103, 104.

[75] "Agency" includes individuals, government departments, private businesses, but not the news media. Privacy Act 1993, s 2.

[76] "Personal information" Privacy Act, ss 2, 6.

[77] Crimes Act 1961 s 215G–215J; Harmful Digital Communications Act 2015 ss 4, 22.

[78] *C v Holland*, above n 18, at [28] per Whata J.

[79] Law Commission, above n 14, at 5.

[80] The Supreme Court weighed up the competing interests in freedom of expression and privacy in the case of a man charged with disorderly conduct for protesting outside a police officer's home. *Brooker v Police*, above n 68, at [252] per Thomas J.

> to remain intact. Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society. It is, as I have mentioned, closely allied to the fundamental value underlying and supporting all other rights; the dignity and worth of the human person.

Breach of confidence protects the privacy interest of secrecy.[81] The equitable action protects individuals' interests in the concealment of information passed in circumstances of confidentiality. Such as commercial interests, private or personal confidences, and government secrets.[82]

In a non-consensual pornography case,[83] Judge Abbott held that the privacy value protected by the common law is the "peculiarly personal…psychological need to preserve an intrusion-free zone of personality and family". A remedy is warranted on the basis of "the loss of the personal shield of privacy of the person to whom the information relates" when private facts are publicly disclosed.[84]

The privacy torts extend protection of privacy against the world at large. They protect matters in which an individual has a "reasonable expectation of privacy" from interference, publication or intrusion that is objectively, highly offensive. The breach of private tort protects private facts.[85] The intrusion into seclusion tort protects the secrecy of information or circumstances concealed by seclusion.[86]

Surveying the existing legal framework, Whata J found that New Zealand law had "embraced freedom from unauthorised and unreasonable physical intrusion or prying into private or personal places such as the home, and freedom from unauthorised recordings of personal, particularly intimate affairs whether published or not".[87]

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81 Solove, above n 2, at 1105–1109.

82 Stephen Todd and others, above n 26, at [14.5.01].

83 Judge Abbott held that the publication of an image of a prostitute's genitals to a swingers magazine without her permission was an invasion of privacy *L v G [2002] DCR 234* at 246.

84 *L v G*, above n 83, at 246.

85 *Hosking v Runting*, above n 5, at [119] per Gault P and Blanchard J.

86 Solove, above n 24, at 497, 498.

87 *C v Holland*, above n 18, at [32] per Whata J.

The New Zealand privacy torts have developed following trends in the United States of America to protect the underlying interest in the right to be let alone. Generally agreeing with the development of a tort of invasion of privacy, Tipping J expanded upon the value it protects, he stated:[88]

> It is of the essence of the dignity and personal autonomy and wellbeing [sic] of all human beings that some aspects of their lives should be able to remain private if they so wish… Quite apart from moral and ethical issues, one pragmatic reason is that unfair and unnecessary public disclosure of private facts can well affect the physical and mental health and wellbeing of those concerned.

Almost, 20 years before the Court of Appeal recognised the breach of privacy tort, McGechan J in *Tucker v News Media Ownership Ltd* expressed the right of ordinary people "to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired, publicity or public disclosure."[89] The right to be let alone denotes a privacy interest protected by limited access to the self and control over personal information.[90]

2. Privacy Harms

Freedom from interference with privacy is not generally recognised as a fundamental right in New Zealand. A rights-based legal response would be made out by proof that privacy has been interfered with.[91] The existing civil and criminal responses to interference with privacy are harms-based. They only protect against serious breaches indicated by: proof of intention, a high standard of harm, or offensiveness.

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[88] *Hosking v Runting,* above n 5, at [238]–[239] per Tipping J.

[89] *L v G*, above n 83, at 241; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 at 731, 732.

[90] Warren and Brandeis, above n 29; Law Commission, above n 6, at 32.

[91] *Hosking v Runting,* above n 5, at [125] per Gault P and Blanchard J.

The law recognises that privacy protects an individual's control over the disclosure of information about themself. Such control is a key interest underlying a person's "independence, dignity, and integrity".[92] Interference with privacy injures a "person's estimate of himself" and causes "mental pain and distress".[93] The law recognises the emotional harm that results from invasions of privacy. However, the laws aimed at addressing invasions of privacy require high standards of harm are met before victims can access a legal response to interference with their privacy interests.

Interference with privacy under the Privacy Act is actionable where it results in "significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual".[94]

The Crimes Act offences for covert filming, and similarly the tort of intrusion into seclusion, address the "development of psychological symptom and disorders, distrust in relationships, fear for personal safety, and shame and humiliation" experienced by victims of covert filming.[95]

The Harmful Digital Communication Act's criminal offence requires the satisfaction of three different harm-related elements: that the offender intended the post to cause harm to a victim; the post would cause harm to an ordinary reasonable person in the position of the victim; and the post causes harm to the victim.[96] The Act expressly defines "harm" as "serious emotional distress".[97]

The breach of privacy tort responds to the distress or humiliation of victims which does not amount to a recognised psychiatric harm.[98] The actual harm experienced by

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[92] Citron, above n 14, at 1820–1821.
[93] Warren and Brandeis, above n 29, at 196–197. cited in Citron, above n 14, at 1820–1821.
[94] Privacy Act 1993, s 66(1)(b)(iii).
[95] Law Commission, above n 14, at 8.
[96] Harmful Digital Communications Act 2015, s 22.
[97] Harmful Digital Communications Act 2015, s 4.
[98] *Hosking v Runting*, above n 5, at [128] per Gault P and Blanchard J.

the victim is not required to be high because a successful case requires that the publicity given to their information was objectively highly offensive.

Breach of confidence responds in equity to the conscience of the person, who breaches the confidence.[99] The action requires that the unauthorised disclosure is "to the detriment of the person entitled to the benefit of the confidence". However, the plaintiff may not need to show any positive harm if the information was clearly confidential.[100]

[99] At [246] per Tipping J.

[100] See Stephen Todd and others, above n 26, at [14.5.02(3)].

PART THREE: AN ASSESSMENT OF EXISTING LAWS

This Part will assess whether existing laws cover scenarios of non-consensual pornography.[101] The law recognises the privacy value in the ability to control certain information. Civil and criminal law set limits on the recording and publication of other's images in certain circumstances. The application of existing laws to four archetypal cases of non-consensual pornogarphy shows that non-consensual pornography can be addressed by existing protections. However, the legal responses are piecemeal and not always appropriate to address the loss of privacy. Whether the existing laws are adequate responses to non-consensual pornography is discussed in Part Four.

The following scenarios represent archetypal cases of non-consensual pornography as discussed in Part One:

1. The victim is recorded without their consent or knowledge in a private place.
2. The victim records an intimate image of himself or herself and does not consent to publication.
3. The victim consents his or her sex-partner recording his or her intimate image.
4. The victim is recorded while engaged in an intimate activity in a public place.

Each of these scenarios involve interference with the individual's ability to exercise control over who has access their intimate images. However, with no general protection of privacy in the law these cases do not share a clear remedy. Civil and criminal law provide redress to the victim who is recorded without their consent or knowledge in a private place. However, a legal response to the other harmful interferences is less certain. Assessing the application of existing law to these facts

[101] It is beyond the scope of this dissertation to consider all of the wider considerations that may preclude a remedy. However, it should be noted that in cases involving the publication of images online there may be difficulty in identifying the wrongdoer and jurisdictional issues. See Law Commission, above n 6, at ch 7.

highlights tensions and difficulties in applying the law to privacy cases with different degrees of consent and public information.[102]

I. Civil Law

Several legal remedies which, are not explicitly framed as 'privacy law', address wrongful publication. These remedies include copyright, defamation and breach of confidence. Civil law privacy actions include complaints under the Privacy Act and an action for breach of privacy or intrusion into seclusion.

1. Copyright

Copyright infringement protects copyrighted works from being copied or distributed.[103] Copyright attaches automatically to "original works" that are "artistic works" and films.[104] Photographs of models; commercial pornography; even private snapshots and home movies attract copyright protection. Copyright is infringed when the work is copied, issued to the public, shown in public or communicated to the public without a license.[105] Copying is defined expressly to include digital copies in "any medium and by any means".[106] Publishing intimate images on the Internet to open blogs and pornography sites is "making them available to the public by means of an electronic retrieval system" and is restricted by the Copyright Act 1994.[107]

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[102] The next stage of consent/public spectrum would be to consider the recognition of privacy in non-intimate acts in public places. There is one case where a photographer was found guilty of offensive behaviour for recording non-intimate images of girls, who knew they could be seen but did not know they were being recorded (*R v Rowe* [2005] 2 NZLR 833). However, a later court held there was no privacy breach on similar facts (David Clarkson "Errol Standeven has conviction quashed for taking photos of women exercising" (16 April 2015) Stuff.co.nz <http://www.stuff.co.nz/national/crime/67796226/errol-standeven-has-conviction-quashed-for-taking-photos-of-women-exercising>).

[103] Copyright Act 1994, s 29.

[104] Copyright Act 1994, s 14.

[105] Copyright Act 1994, s 16.

[106] Copyright Act 1994, s 2.

[107] Copyright Act 1994, ss 10, 16.

The non-consensual pornography victim does not have to be identifiable in the image to assert copyright.[108] However, the ability to bring a claim will depend on whether they are the copyright owner.[109] The copyright owner in the first instance is the author of the work.[110] The author is the person who creates the works, that is, the person who takes the photograph.[111] In many cases this may not be the photo subject.

The victims of non-consensual pornography involving selfies may be able to use copyright infringement where someone has copied and shared their images online. In cases where the sex-partner records the image he or she would own the copyright. This means that in many "revenge porn" cases the victim will not have standing to bring a copyright action. Where the images are hacked from the sex-partner's accounts the victim would have to rely on them to bring a claim, or arrange for the assignment of the copyright, before he or she could get the images removed using copyright law.

Section 105 of the Act specifically recognises some privacy in images created by others. It allows persons, who (for private and domestic purposes) commission the taking of a photograph or the making of a film and do not own the copyright to prevent copies being issued, shown or communicated to the public.[112] This section only applies to images that are commissioned therefore it is likely to be restricted to cases where the party taking the photograph is a professional photographer. It will not assist a victim of non-consensual pornography, who simply consented to his or her partner recording images on their phone or webcam.

Upon finding copyright infringement the copyright owner can obtain relief in the form of an injunction, damages, accounts or otherwise.[113] The copyright owner can

[108] Compare defamation and tort claims discussed below.
[109] Copyright Act 1994, s 120.
[110] Copyright Act 1994, s 21.
[111] Copyright Act 1994, s 5.
[112] Copyright Act 1994, s 105.
[113] Copyright Act 1994, s 120.

also seek an order for "delivery up" of the images and disposal of infringing copies.[114] There is a defence available, which precludes an award of damages, where the defendant did not know, and had no reason to believe, that copyright existed in the work.[115]

The ability to obtain an injunction or the ordering up of the photographs are key remedies for the protecting the victim's privacy, but the law of copyright is not intended to protect the privacy interests of the image subject. Copyright infringement developed to protect economic interests and the commerciality of creative expression. It is not concerned with harm to the dignity of the image subject.[116]

Under the Copyright Act copyright infringers may face criminal liability for distributing an image that the person knows is an infringing copy of copyright work to an extent that affects prejudicially the copyright owner.[117] This is quite a serious offence with a possible penalty of a fine up to $10,000 or imprisonment for a term not exceeding 5 years.[118] Whether emotional distress caused to victims of non-consensual pornography would be considered a prejudicial effect for the purposes of the Act is unclear. The Copyright Act does recognise moral rights of the author, but is concerned with protecting artists' reputations, not the dignity or sensitivity of the author.[119]

Copyright exists in intimate images taken with or without consent, even in public places. Copyright provides a broad protection of the owner's right to control who may use and publish their images. Non-consensual pornography victims, who own the copyright in their images, can use copyright protection.

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[114] Copyright Act 1994, ss 122 134.
[115] Copyright Act 1994, s 121.
[116] Rebecca Tushnet "How Many Wrongs Make a Copyright?" (2014) 98 Minn L Rev 2346 at 2352.
[117] Copyright Act 1994, s 131(1)(f).
[118] Copyright Act 1994, s 131(5).
[119] Copyright Act 1994, pt 4.

2. Defamation

Defamation occurs where a "defamatory statement" is made "about the plaintiff" and "published by the defendant".[120] There is no universal test for what a defamatory statement is.[121] The publication of an individual's intimate images on the internet is capable of, and likely to, lower the victim in the estimation of right-thinking members of society generally; cause them to be shunned; and expose them to ridicule.[122] This is the case especially, for women who live in conservative communities or for victims employed in the areas of health, education or politics, where employers and other members in the community are sensitive to claims of immoral behaviour.[123]

A characteristic of online publications is that they occur out of context. The reasonable man viewing images online will believe that the victim consented to sharing the image and that the victim has no care for privacy or existing social norms.[124] Therefore, while an image of someone may be true as to their appearance and involvement in certain activities it is unlikely that the defence of truth could be used in a non-consensual pornography case.[125]

The defamatory statement must be "about the plaintiff". The test is whether a reasonable person would reasonably believe that the statement refers to the plaintiff.[126] This element requires that the victim is identifiable from the image or connected information. The identification of the victim in the statement is what

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120 Stephen Todd and others, above n 26, at [16.2].

121 Stephen Todd and others, above n 26.

122 *Berkoff v Burchill* [1996] 4 All ER 1008; Stephen Todd and others, above n 26, at [16.3.01]. The House of Lords found that being called pornstars from doctored images of actors in pornographic photos was defamatory (*Charleston v News Group Newspapers Ltd* [1995] 2 AC 65).

123 Citron, above n 20.

124 Such a meaning may not be found where the intimate images is published on a "revenge porn" website. As non-consensual pornography becomes more prevalent and people are made aware of the wrongs committed on the Internet, it may be arguable that the reasonable person would not assume images are uploaded with consent. See Stephen Todd and others, above n 26, at [16.3.03]; Citron, above n 4, at 352

125 Truth is a defence to defamation, see Stephen Todd and others, above n 26, at [16.9]. But, this will not always be the case as digital images can be modified, see *Charleston v News Group Newspapers Ltd*, above n 122.

126 Stephen Todd and others, above n 26, at [16.4.01].

allows others to judge that person, thus causing the harm to their reputation. In non-consensual pornography cases, identifying details of the victim are often posted alongside intimate images in an attempt to further humiliate and harm the victim. When intimate images are published without identifiable features victims will not be able to bring a claim even though they may still feel humiliated.[127]

The defamation action focuses on the defamatory nature of each publication. Defamation may serve as deterrence against further publication, as everyone who shares or re-publishes the image is potentially liable.[128] Where the plaintiff consents to the particular publication of the statement the defendant has a complete defence. However, consent must be clear and convincing and directed toward publication in that way.[129] The consensual sharing of an image with one person will not be considered consent for that person to publish the image online.

A common law action in defamation results in compensatory damages to reflect reputational damage. In awarding damages the court will assess the defendant's behaviour, the nature of the defamatory statement and the extent of publication. Posting intimate images without consent especially, where the harm to the image subject is clear is likely to support a higher award of damages. The extent of publication, such as sending the images specifically to family members and employers or posting the images to "revenge porn" websites will also affect an award of damages.

An injunction may be available if there are clear and compelling reasons.[130] The individuals control over information is lost upon non-consensual publication. An award of damages and a successful judgment go someway to compensating the victim, but cannot reverse the individual's lost privacy. The interest of freedom of expression in posting intimate images of others without their consent is very low,

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[127] *L v G*, above n 83.

[128] *APN New Zealand Ltd v Simunovich* [2010] 1 NZLR 315 (SC) at [24] per Tipping and Wilson JJ.

[129] Stephen Todd and others, above n 26, at [16.12].

[130] At [16.6.02].

therefore non-consensual pornography cases may cross the threshold for a compelling reason for an injunction.

Defamation will cover non-consensual pornography cases where the victim, who suffers reputational harm, is identifiable and has not consented to that particular type or occurrence of publication. In bringing an action for defamatory statements posted to social media sites victims may face difficulty identifying the defendant.[131]

3. Breach of Confidence

Breach of confidence in New Zealand is quite a specfic action.[132] Breach of confidence covers the disclosure of confidential information.[133] The equitable action is established where there is "information of a confidential nature"; "circumstances importing an obligation of confidence" and "unauthorised use" of that information.[134] This cause of action is often used to protect trade secrets and traditional confidential relationships, such as protecting medical records.[135]

Intimate images will usually be information of a confidential nature, however, the image must also be recorded or shared in the appropriate circumstances. The element of "circumstances importing an obligation of confidence" requires there to be a pre-existing relationship between the parties.[136] English case authority extended the action to cover the disclosure where the nature of the information imports the obligation of confidence.[137] Notably this extension of the law occurred instead of the

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131 It is beyond the scope of this dissertation to assess the difficulties surrounding the liability of ISPs and website hosts. For an introduction of the issue see Stephen Todd and others, above n 26, at [16.5.02].

132 *Hosking v Runting*, above n 5, at [46], [109] per Gault P and Blanchard J; Stephen Todd and others, above n 26, at [14.0.52].

133 *Hosking v Runting*, above n 5, at [25] per Gault P and Blanchard J.

134 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 cited in *Hosking v Runting*, above n 5, at [26] and [46] per Gault P and Blanchard J.

135 At [24] per Gault P and Blanchard J; Stephen Todd and others, above n 26, at [14.5].

136 See *Hosking v Runting*, above n 5, at [49].

137 *Peck v The United Kingdom* [2003] EMLR 15 per Judge Pellonpaa.

development of a specific privacy action.[138] In New Zealand the breach of confidence action has not been extended in the same way. Instead the courts chose to develop a separate privacy tort.[139]

It is likely that breach of confidence would protect images recorded within the confines of a personal relationship. The relationship creates an understanding that intimate images, recorded or shared within the relationship, will not be published without the express permission of the other person.[140] Sharing the images outside of the relationship by publishing them online would be unauthorised use of the information.[141] A breach of confidence action may not be successful where images are recorded without the victim knowing they are recorded, especially if they are in a public place, or where the images have been hacked.

The requirement of "circumstances giving rise to an obligation of confidence" mean that breach of confidence will not cover images recorded in a public place.[142] Likewise, it will not cover the further publication of images that are already publicly available as there are no longer circumstances of confidence to protect. Breach of confidence is an equitable action so the victim will need 'clean hands' and 'no delay' upon discovering the publication.

4. Privacy Act 1993

Any person can lodge a complaint with the Privacy Commissioner or Ombudsman under the Privacy Act 1993 where an "agency" has breached an "information privacy principle" and the individual suffers harm.[143] The Privacy Commissioner can

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138 *Hosking v Runting*, above n 5, at [27]–[40] per Gault P and Blanchard J.

139 At [7].

140 *Stephens v Avery* [1988] Ch 449.

141 Whether merely holding onto the images after the relationship ended would be "unauthorised use" is unclear.

142 *Hosking v Runting*, above n 5, at [14] per Gault P and Blanchard J; Law Commission, above n 4, at 45–46.

143 Privacy Act 1993, ss 2, 6, 66, 67.

investigate the complaint and attempt to secure a settlement between the parties.[144] In cases of non-consensual pornography mediation is an effective remedy if the offender can be convinced to take down and destroy the intimate images.[145] If no settlement is reached, civil proceedings before the Human Rights Review Tribunal may be taken by the Director of Human Rights Proceedings for a declaration, an order restraining the conduct complained of, and damages.[146]

The Privacy Act gives individuals control over almost any information about them in informational transactions with others.[147] The Act applies to "personal information" which is defined as "information about an identifiable individual". Information is that which "informs, instructs, tells or makes aware".[148] A person's image tells others about their physical characteristics and often makes others aware of the individual's activities and whereabouts.[149]

An individual must be identifiable from the information.[150] It may be enough to have distinctive clothing, birthmarks or surroundings in the image.[151] Because there is no requirement that complaints are made by the person the information is about, intimate images that are clearly about an individual but, in which the individual is not identifiable, may still be investigated under the Privacy Act.[152]

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144 Privacy Act, ss 70–74.

145 Once established under the Harmful Digital Communications Act 2015, the Approved Agency will deal with complaints of harm resulting from the publication of intimate images on the internet. The Approved Agency has been given similar abilities to the Privacy Commissioner to deal specifically with digital communications (Harmful Digital Communications Act 2015, ss 4, 7, 8.).

146 Privacy Act, ss 77, 82–85. For discussion of the process under the Privacy Act 1993 see *Hosking*, above n 5, at [99].

147 Law Commission, above n 6, at 81.; Although, the Court of Appeal has suggested in obiter that "personal information" should be qualified by other considerations under the Privacy Act (*Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA) at [23] per Tipping J), this approach has not been followed by the Privacy Commissioner's Office or the Human Rights Review Tribunal (Paul Roth *Privacy law and practice* (LexisNexis, NZ, 2007) at [PVA2.12].).

148 *Commissioner of Police v Ombudsman* [1998] 1 NZLR 385 (CA).

149 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [101] per McGrath J. ("It is well recognised that, in general, photographic images may contain significantly more information than textual descriptions.")

150 Privacy Act, s 2.

151 *Proceedings Commissioner v Commissioner of Police* [2000] NZLR 277 Compare *L v G*, above n 83, at 246.

152 Law Commission, above n 14, at 20.

Recording intimate images without consent will most clearly breach Principle 4. Non-consensual pornography is "unfair" and "[intrudes] to an unreasonable extent upon the personal affairs of the individual concerned".[153] Non-consensual pornography cases involving publication will breach Principle 11, which prohibits the disclosure of information, unless the agency reasonably believes an exception is met.[154] Disclosure is allowed if it is one of the purposes in connection with which the information was obtained. It would be unreasonable to believe that within the context of a private relationship intimate images were obtained for the purpose of wider disclosure without consent.[155] It is also arguable that keeping intimate images after a relationship ends is a breach of Principle 9, for holding personal information for longer than is required.[156]

For an actionable interference with privacy the agency's interference must cause loss to the individual; adversely affect the interests of the individual; or result in significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.[157] The harms of non-consensual pornography are likely to amount to significant humiliation and significant injury to feelings.[158]

Recent amendments have limited the Privacy Act's exceptions for publicly available information and personal information relating to domestic affairs. They no longer

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153 Privacy Act, s 6.; Principle 4 applies to "collected" information. "Collect" excludes unsolicited information (Privacy Act, s 2). This may exclude images recorded coincidentally by surveillance cameras or sent to an agency without a request (*Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA) at [25]–[26] per Tipping J.). The Privacy Commissioner's Office and the Human Rights Review Tribunal consider acts of surveillance to be the collection of information (Roth, above n 147, at [PVA6.6(c)].); The New Zealand Law Commission recommended deleting the definition of "collect" to clarify the scope of the Privacy Act (Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, 2010) at [3.85]–[3.102]).

154 Privacy Act, s 6.

155 Citron, above n 14, at 346. See discussion of Updating Privacy Law Concepts for Better Protection in Part 4.

156 Holding the images after the end of the relationship for the purpose of uploading them to a revenge porn website or to harass the ex-partner would breach Principle 9 because it is not a lawful purpose (Privacy Act, s 6.). In deciding how long information should be kept the purpose for which it was obtained and the specific circumstances are relevant considerations (*EFG v Commissioner of Police* [2006] NZHRRT 48 at [77]–[79]).

157 Privacy Act, s 66.

158 See discussion of Privacy Harm in Part 1; The standard of significant humiliation is "a higher threshold than ordinary stress and humiliation" (*H v Westpac Trust* (unreported, Decision No 28/99, CRT 15/99, 20 October 1999)); For a discussion of significant humiliation including for the non-consensual taking of photos see Paul Roth *Privacy law and practice* (looseleaf ed, LexisNexis) at [PVA66.7].

apply where the use and disclosure of personal information is "unfair" and would be "highly offensive to an ordinary reasonable person".[159] Non-consensual pornography will now be covered by the information privacy principles where the images are recorded and shared within a private relationship or are already available online.[160]

The Privacy Act does not apply to news activites by the news media.[161] However, news media may be held accountable using the privacy torts or the criminal law. Broadcasters are also statutorily required to consider privacy and are subject to their own complaints process. [162] The focus of a legal response to non-consensual pornography should be the individuals with internet access, who are recording and sharing intimate images without any regulation or accountability.[163]

5. Breach of Privacy Tort

The New Zealand breach privacy tort for disclosure of private facts was formulated by the majority of New Zealand Court of Appeal *Hosking v Runting*.[164] The elements of the breach of privacy tort as observed in the majority judgment are:[165]

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

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[159] Privacy Act, ss 6, 56; Harmful Digital Communications Act 2015 ss 40, 41.

[160] Sam Grover "Closing the revenge porn loopholes" (9 July 2015) Office of the Privacy Commissioner <https://privacy.org.nz/blog/hdca/>.

[161] Privacy Act, s 2.

[162] Law Commission, above n 6, at 83; Broadcasting Act 1989 s 4(1)(c).

[163] Solove, above n 28, at 58.

[164] *Hosking v Runting*, above n 5. Numerous decisions of the lower courts had recognised breaches of privacy prior to the Court of Appeal's decision in *Hosking v Runting*. However, the Court of Appeal in *Hosking* was the first appellate court to recognise the possibility of a cause of action for the wrongful publication of private facts. Although, its discussion of the tort's elements are obiter, it is credited with establishing the breach of privacy tort in New Zealand.

[165] At [117] per Gault P and Blanchard J.

The tort applies to "private facts", as shorthand for "facts in respect of which there is a reasonable expectation of privacy".[166] What constitutes a "private fact" is uncertain. Facts can by their nature or by the circumstances in which they appear be "private facts".[167] There is also some uncertainty about when one assesses whether there is a reasonable expectation of privacy.[168] Furthermore, the personal culpability of the individual may also limit a reasonable expectation of privacy; celebrities who put themselves into the spotlight may not be able to rely on privacy to the same extent as private citizens.[169]

Non-consensual pornography cases involve "intimate images", which are images that individuals reasonably expect to exercise control over in accordance with social norms.[170] Thus, the element of "private facts" should theoretically be met in all cases of non-consensual pornography. However, in practice the courts have considered consent and the extent to which facts occur in public when interpreting a "reasonable expectation of privacy".[171] Therefore, where the victim consents to taking the image and sharing it, or the image is recorded in a public place, they are unlikely to satisfy the first element of "private facts".[172]

The second element limits the protection of private facts to cases where publication would be "highly offensive to an objective reasonable person". This element ensures that the tort will not be used to address trivial matters and protects the competing interest in the right to freedom of expression.[173] Because of the social expectation that

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166 At [119] per Gault P and Blanchard J.

167 *Rogers v TVNZ Ltd*, above n 149, at [91] per McGrath J; *Hosking v Runting*, above n 5, at [119] per Gault P and Blanchard J; Law Commission, above n 9, at 59.

168 See discussion of Updating Privacy Law Concepts for Better Protection in Part 4.

169 *Andrews v TVNZ* [2009] 1 NZLR 220 (HC) at [42]–[47].

170 See above discussion of Non-consensual Pornography in Part 2.

171 See discussion of Updating Privacy Law Concepts for Better Protection in Part 4.

172 Non-consensual publication is not an ingredient of the tort of breach of privacy. The breach of privacy action failed because the harm resulted from not being told about the publication, not the publication itself. *Andrews v TVNZ*, above n 169, at [70].

173 The necessity of the including this element is doubted in light of international trends. *Rogers v TVNZ Ltd,* above n 149, at [25] per Elias CJ.

intimate images will be kept concealed, non-consensual publication is objectively offensive. Where intimate images are widely published online and the victim experiences serious emotional distress the "highly offensive" standard of the second element is likely to be met.[174]

The tort is concerned with "publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned".[175] Therefore, the victim must be identifiable in the publication by "those who know them but do not know the facts".[176] This requirement may preclude a remedy in cases of non-consensual pornography where the image is of a zoomed-in body part, however the victim may still feel violated by the publication of their image.[177]

The competing interest in the right to freedom of expression is also reflected in the defence of legitimate public concern.[178] To determine whether the matter is of legitimate public concern reference should be made to the "community norms, values and standards" relevant in the individual case.[179] However, upholding freedom of expression in commercial publication should not justify "a substantial adverse impact on the personal dignity and autonomy of individuals".[180] There will be very few cases in which there is a legitimate public concern in the non-consensual publication of an individual's intimate images.

A successful action for breach of privacy or intrusion into seclusion will primarily result in an award of general damages to compensate the victim's emotional harm.[181] An injunction to prevent continuing or recurring harm may be available in some

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174 *Hosking v Runting*, above n 5 at [125] per Gault P and Blanchard J; *C v Holland*, above n 18.
175 Law Commission, above n 4, at 22; *Hosking v Runting*, above n 5, at [126].
176 *Andrews v TVNZ*, above n 169, at [52], [60].
177 *L v G*, above n 83.
178 *Hosking v Runting*, above n 5, at [132]–[135] per Gault P and Blanchard J.
179 At [135] per Gault P and Blanchard J.
180 At [258] per Tipping J.
181 At [149] per Gault P and Blanchard J.; See generally Stephen Todd and others, above n 26, at [25.2].

circumstances.[182] An injunction to restrain publication is limited to where there is "compelling evidence of most highly offensive intended publicising [sic] of private information and little legitimate public concern in the information".[183]

6. Intrusion into Seclusion Tort

In a case involving the non-consensual recording of an intimate image, Whata J held that an invasion of privacy action existed for recording intimate images, without publicity or the prospect of publicity.[184] The elements of the tort of intrusion into seclusion are:[185]

1. An intentional and unauthorised intrusion;
2. Into seclusion (namely intimate personal activity, space or affairs);
3. Involving infringement of a reasonable expectation of privacy; and
4. That is highly offensive to a reasonable person.

"Intrusion" requires an unauthorised affirmative act, but is not restricted to physically invading an individual's private space.[186] Recording someone without their permission is an unauthorised intrusion. However, the tort does not cover incidental recordings by surveillance or recording and receiving images with consent.[187]

"Seclusion" is described as "intimate personal activity, space or affairs".[188] This suggests that the tort is not limited physical privacy and may apply to intimate acts in public places. However, the third element imports the requirement of "a reasonable

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[182] Stephen Todd and others, above n 26, at [25.4].

[183] At [149], [158] per Gault P and Blanchard J, [258] per Tipping J.

[184] *C v Holland*, above n 18, at [5] per Whata J.; The Court of Appeal in *Hosking v Runting* expressly left open the possibility for the development of other privacy torts in New Zealand noting that the development of technology may mean existing remedies will not apply. *Hosking v Runting*, above n 5, at [118] per Gault P and Blanchard J.

[185] *C v Holland*, above n 18, at [94] per Whata J.

[186] At [16] per Whata J.

[187] At [16], [95] per Whata J.

[188] At [94] per Whata J.

expectation of privacy". With respect to the same requirement for breach of privacy, "a reasonable expectation of privacy" in a public place was considered to only exist, if at all, in exceptional circumstances.[189] Thus, the application of intrusion into seclusion in cases involving images shared with consent or recorded in public, is likely to suffer the same limitations as the breach of privacy tort.

Whether an intrusion is "highly offensive to a reasonable person" depends upon social conventions or expectations in the circumstances.[190] The criminal offence for intimate covert filming indicates that recording intimate images without consent is highly offensive to the reasonable New Zealander.[191] Simply recording someone in certain circumstances is recognised as a wrong against that person.[192] Even without publication, the individual's interest in controlling access to their intimate image is infringed.[193] Victims are likely to be distressed by the offender's access to their intimate image.

In non-consensual pornography cases the tort of intrusion into seclusion will cover the gap left by the publication requirement of the breach of privacy tort. Furthermore, it provides an avenue for civil damages or an injunction for acts, which breach the covert filming provisions in the Crimes Act 1961.[194]

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[189] *Hosking v Runting,* above n 5, at [164] per Gault P and Blanchard J; *Andrews v TVNZ,* above n 169, at [31]–[39].; "Seclusion" is interpreted in the United States as a private place leading to the dismissal of cases where the plaintiff was in public (Solove, above n 28, at 59.).

[190] *C v Holland*, above n 18, at [16] per Whata J.

[191] Crimes Act 1961, s 216H.

[192] *C v Holland*, above n 18, at [65], [90].

[193] The inquiry of this dissertation does not extend to the mere viewing of others engaged in intimate activities. Such actions are also inconsistent with individual's interests in the right to be let alone and may be addressed by the offence of peeping and peering (Summary Offences Act 1981, s 30). However, protection against the non-consensual recording and publication of intimate images has become a much more serious interference due to the fact that digital images can be infinitely kept, shared and viewed out of context.

[194] Mr Holland was convicted of making an intimate visual recording under s 216H of the Crimes Act 1961 and ordered to pay reparations of $1000; the victim then took a civil action seeking compensation for the invasion of her privacy. *C v Holland*, above n 18.

II. Criminal law

Under the criminal law the police can prosecute for "giving offensive material to a person" under the Harassment Act 1997,[195] or for making or publishing an "intimate visual recordings" under Part 9A of the Crimes Act 1961.[196] The general approach of the criminal law toward wrongful publication was to reflect the covert filming offences.[197] Accordingly, the offences for wrongful publication under the Crimes Act were limited to situations where the images had been recorded or obtained without consent.

The new criminal offence introduced by the Harmful Digital Communications Act 2015 extends the protection of intimate visual recordings to those recorded with consent. However, the effectiveness of the offence in punishing acts of non-consensual pornography is limited by the requirement that the images are published with the intention of causing harm to the victim.

1. Harassment

Harassment is both a civil action and a criminal offence found in the Harassment Act 1997. Harassment occurs where a person engages in a pattern of behaviour or a continuing act directed against another person that is a "specified act".[198] It is a criminal offence where the harasser intends, or knows that it is likely in the circumstances, for the harassment to cause the other person to fear for his or her safety, or the safety of any person that he or she is in a family relationship with.[199]

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[195] Harassment Act 1997, s 8.

[196] Crimes Act 1961, ss 216G, 216H, 216J.

[197] Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3* (NZLC R113, 2010) at 98.

[198] Harassment Act 1997, s 3.

[199] Harassment Act 1997, s 8.

The Harassment Act was amended this year to cover invasions of privacy by posting offensive material to the internet.[200] "Specified act" now includes "giving offensive material to a person by placing the material in any electronic media where it is likely to be seen by, or brought to the attention of, that person".[201] It is likely that "offensive material" will include images of an intimate nature in cases of non-consensual pornography. Not only would the reasonable New Zealander consider the posting of intimate images without consent an offensive publication, but this is the type of behaviour Parliament sought to cover by extending the scope of the Harassment Act.[202]

To establish harassment the posting of intimate images must occur more than once or continue to have effect over a protracted period. The Act specifically states that for the posting of offensive material this element may be met by the material remaining on the electronic media.[203] The length of time required for a 'protracted period' will be significant as to whether this provision will be an effective response to non-consensual pornography. The harm of non-consensual pornography is exacerbated by longer and broader exposure of the images online.

The Harassment Act provides a limited protection that recognises the privacy interest in being let alone from repeated or continual intrusions into your life that cause a person to fear for their safety. Under the Harassment Act victims of harassment can apply for a restraining order if the behaviour of the harasser causes them distress. This will be useful in cases where victims are sent threatening messages or followed after their images have been released online.[204]

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200 Harmful Digital Communications Act 2015, s 33(2).

201 Harassment Act 1997, s 4.

202 The Act was amended by the Harmful Digital Communications Act 2015, which was enacted by Parliament in light of discussions around the need to provide legal responses for acts of cyber-bullying including revenge porn, see *(25 June 2015) 706 NZPD 4830*; *(30 June 2015) 706 NZPD 4850*.

203 Harassment Act 1997, ss 3(1), 3(3), 3(4).

204 Harassment Act 1997, s 16.

The purpose of the Harassment Act is to address acts that may appear innocent or trivial when viewed in isolation, but may amount to harassment when viewed in context.[205] It deals with actions such as loitering near someone or making contact with someone.[206] Conversely, it is clear that a single act of non-consensual pornography can cause grave harm to victims. The relegation of a non-consensual pornography case to a form of sustained harassment does not give appropriate recognition to the seriousness of the act of publishing intimate images without consent.

The Harassment Act aims to make the most serious types of harassment criminal offences.[207] The mens rea requirements of intention reflects the seriousness of actions that are undertaken for the purpose of causing harm to others. The harm from non-consensual pornography comes from the exposure of the images to the public which destroys the victims interest in privacy. This can occur when the defendant recklessly or carelessly publishes the photos. Therefore the criminal provisions of the Harassment Act would not be able to address all instances of non-consensual pornography.

2. Intimate Covert Filming

In 2004 the Law Commission argued that a new criminal law was required to respond to the development of technology enabling the recording of intimate images without the knowledge or consent of the image subject.[208] Parliament agreed and since 2006, under Part 9A of the Crimes Act, it is an offence to make, possess, and publish intimate visual recordings.[209] Intimate visual recording is exhaustively defined as:[210]

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[205] Harassment Act 1997 s 6(1)(a).
[206] Harassment Act 1997, s 4.
[207] Harassment Act 1997, s 6(1)(b).
[208] Law Commission, above n 14.
[209] Crimes Act 1961, ss 216H, 216I, 216J.
[210] Crimes Act 1961, s 216G.

> (1) In sections 216H to 216N, intimate visual recording means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device without the knowledge or consent of the person who is the subject of the recording, and the recording is of—
> (a) a person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and that person is—
> (i) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or
> (ii) engaged in an intimate sexual activity; or
> (iii) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
> (b) a person's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—
> (i) from beneath or under a person's clothing; or
> (ii) through a person's outer clothing in circumstances where it is unreasonable to do so.

An offender may be criminally prosecuted and liable to up to three years imprisonment for intentionally or recklessly making intimate visual recordings,[211] and where they know or are reckless as to whether the image is an intimate visual recording, for possessing the image for the purpose of publishing[212] and for publishing the image.[213]

The offences apply to intimate visual recordings "made in any medium using any device" so include digital recordings and publication online.[214] However, the scope of the remedy under the Crimes Act is restricted to intimate images that are recorded without knowledge or consent in circumstances, which would reasonably be expected to provide privacy.[215] Because the specific definition of intimate image includes elements of locational privacy and consent this provision will only cover non-

[211] Crimes Act 1961, s 216H.
[212] Crimes Act 1961, s 216I.
[213] Crimes Act 1961, s 216J.
[214] Law Commission, above n 6, at 211.
[215] Crimes Act 1961, s 216G.

consensual pornography where the image subject is in a 'private' place and unaware that they are being recorded.[216]

Although the Crimes Act only applies to a narrow scope of non-consensual pornography cases it remains a comprehensive response to the invasion of privacy in those cases; each of the actions of recording, possessing and publishing the images is an offence. Importantly, under the Crimes Act the court may order the destruction of the recording and the forfeiture of the equipment used to in respect of the commission of the offence, such as a computer hard drive. Such orders help to prevent further publication and go some way to redressing the invasion of privacy by ensuring that the offender no longer has the images and equipment to re-offend.[217] It is also an offence for any person, who without reasonable excuse, knowingly possesses an intimate visual recording of another person.[218] This provision should deter others from saving copies of intimate visual recordings and help to remove the images from circulation.

Once images are published online it is very difficult to effect their complete removal. Also, the deterrent effect of these provisions depends upon the ability to identify the offenders. The criminal law potentially provides comprehensive protection for certain invasions of privacy, but will be difficult to enforce against annonymous, international internet users, who are copying, saving and further publicising intimate visual recordings. Even where a conviction under the criminal law is secured, it addresses the social wrong of the action, but only provides modest monetary redress for the victim. Sufficient monetary compensation may still have to be sought through a civil action.

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[216] Law Commission, above n 4, at 39; *L v G,* above n 83.

[217] Crimes Act 1961, s 216L.

[218] Crimes Act 1961, s 216I.

3. Harmful Digital Communications

From 3 July 2015 the Harmful Digital Communication Act 2015 (HDCA) made it a criminal offence in New Zealand to cause serious emotional distress by "posting digital communications".[219] The purpose of the Act is 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".[220] The scope of the offence is very broad, however the three harm requirements will limit the number of successful cases.[221]

"Digital communication" is defined as "any form of electronic communication".[222] The Act gives as examples any "text message, writing, photograph, picture, or recording".[223] A communication is posted when an individual "transfers, sends, posts, publishes, disseminates, or otherwise communicates".[224] The terms "posts, publishes, [and] disseminates" indicate that the Act is not restricted to a narrow interpretation of "communication" as the exchange of information between individuals, but will include unilaterally uploading content to websites and blogs.[225]

The offence is broader than existing actions for the wrongful publication of information as it does not require that the post is seen by others.[226] The offence expressly includes attempts to communicate.[227] A stricter publication requirement would undermine the intention of the Act to deter and prevent harmful

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219 Harmful Digital Communications Act 2015, ss 4, 22.

220 Harmful Digital Communications Act 2015, s 3.

221 Harmful Digital Communications Act 2015, s 22.

222 Harmful Digital Communications Act 2015, s 4.

223 Harmful Digital Communications Act 2015, s 4.

224 Harmful Digital Communications Act 2015, s 4.

225 The Court of Appeal considered that the breach of privacy tort was concerned with wide-spread publication: *Hosking v Runting*, above n 5, at [125].; Defamation requires publication to some person other than the plaintiff. It is accepted that publication on the internet is publication for the purposes of defamation. Stephen Todd and others *The law of torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [16.5.01, 16.5.02].

226 Harmful Digital Communications Act 2015, s 4.

227 Harmful Digital Communications Act 2015, s 4.

communications from occurring and would limit the Act's ability to provide a remedy for bullying where harmful communications are only sent to the victim.[228]

The HDCA applies to the posting of intimate images that are "intimate visual recordings".[229] The specific definition of "intimate visual recording" reflects the current understanding in New Zealand of images that should be protected by privacy. It includes images of naked body parts and "up-skirt filming", as well as, images of individuals engaged in certain activities.[230]

The specific definition of "intimate visual recording" is at odds with the otherwise broad definitions in the Act. While it has been extended to include recordings made with the knowledge or consent of the image subject, it still includes the locational requirement that an individual is "in a place which, in the circumstances, would reasonably be expected to provide privacy".[231] Thus, it is unlikely to include images recorded in public.[232] The exhaustive definition is inflexible and may impede the court's ability to respond to meritorious claims as social attitudes toward privacy change. Alternatively, it may be possible to bring intimate images within the terms "any information, whether truthful or untruthful, about the victim".[233] However, Parliament expressly included the extended definition of intimate visual recording to deal with the posting of intimate images.[234]

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228 Bullying can occur through a number of mediums some of which do not involve widespread publication such as by email, texts or phone messages, see Law Commission *The News Media Meets "New Media": Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27 2011) at 152.

229 Harmful Digital Communications Act 2015, s 4; Crimes Act 1961, s 216G.; See above footnote 210

230 Harmful Digital Communications Act 2015, s 4; Law Commission, above n 14, at 50.

231 "Upskirt filming" is contained in a separate paragraph of the definition. It is not limited to private places, but applies any place "where it is unreasonable" record the victim. It only covers the recording of specific body parts around or through clothing. Crimes Act 1961, s 216G.

232 See discussion of Updating Privacy Law Concepts for Better Protection in Part 4.

233 Harmful Digital Communications Act 2015, s 4.; Existing remedies using similar definitions include images. The Privacy Act applies to "any information about an individual" (Privacy Act 1993, s 2); Defamation covers false defamatory statements about an individual (Stephen Todd and others, above n 27, at [16.2, 16.9]).

234 Law Commission, above n 228, at 50, 163–164.

A person commits a offence by satisfying three harm requirements addressing the intention to cause harm, and the objective nature of the post and harm suffered by the victim.[235] Posts must be made with "the intention that it cause harm to a victim".[236] Revenge porn would clearly satisfy this element, however intimate images may also be recorded and shared for entertainment, public curiosity or gloating without intending that the image subject suffers serious emotional distress.[237] Intention to cause harm is a prohibitively high standard especially where the harm required is "serious emotional distress".[238]

The posting must also be objectively harmful.[239] To assess this element the court may consider that nature of the post (although intimate visual recordings are already specifically included by the Act), "the extent of circulation of the digital communication" and "the context in which it appears".[240] Although "[posting] a digital communication" does not require publication of the images to others, courts may be reluctant to find "serious emotional distress" where the images are not actually seen by others.

Non-consensual pornography involves interference with the individual's ability to control their intimate information and their right to be let alone. The individual's right to control information is lost when even one person has unauthorised access.

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[235] Harmful Digital Communications Act 2015, s 22(1).

[236] Harmful Digital Communications Act 2015, s 22(1)(a).

[237] Pub-goers who recorded and shared images of a couple having a late night affair in Christchurch most likely did not intend to cause the couple serious emotional distress. Hacked celebrity photos are often shared out of curiosity. The law should still address these acts where they result in harm to the individual. Mabbett, above n 21; Duke, above n 19.

[238] Harmful Digital Communications Act 2015, s 4.

[239] The posting must be of a kind that would "cause harm to an ordinary reasonable person in the position of the victim" (Harmful Digital Communications Act 2015, s 22(1)(b)).; The Act uses the standard of the English and Australian courts where the reasonable person must also possess a quality of ordinariness. The Australian High Court and the English Court of Appeal considered whether the dislcosure would be "highly offensive to a reasonable person of ordinary sensibilities" as a practical test for determining what is private: *The ABC v Lenah Game Meats Pty Ltd* [2001] HCA 6*3* at [42] per Gleeson CJ; *Campbell v Mirror Group Newspaper Ltd* [2003] 1 ALL ER 224 at [54].; The Court of Appeal in *Hosking* applied the standard of the "reasonable person" to determine whether publicity of private facts was high offensive. (*Hosking v Runting*, above n 5, at s 127.).

[240] Harmful Digital Communications Act 2015, ss 22(2)(e), 22(2)(g).

However, to meet the high standards of harm wide-spread publication will usually be necessary.

The tort of intrusion into seclusion and the right to be free from unreasonable search and seizure protect the right to be let alone even where there is no wider publication of facts. The objective harm-requirement recognises that a person's right to be let alone is not absolute. Although, some individuals may be more sensitive and still suffer harm because we must live together in communities our competing interests in privacy and expression must be assessed according to community standards.

The Law Commission found that "[d]amaging behaviour that occurs on the internet mirrors offline behaviours".[241] The previous legal remedies, developed in response to separate "offline behaviours" related to wrongful publication, had left gaps when applied in the digital context.[242] By its broad definitions the HDCA covers all online communications, but the criminal offence will only apply to cases which satisfy the strict harm requirements.[243]

The HDCA criminal offence extends the law's response to cases of non-consensual pornography to images recorded with consent. It addresses typical cases of revenge porn, but will still not cover images recorded in public. Despite its broad application, the HDCA will not protect the victims of the reckless or careless sharing of images, or intimate images shared for the purpose of entertainment or curiosity.

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[241] Law Commission, above n 228, at 152.

[242] At 195–197.

[243] At 152; Harmful Digital Communications Act 2015, s 22(1).

PART 4: ADEQUATE PROTECTION FOR NON-CONSENSUAL PORNOGRAPHY

This chapter begins by assessing what interests the existing legal responses are aimed at protecting. Non-consensual pornography is a form of privacy invasion involving the interference with an individual's ability to control their information. The adequacy of the existing legal remedies not only depends upon, whether the laws cover scenarios of non-consensual pornography, but also whether the provisions are specifically aimed at the essence of the harmful conduct.[244]

It then looks to see whether the civil or the criminal law are better suited to addressing cases of non-consensual pornography. The tort of breach of privacy and the criminal prohibition on publishing intimate visual recordings have the potential to provide comprehensive protection of the privacy interest in controlling information with respect to intimate images.

Finally, it discusses how the concepts used to consider privacy cases should be updated in light of the digital context in which many of our interactions take place.

1. Do the Existing Remedies Protect the Privacy Interest?

Analysing the adequacy of existing legal remedies this dissertation looks at two factors: whether the civil actions and criminal offences apply to scenarios of non-consensual pornography, and whether they are specifically aimed at the essence of the harmful conduct. The civil and criminal law both cover the non-consensual recording and publication of intimate images in some scenarios, but only a few laws are directed toward protecting individuals from humiliation and distress caused by invasions of their privacy interests.

[244] Law Commission, above n 197, at 72–73.

Copyright infringement responds to economic loss from the unlicensed publication of images an individual has authored. Copyright Act expressly provides for relief that is "available in respect of the infringement of any other property rights".[245] Copyright is directed toward the skill and labour of the author in creating the original work. Copyright law responds to the unlicensed use of copyright images to protect the economic value in creating original works, thereby promoting creativity and innovation.

Defamation addresses reputational harm, it provides relief for false statements published about the victim. A successful action in defamation expresses to the world that the information spread about the plaintiff was false and goes someway to remedying the damaged reputation. Non-consensual pornography will often result in damage to the victim's reputation. However, the publication of intimate images causes hurt and distress beyond reputational harm.[246] Defamation is about the lowering of an individual in the eyes of others, whereas invasions of privacy change how a person feels about himself or herself.[247]

Breach of confidence is limited to protecting the concealment of information communicated in confidential relationships.[248] There is clearly an overlap between protecting privacy and remedies for the publication of confidential information.[249] However, an action protecting information obtained in confidence will not protect all of the intimate and secret matters that deserve protection. To extend the established concept of confidence to accommodate the privacy interests beyond confidential information would confuse the existing law as it protects trade secrets and commercial documents.[250] Breach of confidence addresses the harm of that results

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[245] Copyright Act 1994, s 120.

[246] *Hosking v Runting*, above n 5, at [138] per Gault P and Blanchard J.

[247] Citron, above n 14, at 1820.

[248] Stephen Todd and others, above n 26, at [14.5].

[249] *Rogers v TVNZ Ltd*, above n 149, at [24].

[250] *Hosking v Runting*, above n 5, at [48]–[49] per Gault P and Blanchard J.; The Privacy Act does not apply to news activites by the news media (Privacy Act, s 2). But the focus of laws for non-consensual pornography is individuals with access to the internet, who are able to disseminate information on a wide scale without relying on mainstream media (Solove, above n 28, at 58.).

when trust is broken as in cases of revenge porn, but does not address the emotional distress, humiliation and fear that results from having one's intimate self exposed online.

The Privacy Act is directed toward promoting individuals' control of their personal information. The harm requirement for an actionable interference with privacy shows that the Act is aimed at the emotional distress caused to victims by invasions of privacy.[251] The Privacy Act information privacy principles set minimum standards for processing information: collection, storage, access, correction, holding, using and disclosing.[252] The Act is a mechanism by which individuals may assert control over information about themselves. It relies on individuals being aware of the information held by agencies about them and taking action to protect their own privacy interests.[253]

The breach of privacy tort addresses emotional harm from the highly offensive publicity of an individual's private facts. The tort provides victims with a remedy against any one who breaces their privacy by publicising their private facts. It gives individuals an avenue to assert control over the disclosure of their private facts. However, the requirement for publicity to be highly offensive limits the recognition of the privacy interest. The tort is directed to the ability of individual's to control wide-spread disclosure of their private facts.[254]

The intrusion into seclusion tort addresses the right to be let alone. It provides a remedy for highly offensive acts intruding into seclusion, in which indivduals have a reasonable expectation of privacy. It widens the protection of tort law by targeting the individual's ability more broadly to control access to themself.

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[251] Privacy Act 1993, s 66.
[252] Privacy Act, s 6.
[253] Law Commission, above n 6, at 59.
[254] *Hosking v Runting*, above n 5, at [125].

The Harassment Act is directed patterns of behaviour or continuing acts that are done to individuals. The Act specifies the failure to remove online images after a protracted period.[255] The Harassment Act protects the right to be let alone from the annoyance of others, but is aimed at an accumulation of less serious acts. Non-consensual pornography is a serious appropriation of control over one's public persona, enough to cause serious emotional harm and distress. It is not appropriately dealt with as simply an uncomfortable interference that deserves a response only once the images remain published for a protracted period.

The Crimes Act prohibitions address intentional or reckless interferences with the privacy interest of the right to be let alone. The Act goes further than the privacy torts by specifically prohibiting the possession of "intimate visual recordings".[256] The definition of "intimate visual recording" excludes images recorded with the knowledge or consent of the image subject.[257] Therefore, the Act does not recognise the interest individuals have in limiting the publication and possession of intimate images taken with their consent.

The Harmful Digital Communications Act (HDCA) addresses harmful online communications, including posts of "intimate visual recordings" taken with the image subject's consent.[258] It addresses privacy interests in both the right to be let alone and the ability to control the disclosure of information. The wide definition of "digital communication" covers communication between two individuals, as well as, website or blog posts and "posts a digital communication" expressly includes posts of intimate visual recordings.[259] The HDCA is intended to prevent harm caused to victims of cyber-bullying. Non-consensual pornography and the interference with an individual's privacy causing emotional distress is a type of bullying. While the HDCA broadly covers the right to be let alone from online bullying, the protection provided by the

[255] Harassment Act 1997 ss 3(4), 4
[256] Crimes Act 1961, s 216I.
[257] Crimes Act 1961, s 216G.
[258] Harmful Digital Communications Act 2015, s 4.
[259] Harmful Digital Communications Act 2015, s 4.

criminal offence is severelly constrained by very strict harm requirements.

2. Should the Civil or Criminal Law Respond to Acts of Non-consensual Pornography?

Since the existing law does not clearly respond to the common scenarios of non-consensual pornography (both in terms of strict legal applicability and conceptual underpinnings) the question becomes what is the best way to change the law to provide a response. First, we must decide whether Parliament or the courts are best placed to provide a legal solution to non-consensual pornography. Parliament can create new criminal offences or expand the scope of existing offences. Likewise, the courts may develop new torts or update existing causes of action. The following section, sets out how the courts should revise the concepts and principles underlying the law to reflect current social norms changed by the development of new technology. To conclude, Part 4 recommends that the civil complaints process under the Privacy Act (and within the next two years under the HDCA) is the most appropriate first response to interferences with privacy. However, in more serious cases, the criminal offences for covert filming and the privacy torts, with slight modification, can provide an appropriate legal response to non-consensual pornography.

The common law has an inherent ability to respond to proved wrongs by providing a cause of action for relief.[260] Privacy tort law developed in the United States of America with Warren and Brandeis' seminal article on the general need for privacy protection and the work of William Prosser, reducing the general recognition of privacy into the four separate torts.[261] New Zealand has since adopted two of the torts

[260] *L v G*, above n 83, at 242.

[261] Warren and Brandeis, above n 29; William L Prosser "Privacy" (1960) 48 CLR 383; *C v Holland*, above n 18, at [11].; For further discussion of the development of tort law in the USA, see: Solove, above n 2, at 58; Citron, above n 14, at 1824.

expressed by Prosser and left open the possibility of the development of further privacy actions.[262]

Tipping J in the Court of Appeal in *Hosking v Runting* wrote that in the face of rapidly changing technology the common law should develop to deal with the problems that have arisen.[263] The common law has the advantage of being able to adapt to swift changes in developing areas of law and gives courts the flexibility to respond to cases as they arise.[264]

Simply because a wrong results in non-pecuniary loss does not preclude a tortious response and judicial consideration of appropriate compensation.[265] Remedies of damages are intended to compensate the victim for damage, loss or injury suffered.[266] However, protecting privacy in the courts is costly and with the prospect of only small damages awards.[267]

The court in *Hosking v Runting* considered the development a remedy for interference with privacy was a shift away from the traditional focus of tort liability for reprehensible conduct.[268] The tort protection that developed, however, was far from a general recognition of the right to be free from interference with privacy. Privacy protection in tort has developed in response to the specific acts of publication and intrusion.[269] The "highly offensive" element of the torts focuses the inquiry on whether the invasion of privacy is sufficiently serious to warrant a remedy.[270]

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[262] *Hosking v Runting, above n 5,* at [7], [117], [118] per Gault P and Blanchard J; *C v* Holland, above n 18, at [93] per Whata J.

[263] *Hosking v Runting*, above n 5, at s 226.

[264] Law Commission, above n 197, at 90.

[265] *L v G*, above n 83, at 245.

[266] Harvey McGregor *McGregor on damages* (18th ed, Sweet & Maxwell, London, 2009) at 8.

[267] Law Commission, above n 14, at 22.

[268] *Hosking v Runting*, above n 5, at [2] per Gault P and Blanchard J.

[269] William Prosser refocused the protection of privacy in tort from a general right to be let alone to four more specific activities and the emotional, reputational, and proprietary injuries that they inflicted. Citron, above n 14, at 1822.

[270] *Hosking v Runting*, above n 5, at [125]–[128] per Gault P and Blanchard J.

Although now clearly established in New Zealand law, there was resistance to the development of a breach of privacy tort.[271] The boundaries of the privacy interest protected by the tort are still ill-defined and the application of the major elements in different cases is uncertain.[272]

The development of the tort in cases, which did not involve intuitively "private" facts,[273] and the cautionary approach of the courts in balancing privacy against the right to freedom of expression has resulted in the formation of an overly restricted tort.[274] The compounding elements of the tort set a "heavy burden" for the plaintiff.[275]

A remedy in tort appropriately reflects the need for flexibility to respond to technology and allows for a case-by-case analysis of private facts worthy of protection. The Law Commission recommended leaving the development of privacy protection to the courts.[276] However, the current interpretation of the torts is poorly adapted to wrongs committed in cyberspace.[277] The next section discusses how the court's use of the public/private distinction and consent needs to be updated to deal with invasions of privacy in non–consensual pornography cases.

A response from Parliament offers different advantages. Dealing with non-consensual pornography through the criminal law offers several benefits. The enactment of a criminal offence indicates parliamentary intent to protect a recognised right or

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271 *Hosking v Runting*, above n 5, at [25], [144] per Gault P and Blanchard J.

272 Law Commission, above n 197, at 89.; See Keith J's dissenting judgment against the recognition of the breach of privacy tort *Hosking v Runting [2005] 1 NZLR 1 (CA)*, above n 5, at [177] per Keith J.; The limits of the tort not yet set, the scope of the tort will have to be considered on a case-by-case fact, specific basis: *Rogers v TVNZ Ltd*, above n 150, at [23], [26] Elias CJ.

273 Cases considering the tort involved the disclosure of criminal convictions (At [78]); the appearance of a family tombstone in a film (At [80]); the publication of the psychiatric treatment of a public figure (At [81]); and photographs of a celebrity's children on a public street *Hosking v Runting*, above n 5, at [77]–[86].

274 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *Hosking v Runting*, above n 5, at [87], [130] per Gault P and Blanchard J.

275 *Andrews v TVNZ,* above n 169, at [99].

276 Law Commission, above n 197, at 91.

277 Solove, above n 28, at 58.

interest. Interference with such interests is not merely a wrong committed against another individual, but an affront to public conceptions of acceptable conduct.[278]

A criminal offence for invasion of privacy recognises that privacy is a form of control over information necessary to maintain one's dignity and autonomy, not a kind of property right.[279] The psychological harm experienced by victims of non-consensual pornography is more closely related to the kind of harm traditionally addressed by prosecution under the criminal law, rather than compensation from common law damages.[280]

Criminal offences do not only protect the individual's interest in privacy. They help to promote better respect for privacy in the community. For example, the Crimes Act offence prohibits "intentional or reckless" interference with privacy without requiring proof of harm. The focus is on the interference itself.[281] Although, criminal sanctions are only partially concerned with vindicating individuals' rights, they have a stronger deterrent effect on harmful behaviour than civil penalties.[282]

3. Updating Privacy Law Concepts for Better Protection

Courts have been unwilling to recognise general actions for the invasion of privacy so have applied restrictive elements to limit liability. The reluctance of the courts to provide broader protection to victims stems from the ethereal nature of the alleged harm,[283] the uncertain boundaries of what is actionable privacy and consideration of the competing interest in the right of freedom of expression.[284]

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[278] Anupam Chander, Lauren Gelman and Margaret Jane Radin *Securing privacy in the Internet age* (Stanford Law Books, Stanford, 2008) at 271; *C v Holland,* above n 18, at [89].

[279] Solove, above n 2, at 1112–1114, 1149.

[280] Citron and Franks, above n 12, at 347, 362–363.

[281] Law Commission, above n 6, at 61, 63.

[282] Citron and Franks, above n 9, at 349.

[283] Citron, above n 14, at 1825.

[284] For discussion of the recognition of privacy see Law Commission, above n 6, at 75.

To preclude trivial claims the tort of breach of privacy is limited to "private facts" in respect of which there is a "reasonable expectation of privacy".[285] The court's interpretation of this element bars recovery in some cases of non-consensual pornography because of the reliance on privacy concepts from the 20th Century.[286] Notably, the tort fails to provide a remedy where the matter is publicly known or the victim consents to being recorded.

A. Public/Private Distinction

The breach of privacy tort protects private facts. New Zealand Courts have cited, with approval, the test by the Australian High Court in *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199:[287]

> There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private…Certain kinds of information about a person… may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.

The public/private divide is a key assumption of the privacy framework in New Zealand.[288] The general rule is that matters which occur in public places are not private facts for which there is a reasonable expectation of privacy.[289] The image of an action undertaken in a public place has little privacy value because it is simply a record of what anyone in the area would have seen. Participating in societal life

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[285] The Court of Appeal held that the test for a reasonable expectation of privacy is a single test; if it is a fact in respect of which there is a reasonable expectation of privacy it is a private fact. *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 (CA) at [41]; *Andrews v TVNZ*, above n 169, at [27].

[286] Citron, above n 14, at 1809; Solove, above n 2, at 1151, 1152.

[287] *Hosking v Runting*, above n 5, at [119]; *Andrews v TVNZ*, above n 169, at [29].

[288] Law Commission, above n 6, at 42.

[289] *Hosking v Runting*, above n 5, at [119], [164]; *Andrews v TVNZ*, above n 169, at [31]–[39].

necessitates interactions with others and a certain degree of exposure.[290] The possibility that this rule may be qualified in exceptional circumstances has been left open.[291]

A strict test of private as opposed to public information reflects an understanding of privacy as meaning secrecy.[292] Privacy only exists in secrets which are concealed or hidden from the public; when secrets are disclosed the interest in privacy is lost.[293] However, the introduction of information technologies has exacerbated the confusion at the boundaries of what is private and what is public.[294] The concept of publicly available information needs to be readdressed in the digital age.[295]

Individuals often expect privacy even in public spaces.[296] We may reasonably expect to be seen and heard by those in the area, but that does not necessarily extend to an acceptance that our images will be permanently recorded and disclosed to an audience much larger than, and physically separated from, the context in which the action is undertaken. Publishing the image of a topless woman on a beach to the internet causes harm because the exposure of her body is of a different kind and scale to what she has consented to.[297]

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[290] The Broadcasting Standards Authority commented, "on a public street or in any public place, the plaintiff has no legal right to be let alone, and it is no invasion of privacy to follow him about and watch him there, not to take a photograph of him. Such an action amounts to nothing more than making a record not essentially different from a full written description of a public site which anyone would be free to see." *Re McAllister [1990]* NZAR 324.

[291] *Rogers v TVNZ Ltd*, above n 149, at [98]; Law Commission, above n 9, at 201.

[292] See discussion of Secrecy in Part 2.

[293] Solove, above n 2, at 1148–1151.

[294] Nissenbaum, above n 4, at 101–102.

[295] Law Commission, above n 6, at 157.

[296] Solove, above n 2, at 44 citing Nissenbaum "Protecting Privacy in the Information Age: The Problem of Privacy in Public" (1998) 17 Law & Phil 559.

[297] The Law Commission considered that in the case of topless sunbathing the image subject would not have a remedy for being photographed, but where the photograph was sold or uploaded on the internet a complaint to the Privacy Commissioner may be possible. Law Commission, above n 6, at 210.

Understanding private facts as information that is not public uses a 'spatial metaphor' to protect an area of privacy into which the State cannot intrude.[298] This metaphor is not apt to deal with privacy online; cyberspace is not a physical space.[299] The digital age also changes the focus of privacy protection because individuals need their privacy to be protected from interference by other individuals.[300]

Public and private information should not be divided in absolute terms. Individuals value selective disclosure and do not intend acts of disclosure to be limitless. The introduction of the Internet and online sharing now means that despite any such limited or selective intention information may be infinitely copied and shared.[301] The courts should assess reasonable expectations of privacy in context, recognising that disclosure is a question of degree.[302]

B. Consent

The law does not protect individuals from the consensual publication of their information.[303] By consenting to being recorded the individual accepts the risk that the recording could be seen by others.[304] The common law has adopted the element

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[298] The law protecting privacy developed initially with a focus on protecting the domestic sphere from invasion by the State. The State had the resources to enter people's homes and had an interest in investigating crimes and quashing political unrest, see Solove, above n 2, at 1131.

[299] At 1131.

[300] The Internet has reduced the costs of privacy invasions so that anyone with access to a computer or smart phone may find or share information about others. Yet the law has largely remained focused on protection from State invasions with the exclusion of the media and the focus on databases and unique identifiers in our central data protection legislation (Privacy Act 1993 ss 2, 6).

[301] Solove, above n 2, at 1108.

[302] Nissenbaum, above n 4, at 144.

[303] Consent is a defence to tort, see Stephen Todd and others, above n 26, at [1.3]; A complaint under the Privacy Act was rejected on the basis that an individual "cannot be humiliated by a practice of which he was aware". *Smits v Santa Fe Gold (unreported) Complaints Review Tribunal 12/99 (18 May 99)* at 6; Blanchard, Tipping and McGrath JJ found no reasonable expectation of privacy in an interview recorded for a criminal investigation with the consent of the subject where it must have been known the recording would be shown during the proceedings. Anderson J left open the possibility for a reasonable expectation of privacy in relation to other uses of the footage: *Rogers v TVNZ Ltd*, above n 149, at [48] per Blanchard J, [63] per Tipping J, [104] per McGrath J, [145] per Anderson J.; Recording and publishing intimate visual recordings under the Crimes Act is only an offence if done without the consent or knowledge of the individual. Crimes Act 1961, s 216G.

[304] Law Commission, above n 197, at 98.

of a reasonable expectation of privacy to delineate circumstances or facts, in respect of which the reasonable person does not consent to interference from others.[305]

The element allows the courts to assess the subjective desire of the individual to control information and whether the particular information is considered worthy of protection by society. A reasonable expectation of privacy arises out of the nature of the facts or the circumstances in which they are obtained.[306]

The concept of reasonable expectation of privacy helps the courts to consider what information ought to be within one's control.[307] However, consent is not binary.[308] Individuals may have a reasonable expectation of privacy in relation to certain uses of their information and may relinquish degrees of privacy by consensually disclosing the information to a particular audience or in a particular context.[309] Whether an individual has a reasonable expectation of privacy in information or activites must be decided contextually, with regard to contemporary societal norms for what interferences amount to a violation of privacy.[310] A more concretely defined conception than the "amorphous" element of reasonable expectations is undesirable in privacy law where the value afforded to privacy depends upon the culture and time in which the action occurs.[311]

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[305] Law Commission, above n 6, at 63.

[306] *Hosking v Runting*, above n 5, at [249]. Consent can be express or implied; The Law Commission noted the issue of whether consent can be revoked once information is publicly available, see Law Commission, above n 6, at 202.; For a discussion of the complexity surrounding the "Right to be Forgotten", see: John Edwards "A right to be forgotten for New Zealand?" (1 July 2014) Office of the Privacy Commissioner <https://www.privacy.org.nz/blog/right-to-be-forgotten/>.

[307] Law Commission, above n 6, at 63.; Assuming as discussed in the previous chapters that the core of privacy is the ability to control access to information about oneself.

[308] Citron and Franks, above n 9, at 356; Solove, above n 2, at 1109.

[309] The Information Privacy Principle 1 of the Privacy Act clearly recognises that permitting an entity to use information in one context does not confer consent to use it in another context without the subject's permission Privacy Act 1993, s 6; For further explanation of consent as limited access, see Citron and Franks, above n 9, at 348.

[310] *Hosking v Runting*, above n 5, at [250] per Tipping J; Nissenbaum, above n 4, at 233–234.

[311] *Hosking v Runting*, above n 5, at [249] per Tipping J.

A reasonable expectation of privacy at the time information is recorded may differ from expectations when facts are published.[312] Three members of the Supreme Court in *Rogers v Television New Zealand Ltd* considered the reasonable expectation of privacy of the subject of a recorded police interview at the time of filming.[313] Elias CJ, in *Rogers* observed that Canadian and British authorities assess a reasonable expectation of privacy at the time of publication, and held that the time for an assessment of reasonable expectation of privacy was not yet settled in New Zealand.[314]

A later assessment focuses on the impact of the particular publication and remains flexible enough to allow individuals to develop a reasonable expectation of privacy with respect to information. Underlying such an approach is the idea that expectations of privacy depend upon the social and cultural context. The publication of information, which was once not considered private, may become harmful as social norms change.

4. Recommendation

It is important in cases of non-consensual pornography that a quick and efficient means of redress is available. The victim's privacy continues to be interfered with until the images are taken down and destroyed. The longer intimate images remain online the more likely they are to be seen and copied, increasing the harm caused to the victim.

The ability to cheaply secure a quick response to privacy interference is problematic under the civil law torts and criminal offences. Bringing a civil action in the courts is expensive and the prospects of damages for privacy breaches are low. Criminal

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312 *Andrews v TVNZ*, above n 169, at [30] per Allan J.

313 *Rogers v TVNZ Ltd [2007] NZSC 91*, above n 149 at [48] per Blanchard J, [63] per Tipping J, [104] and [105] per McGrath J.

314 At [26]; O'Regan and Panckhurst JJ in the Court of Appeal, and Allan J in the High Court in earlier decisions found, as a matter of principle and with respect to the elements of the tort as expressed in *Hosking v Runting*, that a reasonable expection of privacy is assessed as the time of publication *Television New Zealand Ltd v Rogers*, above n 285, at [51]–[54]; *Andrews v TVNZ*, above n 169, at [30].

prosecution depends upon the identification of the defendant, the requisite jurisdiction and the decision of the police to prosecute.

Under the Privacy Act and (within the next two years) the Harmful Digital Communications Act complaints can be made to statutory bodies, which have been created specifically to deal with complaints about interference with privacy and harmful digital communications. The complaints process is a cheap way to address privacy breaches, however the process can be slow and without guaranteed results.

In theory, the mandate of the Privacy Commissioner and Approved Agency to investigate complaints and attempt settlement between the parties will provide the most appropriate response to dealing with the interference of privacy interests in most cases. Defendants can be made aware of the seriousness of interferring with an individual's privacy and the grave harms experienced by the victims of non-consensual pornography. They can, then, be given the opportunity to apologise, delete the images and promise not repeat the interference in the future. Although highly optimistic, such a result would have the benefit of educating people about harmful online practices and may go someway to addressing the hurt and fear of repetition experienced by the victim.

The use of the civil complaints process as a first response to interference with privacy aims to reduce the impact the interference has on the victim. It is important in non-consensual pornography cases that attempts are made to have all copies of intimate images returned or destroyed and that published images are taken down off websites. In serious cases the criminal law should respond by prosecuting the offender, who interfered with the privacy of the victim. If the harm experienced by the victim cannot be properly addressed in reparations, the victim should also have recourse to a civil action in tort against the offender.

A criminal law response to non-consensual pornography, which directly addresses the privacy value in initimate images, demonstrates social disapproval of privacy invasion and deters further invasions of privacy. Parliament should modify the existing

criminal offences for intimate visual recordings under Part 9A of the Crimes Act 1961 to respond to non-consensual pornography. The Crimes Act sets out three prohibitions covering interferences with individual's privacy interests in intimate visual recordings. The prohibition on "intentionally or recklessly making an intimate visual recording" protects the individual's privacy in the "right to be let alone" even where the intimate image is not published.[315] The prohibitions on "knowingly or recklessly possessing for the purpose of publishing" and "knowingly or recklessly publishing" protect the individual's privacy in the right to control their intimate image.[316]

The offence needs to be modified in light of current understandings of privacy to adequately respond to non-consensual pornography cases. The condition "without the consent of the person who is the subject of the recording" will have to be inserted into the provisions of the offence. Listing specific body parts and actions for an image to be an "intimate visual recording" is not desirable, but will address the currect privacy concerns, until that definition no longer reflects the social understanding of what is intimate.[317]

The specific definition of "intimate visual recording" needs to be extended to reflect that individuals may consent to limited disclosure of their intimate image and may reasonably expect privacy in public.[318] Parliament already extended the definition to include images recorded with consent in the Harmful Digital Communications Act 2015:[319]

> [A] visual recording… that is made in any medium using any device *with or without* the knowledge or consent of the individual who is the subject of the recording, and that is of–

[315] Crimes Act 1961, s 216H; See above discussion of What is Privacy in Part 2.
[316] Crimes Act 1961, ss 216I, 216J.
[317] See above discussion of "intimate image"
[318] Crimes Act 1961, s 216G; See the section above at 210
[319] Harmful Digital Communications Act 2015, s 4.

Intimate visual recordings, which are not "upskirt filming", must be of "a person who is *in a place*, which in the circumstances, would reasonably be expected to provide privacy, and that person is–". This reference to a physical location reflects the practice of considering private information as "information that is not public". Instead, the definition could simply refer to "a person who has a reasonable expectation of privacy, and that person is–".

The "reasonable expectation of privacy" test takes into account the individual's desire for privacy and the competing interests of other members of society. The reference to physical space in defining privacy is an anachronism in the digital age. A person who streams themself dancing naked in front of their webcam may be in the privacy of their home, but have no reasonable expectation of privacy. A person at the beach whose togs accidentally fall down should reasonably expect that others would not be permitted to record their naked body as they cover themselves back up.

The Crimes Act offences are preferred over the Harmful Digital Communication Act's criminal offence because they are directly concerned with intimate images and privacy protection. The lower mens rea requirements of recklessness and knowledge are more suitable to address the wrong of interference with privacy. Not every interference with privacy will deserve criminal liability. However, when recording or publishing intimate visual recordings it is enough that the offender knows they are likely to cause harm. A higher standard is not required because the nature of the images will make it clear that acting without the consent of the image subject is an interference with their privacy and may cause them harm. A lower standard than intention, also ensures that the prohibition applies where images are uploaded for entertainment or as a joke. The defintion of "publishes" is already broad enough to cover digital media. It includes: "displays", "sends" or "distributes" by any means,

"conveys by electronic medium" and "stores electronically in a way that is accessible by any other person or persons".[320]

In comparison the Harmful Digital Communication Act is framed much more broadly. The Act will cover almost all possible digital communications and is not limited to harm caused by interference with privacy interests.[321] The specific focus of the Act is serious emotional harm that results from receiving or becoming aware of digital communications, one example is an intimate visual recording. "Posts a digital communication" is defined with two limbs: "any information, whether truthful or untruthful, about the victim;" or "an intimate visual recording of another individual".[322]

To limit the extent of criminal liability created by the offence three strict harm requirements must be satisfied. Because the Harmful Digital Communication Act applies to almost all digital communications, the first element of the offence requires an intention to cause harm. The high standard of mens rea is required to prevent unduly restricting online communication. However, such a high standard of mens rea is unnecessary in relation to intimate visual recordings. The nature of intimate visual recordings is that non-consensual publication will cause harm to the image subject, regardless of the intention of the offender. Therefore, in relation to intimate visual recordings this requirement only serves to limit the cases of non-consensual pornography that can be dealt with under the Act. It would not be possible to alter the elements of the offence, as they apply to intimate visual recordings, because of the way they have been included in the interpretation of "posts a digital communication".

Where the victim's rights are not sufficiently vindicated or the harm is not sufficiently addressed under the criminal law, an individual may seek recovery in the civil courts.

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320 Crimes Act 1961, s 216J(2).

321 See above discussion of the Harmful Digital Communications Act in Part 3.

322 Harmful Digital Communications Act 2015, s 4.

The tort of breach of privacy can be used in cases of non-consensual publication or threatened publication of intimate images, and the intrusion into seclusion tort can be used for the recording of intimate images without consent.

Complaints under the privacy torts promote the privacy value in giving individuals control over their private facts and protecting the right to be let alone in seclusion. Nevertheless, victims of non-consensual pornography are left without a remedy where they consent to the recording or sharing of the image, or are recorded in a public place. The same torts may provide a remedy in cases of non-consensual pornography if the court revises how it interprets "reasonable expectation of privacy".[323]

The privacy tort is the closest legal response to a comprehensive and general protection of privacy interests under our law. It provides an individual with a remedy where private facts are given publicity that is highly offensive.[324] However, the Court of Appeal in *Hosking* stated that the tortious action it recognised was not to be understood as a general protection and only applies where publicity is highly offensive.[325] As it exists now, the tort gives individuals a limited privacy right against the world at large.

In developing the tort of privacy, the courts have the opportunity to provide a general privacy protection for the wrongful publication of private facts. A remedy would be available upon proof that an individual's private facts were published without their consent. The restriction of the tort to proper cases of "private facts" would be enough to preclude trivial claims and unreasonable limitations of freedom of expression. The court considers community norms and standards when assessing whether the victim has a reasonable expectation of privacy in the facts.[326] Where "private facts" are published without permission the victim's interest in controlling that information is lost, and in most cases they will experience emotional harm and loss of dignity. There

[323] See discussion of Updating Privacy Law Concepts for Better Protection in Part 4.
[324] *Hosking v Runting*, above n 5, at [117], [119].
[325] At [45], [125].
[326] At [125].

will be very few cases of legitimate public concern in publishing private facts without the consent of the individual, where the publication is truly humiliating or distressing.

CONCLUSION

The law is a tool capable of redefining and regulating social practices. In response to the advancement of technology, which enables the recording and sharing of intimate images online, the law must provide better capacity for individuals to exercise control over tangible expressions of their private information, such as intimate images. The law should respond to activities that interfere with recognised values and cause individuals to suffer harm.

The law recognises the privacy value in the right to be let alone and to control information about oneself. A combination of legal responses exists to cover the non-consensual pornography scenarios analysed in this dissertation. However, they are not all directed toward protecting privacy interests and some are inappropriate given the serious emotional harm caused by non-consensual pornography. There is potential under the current law to provide broader protection of privacy, but the use of old concepts relating to consent and the public nature of information reduce the efficacy of those remedies.

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