

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

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The role of technology in intimate partner violence is becoming increasingly common. Intimate partner cyber harassment is a subset of "digital domestic violence", whereby partners and ex-partners use technology to stalk and harass their victims. This article examines intimate partner cyber harassment, discussing the nature of the behaviour, its prevalence in New Zealand and the damaging impact it has on its victims. The focus, however, is on New Zealand's legislative response. The conclusion reached is that despite the recent introduction of the Harmful Digital Communications Act 2015 and the review of both the Harassment Act 1997 and the Domestic Violence Act 1995, protections for victims of cyber harassment in the context of intimate partner violence remain ineffective. The current legislation fails to fully appreciate the complex issue and protections for victims lie behind procedural barriers. This article recommends that amending existing legislation is the most desirable solution as it enables pre-existing protections to be utilised to more effectively apply to and thus protect victims of intimate partner cyber harassment.

I INTRODUCTION

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

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Levels of domestic violence in New Zealand are staggeringly high. Intimate partner cyber harassment represents a new form of domestic violence made possible by new technology and our increasing reliance on it. Further, as technology is being used in the formation and development of relationships and personal boundaries, it is important that intimate partner cyber harassment does not become normalised. Due to the complex and harmful nature of the issue, New Zealand's legislative regime must adequately protect victims.

This article directly examines the effectiveness of New Zealand's legislation in protecting victims of intimate partner cyber harassment and ultimately concludes that more needs to be done. While the prevention of intimate partner cyber harassment requires wider societal changes, this discussion will focus on New Zealand's legislative response to protecting the victims. Behaviour constituting intimate partner cyber harassment is considered within the social and legal context of both intimate partner violence and cyber harassment. The need for protection is shown by highlighting the complex nature of the issue and its tendency to be overlooked and minimised. To conclude, this article makes suggestions for a suite of legislative changes to ensure victims are more effectively protected.

II THE NATURE OF THE PROBLEM

A The Behaviour

Behaviour amounting to intimate partner cyber harassment is extremely diverse. Harassment methods often depend on the technology or means available to the offender, as harassers predominately use technologies already in use of either themselves or the victim. Intimate partner cyber harassment can consist of behaviours such as constant abusive text messages and voice mails, gathering and using personal information about the victim and monitoring a victim's computer usage.¹ An example of intimate partner cyber harassment comes from a California case whereby a stalker activated the GPS tracker on a cell phone and hid it in the victim's car.² The stalker was able to determine the whereabouts of the victim at any given time. Such behaviour is one example of many, varying ways in which offenders use technology to harass their victims.

To qualify as intimate partner cyber harassment, the behaviour must satisfy two distinct elements. First, it must occur within the context of an intimate partnership. Second, the behaviour must be perpetrated through the use of technology. In order to more comprehensively understand the nature of the problem, both elements must be analysed. The elements do not equate to two distinct issues however and should ultimately be assessed in conjunction.

1 Laurence Miller "Stalking: Patterns, motives, and intervention strategies" (2012) 17 *Aggression and Violent Behavior* 495 at 501.

2 Cynthia Fraser and others "The New Age of Stalking: Technological Implications for Stalking" (2010) 61(4) *Juv & Fam Ct J* 39 at 45.

It is important to note that intimate partner cyber harassment is a subset of a wider category of digital domestic violence, a phenomenon that is unfortunately becoming increasingly common.³ Digital domestic violence can include other behaviours that do not qualify as intimate partner cyber harassment such as revenge porn and posting information on social media to humiliate or shame a victim. While such behaviours are equally deserving of a response, they fall outside the scope of this article. They do not entail stalking or harassment behaviours, which will be defined in the following discussion.

Throughout the literature, the behaviour is interchangeably referred to as intimate partner cyber stalking or intimate partner cyber harassment. The term intimate partner cyber harassment will be used in this discussion. While stalking behaviours are included within the ambit of the issue, intimate partner cyber harassment is a more inclusive definition. It ensures behaviours outside the narrow understanding of stalking are addressed. Further, it enables the issue to be more effectively located in the legislation, as a specific offence of stalking does not exist in New Zealand.

1 The intimate partner violence element

Intimate partner harassment entails stalking or harassing behaviour directed towards a current or former intimate partner. For the purpose of this discussion an intimate partnership is narrowly construed and refers to a spouse or partner (for example, a boyfriend or girlfriend).⁴ An intimate partnership does therefore not include any children, other family members or persons simply sharing a household, unlike the concept of "domestic relationship" under the Domestic Violence Act 1995.⁵

Intimate partner stalking is the most common form of stalking. A United States study shows that former or current partners perpetrate more than of 60 per cent of stalking incidents.⁶ It is chronic as opposed to acute. In other words, it is persistent and long term in nature.⁷ While literature on intimate partner stalking in New Zealand is scarce, a statistical study in the United States demonstrates that it lasts on average just over two years which is double the average duration of stranger stalking.⁸

3 Andrew King-Ries "Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?" (2011) 20(2) *Texas Journal of Women and the Law* 131 at 133–134.

4 Pauline Gulliver and Janet Fanslow *Family Violence Indicators: Can national administrative data sets be used to measure trends in family violence in New Zealand?* (Families Commission, Research Report 3/13, December 2013) at 70.

5 At 16.

6 Cindy Southworth and others *A High-Tech Twist on Abuse: Technology, Intimate Partner Stalking and Advocacy* (Violence Against Women Online Resources, June 2005) at 3.

7 Lauren Bennett and others "Describing Intimate Partner Stalking Over Time: An Effort to Inform Victim-Centered Service Provision" (2011) 26 *Journal of Interpersonal Violence* 3428 at 3432.

8 At 3432; and Fraser and others, above n 2, at 41.

Intimate partner harassment is a form of intimate partner violence. Four distinct types of intimate partner violence have been identified by Michael P Johnson in *A Typology of Violence: intimate terrorism, violent resistance, situational couples violence and mutual violent control*.⁹ Intimate partner violence in this article will refer to "intimate terrorism". Intimate terrorism is characterised by coercive control: a term introduced to develop understandings of intimate partner violence as more than just a fight.¹⁰ It involves a cycle or pattern in which the abuser utilises psychological intimidation, often paired with physical victimisation to create dependence, isolation and a climate of fear.¹¹ This form most closely resembles the common understanding of intimate partner violence. While the other forms of intimate partner violence involve aggressive behaviour, self-defence and violence, only intimate terrorism is typified by coercive control. Accordingly, behaviours constituting intimate partner cyber harassment are behaviours that play into the abusive cycle and exacerbate coercive control. It is unsurprising then that, in a relationship where intimate terrorism is present, harassment behaviours tend to occur alongside other forms of abuse.¹²

2 *The cyber harassment element*

In order to be defined as intimate partner harassment, the conduct must not only occur within an intimate partnership, it must also be facilitated by technology. Accordingly, intimate partner cyber harassment entails behaviours that qualify as intimate partner harassment (as above) and are perpetrated or facilitated by technology.¹³ Intimate partner cyber harassment is an extension of an existing pattern of behaviour in society, rather than an entirely new phenomenon. As Ellison and Akdeniz assert, "While the Internet tends to produce extreme versions of problems, it rarely produces genuinely new ones."¹⁴ Stalkers are simply employing new methods to instil fear and assert control over their victims.

Technology is an attractive tool for harassers for a multitude of reasons. It is a readily available and relatively inexpensive way to harass and control a victim.¹⁵ The increasing reliance on

9 Michael P Johnson *A Typology of Domestic Violence: Intimate terrorism, violent resistance, and situational couple violence* (University Press of New England, Boston, 2008) at 7.

10 Evan Stark "Coercive Control" in Nancy Lombard and Lesley McMillan (eds) *Violence Against Woman: Current Theory and Practice in Domestic Abuse, Sexual Violation, and Exploitation* (Jessica Kingsley Publishers, London, 2013) 17 at 17.

11 Cynthia Southworth and others "Intimate Partner Violence, Technology, and Stalking" (2007) 13 *Violence Against Women* 842 at 843.

12 Bennett and others, above n 7, at 3429.

13 Miller, above n 1, at 501.

14 Louise Ellison and Yaman Akdeniz "Cyber-stalking: the Regulation of Harassment on the Internet" [1998] *Crim L Rev* 29 at 29 (special issue on "Crime, Criminal Justice and the Internet").

15 Fraser and others, above n 2, at 41.

technology, coupled with its speed ensures stalkers are more easily able to access the victim.¹⁶ Further, it increases the likelihood that a stalker will avoid detection, apprehension and ultimately prosecution.

While both the technologies and methods employed can vary, two main forms of technology are most frequently utilised. These are new communication technologies and technologies of surveillance.

The term "communication technologies" refers to technology employed by harassers in order to repeatedly contact a victim against their wishes. Such behaviour can be in the form of excessive text messages, phone calls, voice mails, emails and social media messages.¹⁷ Often the harassment involves a combination of many, if not all, of these technologies. The content is predominately abusive and threatening.¹⁸ The content, coupled with repetition, has the effect of intimidating the victim and making them fearful. While motives vary from case to case, new communication technologies are often employed as a means with which to harass, punish and control the victim.¹⁹ A study of college students' perceptions of intimate partner cyber harassment in the United States found constant unwanted contact to be a form of intimate terrorism.²⁰ One student in particular noted:²¹

... it's ... a really big intimidation thing ... I'm always in your inbox or your Facebook or whatever, telling you things or messaging you or texting you or whatever it might be ... It's another way to control people, too.

Surveillance technologies on the other hand are technologies used by harassers to track and monitor a victim's whereabouts and actions. To gain access to a victim's whereabouts, location technologies found on most mobile phones, GPS devices and hidden cameras are most commonly used.²² Additionally, spyware and keystroke software can monitor and survey a victim's computer usage.²³ An example of surveillance technology stalking appears in an Illinois case, where a spyware attachment was installed onto a victim's computer simply through the victim opening a link sent to

16 King-Ries, above n 3, at 137.

17 Fraser and others, above n 2, at 42.

18 Ellison and Akdeniz, above n 14, at 30.

19 Miller, above n 1, at 501.

20 Lisa A Melander "College Students' Perceptions of Intimate Partner Cyber Harassment" (2010) 13 *Cyberpsychology, Behavior, and Social Networking* 263 at 265.

21 At 265.

22 Fraser and others, above n 2, at 44.

23 At 45.

her email address.²⁴ The spyware enabled the stalker, her ex-partner, to track and monitor her computer usage. This case speaks to the fundamental aspect of coercive control.

B The Prevalence of Intimate Partner Cyber Harassment

As research on intimate partner cyber harassment is in its infancy, statistics on its prevalence are scarce.²⁵ Furthermore, due to its personal nature it is chronically under-reported. It is also a complex issue, which can take a multitude of different forms often proving problematic to detect.²⁶ Information about its prevalence will likely gravely underestimate the reality, significantly contributing to the "dark figure of crime".²⁷ Conclusions therefore must be drawn from United States data as well as New Zealand statistics on both intimate partner violence and use of technology.

Intimate partner violence is overwhelmingly prevalent in New Zealand. Between 2000 and 2010 the number of reported incidents of intimate partner violence were higher in New Zealand than any other OECD country.²⁸ As at 2015, 55 per cent of New Zealand women reported facing intimate partner violence at least once in their lifetime.²⁹ The Law Commission's ministerial briefing paper, addressing harmful digital communications outlined a number of factors that suggest harassment via technology is also a significant problem. In one survey it was found that five per cent of 20–29 year olds and seven per cent of 15–19 year olds had received texts containing threatening or harassing content within the past year.³⁰ Further, the use of technology is increasing at extreme rates. Over 90 per cent of New Zealanders between the age of 15 and 49 own and regularly use mobile phones. In 2011, 1.9 million New Zealanders had active Internet connections on their mobile phones. It therefore becomes obvious that in a culture with such a prevalence of both intimate partner violence and technology use, intimate partner cyber harassment will be a significant issue.

The demographic most vulnerable to intimate partner cyber harassment is young females. First, while both intimate partner violence and cyber harassment are gender-neutral crimes, statistics clearly show that females are more likely to be victimised. The National Violence Against Women Survey

24 At 45.

25 King-Ries, above n 3, at 137.

26 At 137.

27 Stephanie Fohring "Putting a Face on the Dark Figure: Describing victims who don't report crime" (2014) 17(4) *Temida* 3 at 4.

28 Denise Wilson and others "Becoming Better Helpers: rethinking language to move beyond simplistic responses to women experiencing intimate partner violence" (2015) 11 *Policy Quarterly* 25 at 26.

29 New Zealand Family Violence Clearinghouse "Data Summaries 2015: Snapshot" (2015) <<https://nzfvc.org.nz>>.

30 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at 33.

in the United States found that 78 per cent of stalking victims are female and 87 per cent of offenders are male.³¹ Such a conclusion is consistent with the fact that violence against women is the most common form of intimate partner violence.³² Second, the use of technology among the millennial generation is extensive. In New Zealand, in 2014, approximately 90 per cent of young people ages 20–24 were on Facebook.³³ More frequent exposure to, and reliance on technology amongst young adults leads to technology being incorporated into intimate relationships at a young age. Through pervasive use of technology in adolescent relationships, controlling and monitoring behaviour is normalised.³⁴ Intimate partner cyber harassment is therefore a serious issue that will intensify over time, meaning that effective protections are required now more than ever.

C The Harm

The impacts of enduring intimate partner harassment are significant emotionally, psychologically and often physically. Continual harassment, especially post separation, contributes to feelings of hopelessness, humiliation, fear and distrust.³⁵ Often, such feelings will lead to a diagnosable mental illness. Research shows that, when stalking variables are introduced as predictors of depression and post traumatic stress disorder (PTSD), physical violence variables are no longer significant.³⁶ In other words, intimate partner cyber harassment is demonstrably a strong and unique predictor of both depression and PTSD even in the absence of physical violence. Statistics show that up to 85 per cent of victims of intimate partner violence in the form of stalking develop PTSD.³⁷ This is higher than in women with histories of other criminal victimisation including sexual violence.³⁸ Further, the PTSD suffered by these victims is chronic, with symptoms persisting for longer than one year.³⁹ As harassment is a repetitive offence, each specified act has the potential to trigger a victim into a crisis

31 Southworth and others, above n 6, at 3.

32 Loretta J Stalans and Arthur J Lurigio "Responding to Domestic Violence Against Women" (1995) 41 *Crime and Delinquency* 387 at 389.

33 Grant Osborne "Facebook NZ Demographics and Insights 2014" (10 September 2014) First Digital <www.firstdigital.co.nz>.

34 King-Ries, above n 3, at 155.

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

36 At 649.

37 At 649.

38 At 649.

39 At 648.

state, which may develop into hyper vigilance and a chronic state of crisis.⁴⁰ Other well-documented, distressing effects include suicidal thoughts and tendencies, substance abuse, lowered sense of self-worth, diminished physical health, social withdrawal and an increased sense of isolation.⁴¹

Evidence of the effects of cyber harassment is scarcer. However among the studies conducted there is consensus that the damaging consequences of cyber and offline harassment are similar.⁴² Intrusive, threatening and persistent behaviours are still experienced. Studies conducted in the United States show this similarly leads to a significantly deteriorated mental well-being among victims compared to non-victims.⁴³

While the impacts of intimate partner cyber harassment are clearly enough to warrant protection on their own, the link to physical violence is important. It is widely acknowledged that intimate partner harassment is identified as an extremely significant risk factor for severe violence or homicide.⁴⁴ Of women murdered by intimate partners or former partners, 75 per cent were stalked preceding the femicide.⁴⁵ It is important to recognise that the statistics may vary somewhat in relation to cyber, as opposed to physical, harassment. There are perpetrators of cyber harassment who would not harass others in the non-virtual world.⁴⁶ Further, physical separation exists between the offender and the victim. Such separation may decrease the likelihood of femicide, compared to physical stalking. However, as has been previously noted, cyber harassment is but one tool used by an offender. Accordingly, the risk of physical violence is still immensely important.

Protections to ensure the safety of the victim from current and future behaviours from the offender are necessary. The legislation therefore must take the issue seriously and provide protections sufficient to avoid, or at the very least mitigate, these severe emotional, psychological and physical harms.

40 Emily Spence-Diehl "Stalking and Technology: The Double-Edged Sword" (2003) 22 *Journal of Technology in Human Services* 5 at 14.

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

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

43 At 61.

44 Mechanic, Weaver and Resick, above n 35, at 636.

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

46 Drebing and others, above n 42, at 61.

III THE NEED FOR CHANGE

A The Unique Challenges Posed by Intimate Partner Cyber Harassment

As the preceding discussion demonstrates, intimate partner cyber harassment is a unique form of stalking or harassment. Any effective legislative regime must appreciate the unique challenges it poses.

First, it occurs within the context of a current or previous intimate partnership. Accordingly, a victim's personal knowledge of the perpetrator, coupled with relationship history, heightens feelings of fear and intimidation: the basis of criminal harassment.⁴⁷ Behaviour that may not objectively appear to induce fear may subjectively do so to the victim due to vulnerabilities arising from previous patterns of abuse. The perpetrator has intimate knowledge of the victim, enabling more intrusive harassment.⁴⁸ For example, the perpetrator may have knowledge of the victim's cyber security details, patterns of technology use, vulnerabilities and close friends and loved ones. Second, the element of technology enables a stalker to be omnipresent. Despite physical separation, a stalker is still able to harass and maintain control. Communication and control is no longer limited by time or distance. It can penetrate all aspects of the victim's life. Stalkers are able to quickly and effectively monitor their partner or former partner with little risk of detection.⁴⁹

B Overlooked and Minimised

The dangerous and complex nature of intimate partner cyber harassment is often minimised. It has also been a long-standing and ingrained phenomenon to treat intimate partner violence with indifference. Historically, it was treated "as an intractable interpersonal conflict unsuited for police attention and inappropriate for prosecution and substantive punishment".⁵⁰ While this is now changing, this perspective contributed to a long-standing belief that intimate partner violence against women should be kept out of the public eye.⁵¹ Further, United States literature suggests that stalking is viewed with ambivalence by a large portion of society.⁵² It has even been suggested that "some stalking victims state a wish for their stalker to physically attack them, in order that they be taken

47 Jennifer Lynn Truman "Examining Intimate Partner Stalking and Use of Technology in Stalking Victimization" (PhD Philosophy, University of Central Florida, 2009) at 3.

48 At 12.

49 King-Ries, above n 3, at 133.

50 Jeffrey Fagan *The Criminalization of Domestic Violence: Promises and Limits* (US Department of Justice, January 1996) at 8.

51 Stalans and Lurigio, above n 32, at 389.

52 Brian H Spitzberg and William R Cupach "What mad pursuit? Obsessive relational intrusion and stalking related phenomena" (2003) 8 *Aggression and Violent Behaviour* 345 at 346.

seriously".⁵³ It can be said that intimate partner cyber harassment in particular is viewed with indifference due to the "cultural constructions of romantic and passionate love".⁵⁴ Such a construct portrays obsession and mad pursuit in the name of love as heroic and amorous. Stalking and harassment have therefore been located "Somewhere at the nebulous nexus of privacy and possessiveness, courtship and criminality [and] intrusion and intimacy".⁵⁵ Finally, as noted earlier, digital domestic violence is becoming increasingly prevalent in adolescent relationships.⁵⁶ Adults tend to minimise, or at least misunderstand "young love" or "puppy love", which can lead to intimate partner cyber harassment being overlooked.⁵⁷

In recent parliamentary documents surrounding the Harmful Digital Communications Act 2015 (HDCA) there is virtually no discussion of intimate partner cyber harassment. In 2012 the Law Commission released a ministerial briefing paper titled "Harmful Digital Communications: The adequacy of the current sanctions and remedies" in which cyber-bullying appears to be the focus of harmful digital communications.⁵⁸ Cyber-bullying is given a narrow meaning: "intentionally harmful communication which occur[s] within the context of adolescent relationships".⁵⁹ Harmful digital communication has a much wider meaning. It is defined in the paper as, "the spectrum of behaviours involving the use of digital technology to intentionally threaten, humiliate, denigrate, harass, stigmatise or otherwise cause harm to another person".⁶⁰ Intimate partner cyber harassment not only qualifies as, but in some ways typifies, harmful digital communication. The issue however was left out of the discussion. When explaining harmful digital communications, the Law Commission touched on specific issues and case studies. These include posting explicit sexual content, revenge porn, "cat-fishing" (creating a fake social media profile to lure unknowing victims), mob-like behaviour and cyber-bullying.⁶¹ Intimate partner cyber harassment was overlooked. The oversight can be somewhat attributed to the social and political context of the time. The "Roast-busters" scandal had just taken place, in which male secondary-school students uploaded filmed footage of young

53 LP Sheridan and T Grant "Is cyberstalking different?" (2007) 13(6) *Psychology, Crime & Law* 627 at 636–637.

54 Spitzberg and Cupach, above n 52, at 346.

55 At 345.

56 King-Ries, above n 3, at 160.

57 At 160.

58 Law Commission, above n 30, at 21.

59 At 25.

60 At 31.

61 At 37.

intoxicated females being sexually assaulted to a Facebook page.⁶² Peoples' attention was subsequently focussed on publicly posted, sexual and offensive content. Due to the private and personal nature of intimate partner violence, media coverage is extremely limited, unless physical violence or homicide is involved. With little media attention, the issue was not at the forefront of political thinking. While addressing these shocking, contemporaneous events was necessary, focussing on such a narrow manifestation of harmful digital communications overlooks the important issue of intimate partner cyber harassment.

Politicians' concepts of harmful digital communications was even narrower than those of the Law Commission. Throughout parliamentary debates the Harmful Digital Communications Bill was often referred to as the "cyber-bullying Bill". Although a few politicians understood the wider implications of harmful digital communications, the expression was predominately used in terms of non-intimate relationships between adolescents and schoolchildren.⁶³ Concerns raised surrounded the possibility of criminalising children and how children and teenagers are to navigate the legislation.⁶⁴ In the three readings of the Bill only once was the issue of intimate partner cyber harassment raised. During the first reading, David Clendon MP stated:⁶⁵

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

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

IV CURRENT LEGISLATIVE LANDSCAPE

As has been established, the need for effective protections for victims of intimate partner cyber harassment is not only desirable but necessary. The next step then is to assess how effectively the current legislative landscape in New Zealand provides the necessary protections. Such a discussion will inform subsequent dialogue regarding recommended legislative amendments. There are four key pieces of legislation that may be of assistance to victims. Each will be evaluated in light of the complex nature of the issue.

62 Lynley Bilby "Warnings for Roast Busters II" *The New Zealand Herald* (online ed, New Zealand, 8 November 2015), at 1.

63 (24 March 2015) 704 NZPD 2542.

64 (24 March 2015) 704 NZPD 2542.

65 (3 December 2013) 695 NZPD 15173.

A Crimes Act 1961

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

The first offence fits within Part 9A of the Act: crimes against personal property. Anyone who "intentionally intercepts any private communication by means of an interception device" can be liable to a term of imprisonment.⁶⁶ An offender who, for example, intercepted a victim's phone call in order to gather personal information about the victim such as their whereabouts, would be covered by this section. The second offence falls under Part 10: crimes involving computers. Section 150 covers damaging or interfering with a computer system, specifically: causing a computer system to deny access to authorised users⁶⁷ and interfering with any data or software in a computer system.⁶⁸ Section 150 would cover the previously discussed case whereby an offender installed a spyware attachment onto his ex-partner's computer. Section 307, the third offence, relates to threatening to destroy property. The maximum penalty for this offence is three years' imprisonment.⁶⁹ The final and arguably most applicable possible offence falls within threatening, conspiring and attempting to commit harm. Section 306 covers threats to kill or do grievous bodily harm to another person.⁷⁰ Sending or causing to be received any writing containing such threats is also covered, thus abusive and threatening messages would constitute threats for the purposes of this section.⁷¹ Offenders are liable for a term of imprisonment not exceeding seven years. As established, all of the aforementioned behaviours may qualify as intimate partner cyber harassment.

Specific behaviours that constitute digital domestic violence may be crimes under ss 150, 216, 306 and 307 of the Crimes Act. The Act is of fairly limited application as there are a significant number of behaviours that constitute intimate partner cyber harassment that are not covered. Additionally, while individual occurrences of the above examples would be covered, the Act may fail to fully take account of repetitive acts of the same nature. Sentencing an offender for one isolated act

⁶⁶ Section 216B(1).

⁶⁷ Section 250(2)(c)(ii).

⁶⁸ Section 250(2)(a).

⁶⁹ Section 307(1).

⁷⁰ Section 306(1)(a).

⁷¹ Section 306(1)(b).

overlooks the fundamental and repetitive patterns of behaviour and the wider context of control, intimidation and fear that typify intimate partner cyber harassment. More often, harassing behaviours consist of repeated acts that on their own may not amount to a specified offence.⁷² The Crimes Act, while not completely unfit, does not sufficiently provide all victims with the necessary protection. Accordingly, further legislation must be relied upon.

B Harmful Digital Communications Act 2015

The HDCA is the most recent piece of legislation of potential assistance to victims of intimate partner cyber harassment. It was introduced to "(a) deter, prevent, and mitigate harm caused to individuals by digital communications; and (b) provide victims of harmful digital communications with a quick and efficient means of redress."⁷³ The question is whether the HDCA fulfils this purpose in regards to victims of intimate partner cyber harassment.

Section 4 defines a digital communication as "any form of electronic communication; and ... includes any text message, writing, photograph, picture, recording or other matter that is communicated electronically". Such a wide definition ensures that all forms of electronic communication are covered. Texts, emails, phone messages, social media posts and other such forms of communication commonly employed by harassers will fall within this definition. However, the scope of the digital harm is immediately narrowed as intimate partner cyber harassment behaviours that do not involve communication do not fall within the scope of this legislation. Such behaviours include surveillance methods such as GPS tracking and monitoring a victim's computer use. As previously discussed, these behaviours make up a significant portion of intimate partner cyber harassment and should be protected against consistently with communication technologies.

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

1 Civil enforcement regime

The civil enforcement regime created by the HDCA is comprised of complaints directed towards an approved agency and proceedings in the District Court. The legislation provides that the affected individual, a parent or guardian, the professional leader of a school or the police, may bring a complaint.⁷⁴ While assistance is provided to victims of intimate partner cyber harassment, the regime has limitations which restrict both access to, and the effectiveness of, certain statutory protections.

72 Lynne Roberts "Jurisdictional and definitional concerns with computer-mediated interpersonal crimes: An Analysis on Cyber Stalking" (2008) 2 International Journal of Cyber Criminology 271 at 280.

73 Harmful Digital Communications Act, s 3.

74 Section 11.

An application to the approved agency is intended to be the first filtering step in the complaints process. The agency may be any person, organisation, department or crown entity, as appointed by the Governor-General on the recommendation of the Minister.⁷⁵ It is charged with hearing and assessing complaints about harmful digital communications.⁷⁶ The function of the agency is relatively limited, as it has no real enforcement powers or duties. Instead, where appropriate, advice, negotiation, mediation and persuasion are to be used to resolve complaints.⁷⁷ Additionally, the approved agency has wide discretion. It may opt to cease investigation of a complaint, or outright refuse to investigate should it consider the complaint to be inappropriate.

These features of the approved agency may restrict the ability of victims of intimate partner cyber harassment to gain effective protections in certain circumstances. First, it seems apparent that Parliament contemplated such applications to the approved agency being made in the context of cyber-bullying (using the narrow definition). Complainants are limited to an affected individual, parents, guardians, school leaders and the police.⁷⁸ A representative of the victim who does not fit within the above categories is unable to apply. The listed complainants are strongly associated with children and adolescents and thus may be unavailable or inappropriate in many cases of intimate partner cyber harassment. Consequently, where an affected individual is unable to apply to the approved agency themselves due to physical incapacity, fear of harm or any other reason, the enforcement regime may be inaccessible. Second, the statutory dispute resolution methods are likely to be inappropriate in the context of intimate partner violence. As the underlying motive is to intimidate and control the victim, negotiation and mediation may be ineffective in certain situations, including those of cyber-bullying not in the context of intimate partner cyber harassment. As the approved agency has no remedial powers beyond these, its protections will be inadequate in extreme cases. Finally, while discretion is necessary for the effective functioning of any agency, it may be unhelpful in certain cases involving intimate partner cyber harassment. Communication that may appear trivial to an objective third party who is not aware of, or affected by, the pattern of abuse may in fact constitute extremely harmful digital communication. This is exacerbated by the current failure to recognise the seriousness of intimate partner cyber harassment. Accordingly, appropriate training should be provided to ensure a complaint regarding intimate partner cyber harassment is not considered "inappropriate" and fails to be investigated.

If an individual is dissatisfied with the approved agency's response, they may bring proceedings in the District Court. An affected individual may only bring proceedings provided the approved

75 Section 7.

76 Section 8.

77 Section 8.

78 Section 11(a).

agency has received the complaint and had reasonable opportunity to consider it.⁷⁹ Unlike the approved agency, the District Court provides effective protections for victims in the form of orders. The limitations however lie in procedural barriers to attaining these orders.

The District Court has the ability to grant a range of orders, set out in s 19. The Court may grant one or more orders against a defendant, an online content host or an Internet protocol address provider (IPAP).⁸⁰ Any breach of an order amounts to a criminal offence and is punishable by a term of imprisonment not exceeding six months or a fine of up to \$5,000.⁸¹ The most effective order against a defendant is s 19(1)(b): "an order that the defendant cease or refrain from the conduct concerned". Many other orders concern remedies inappropriate for harassing behaviours such as publishing corrections and rights of reply.⁸² Section 19(1)(b) however would require intimate partner cyber harassment behaviours to immediately cease, thus proving an effective response. In terms of orders against an online content host, the only applicable order is "that the identity of the author of an anonymous or pseudonymous communication be released to the Court".⁸³ Such an order may be of limited application as in most cases a victim will know that their partner or former partner is the offender.

While these orders are important for victims' protection, procedural limitations may restrict their availability and effectiveness. A complainant's ability to apply for an order is initially restricted due to the fact that the complaint must first be received by the approved agency. Additionally, the District Court has high levels of discretion, creating limitations akin to those of the approved agency. Further, s 5 establishes factors to be taken into account when considering whether or not to grant an order. While various factors speak to the context in which the communication was made, the relationship between offender and victim is not a relevant consideration.⁸⁴ Moreover, repeated communication and past behaviours are omitted. In respect of intimate partner cyber harassment, the relationship and past behaviours are of the utmost importance to place the conduct in a meaningful context. Failing to recognise these considerations is to overlook the cyclic nature and pattern of abuse. Instead, the HDCA runs the same risks as the Crimes Act, simply addressing individual acts, rather than the broader cycle of abuse.

79 Section 12.

80 Copyright Act 1994, s 122A.

81 Harmful Digital Communications Act, s 21(2)(a).

82 Section 19.

83 Section 19(2)(b).

84 Section 5.

2 *A new criminal offence*

The HDCA also creates a new criminal offence. A person commits an offence if they post a digital communication with the intention to cause harm. The communication must cause actual harm to the victim and "would cause harm to an ordinary reasonable person in the position of the victim".⁸⁵ The offence is punishable by a prison sentence of up to two years or a fine not exceeding \$50,000.⁸⁶

Initially, behaviours that amount to intimate partner cyber harassment appear to be criminalised under this section. The requirements of intention to cause harm, reasonable expectation of harm and actual harm would easily be satisfied. In the recent High Court appeal of *R v B*, whether the victim suffered harm was at issue. The Judge held that evidence of harm needs to be assessed "in its totality" and with "reference to context".⁸⁷ Such an approach appreciates the wider context of control in cases of intimate partner cyber harassment, and would ensure the harm requirement is satisfied.

However, due to the narrow definition of "posts a digital communication", only some such behaviour would be caught. "Posts a digital communication" means:⁸⁸

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

Distressing text messages, constant communication and other methods employed by harassers would not be considered "posted" unless they contained information about the victim. While many communications would contain information about the victims, the relatively narrow definition of posting means not all harassing communication would qualify. For example, a partner who constantly messages a victim, "I'm going to get you" might not be considered to have posted the messages. The Family Court in *R v Iyer* however, held that in light of the purpose of the HDCA, "posts a digital communication" should be interpreted broadly.⁸⁹ Doherty CJ stated "The list of verbs which constitute the act of posting [in the HDCA] is wide-ranging and non-exhaustive."⁹⁰ The interpretation

85 Section 22(1).

86 Section 22(4).

87 *R v B* [2017] NZHC 526 at [43].

88 Section 4.

89 *R v Iyer* [2017] NZFLR 119 at [29].

90 At [29].

of "posts a digital communication" was not subject to appeal in the High Court decision.⁹¹ *R v Iyer* concerned the uploading of pictures to Facebook, which the Judge held contained information about the victim. While it is likely courts will interpret "posts a digital communication" equally broadly in future, an issue may still arise when a communication clearly does not convey information about a victim. The definition would have to be amended in order to bring all intimate partner cyber harassment easily within the concept of posting a digital communication.

As previously established, the HDCA does not recognise intimate partner cyber harassment as behaviour to be addressed under this piece of legislation. The definitions and discussion around the HDCA have been narrowly construed. As echoed throughout the literature, the HDCA was a reactive response to significant and highly publicised instances of cyber abuse but dealt with the issue in a far from exhaustive manner. While the HDCA does provide some recourse for victims of intimate partner cyber harassment, existing limitations mean that the level of protection required for victims will often not be provided.

C Harassment Act 1997

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

Under s 8 of the Harassment Act every person who harasses another person commits an offence. Harassment is defined as:⁹²

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

The Act defines as a "specified act" behaviour that both (subjectively) causes the person being harassed to fear for their safety and would (objectively) cause a reasonable person in the specific circumstances to fear for their safety.⁹³ Behaviour becomes criminal harassment as opposed to civil harassment when the harasser knows and intends that the person to whom their behaviour is directed will likely fear for their safety.⁹⁴ Section 8(2) stipulates "Every person who commits an offence against this section is liable, on conviction, to imprisonment for a term not exceeding 2 years."

91 Note the appeal is *R v B*, above n 87, at [43], which dealt only with the question of harm.

92 Section 3(1).

93 Section 4(f).

94 Section 8(1).

The requirement that there must be a pattern of behaviour aligns with intimate partner cyber harassment. It does not criminalise one act of many; it recognises the acts as a whole. The definition of specified act is extremely wide. It covers any act that causes a person to fear for their safety if a reasonable person in their particular circumstances would fear for their safety. Making contact, interfering with property and giving offensive material are other specific acts.⁹⁵ Such a definition speaks to the uniqueness of intimate partner harassment that has often been a challenge to identify. Considering the victim's particular circumstances enables acts that may not constitute harassment to an objective third party to qualify. While GPS tracking and other surveillance stalking behaviours are not explicitly covered, they would fall within s 4(1)(f). In 2015 s 4(1)(d) was amended by the HDCA so that a specified act now includes making contact with a person (whether by telephone, correspondence, electronic communication or in any other way).⁹⁶ A further paragraph was inserted stating that the following qualifies as a specific act:⁹⁷

... giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person[.]

Such amendments better align the legislation with intimate partner cyber harassment.

In addition to establishing a criminal offence, the Harassment Act also provides restraining orders for victims of harassment.⁹⁸ A restraining order stipulates that the offender must refrain from carrying out specified acts against the victim.⁹⁹ The court may also impose any additional conditions it deems necessary given the circumstances to further protect the victim.¹⁰⁰ While the effectiveness of these restraining orders is the subject of ongoing debate, such a regime aims to provide ongoing protections to victims with regard to the specific offending. Immediate recourse is available in the form of an imprisonable offence if a restraining order is breached.¹⁰¹

The purpose of the Act however, is to provide protections for people who do not fit within the Domestic Violence Act. Section 9(4) states:

A person who is or has been in a domestic relationship with another person may not apply under this Act for a restraining order in respect of that other person.

⁹⁵ Section 4(1).

⁹⁶ Section 4(1)(d).

⁹⁷ Section 4(1)(ea).

⁹⁸ Section 6(2)(b).

⁹⁹ Section 19(1).

¹⁰⁰ Section 20(1).

¹⁰¹ Section 25.

An intimate partnership qualifies as a domestic relationship and is therefore excluded from the restraining orders provided in this Act. The distinction is echoed throughout the materials surrounding the Act. The Ministry of Justice's *Report on the Harassment and Criminal Associations Bill* states "[persons] covered by domestic violence legislation cannot apply for an order [under the Harassment Act] but should instead use that regime".¹⁰² While the policy basis for this distinction is relatively unclear, it appears to originate from Parliament's apparent focus on stranger harassment and the timing of the legislation. The Harassment Act was introduced as part of the wider Harassment and Criminal Associations Bill 1997. The Bill was introduced to prove that "the Government is very serious about dealing with gangs".¹⁰³ Accordingly, the focus was placed directly on gang activity and stranger harassment. Further, the Harassment Act was introduced after the Domestic Violence Act as a form of response, as opposed to an addition, to it. Reports stated that the Domestic Violence Act already had increased protections for victims of domestic violence.¹⁰⁴ Instead, concerns were raised about the inadequacies of the law in dealing with stranger harassment.¹⁰⁵ The Harassment Act was thus introduced to cover the deficiencies of the Domestic Violence Act as opposed to working alongside it.¹⁰⁶

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

D Domestic Violence Act 1995

Of the current legislation, the Domestic Violence Act is of the most assistance to victims of intimate partner cyber harassment. An intimate partnership easily falls within the definition of a domestic relationship under s 4(1)(a) or (d).¹⁰⁷ Generally, the acts amounting to cyber harassment

102 Ministry of Justice *Report on the Harassment and Criminal Associations Bill* (CL 17/01 jh945cri 21, 17 June 1997) at 11.

103 (20 November 1997) 565 NZPD 5534.

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

105 NZPD, above n 103, 5534–5535.

106 Jane Mountfort "The Civil Provisions of the Harassment Act 1997: A Worrying Area of Legislation?" (2001) 32 VUWLR 999 at 1018.

107 Section 4(1) reads:

- (1) For the purposes of this Act, a person is in a domestic relationship with another person if the person—
 - (a) is a spouse or partner of the other person; or
 - ...
 - (d) has a close personal relationship with the other person.

will fall within the definition of domestic violence under s 3(2)(c)(i)(ii) and (iv).¹⁰⁸ Such provisions cover psychological abuse including (but not limited to) intimidation, harassment and threats. Additionally, the Family and Whānau Violence Legislation Bill currently before the House, if passed, will be a step forward in recognising cyber harassment. Clauses 8, 19, and 58 make references to digital communications (as defined in the HDCA), albeit only in relation to protection orders and police safety orders.

The term "psychological abuse" however may prove to be an obstruction. In light of this requirement, the threshold for establishing domestic violence is higher than establishing harassment, as actual psychological harm is required in the former and not the latter. Potter J asserts in *Beadle v Allen*:¹⁰⁹

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

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

Further, the Act fails to fully accommodate the complex and unique nature of intimate partner cyber harassment, or even digital abuse as a form of domestic violence. There is no specific reference to digital domestic abuse or cyber harassment in the Act, which can be understood given the legislation was passed in 1995. The Family and Whānau Violence Legislation Bill however makes specific mention of "digital communication".¹¹⁰ Such an inclusion is an improvement in recognising intimate partner cyber harassment. Digital communication is only included in relation to protection orders and police safety orders. It is not included in the section which defines domestic violence.

108 Section 3(2) reads:

- (2) In this section, violence means—
- ... (c) psychological abuse, including, but not limited to,—
- (i) intimidation:
 - (ii) harassment: ...
 - (iv) threats of physical abuse, sexual abuse, or psychological abuse[.]

109 *Beadle v Allen* [2000] NZFLR 639 (HC) at [35].

110 Clauses 8, 9 and 58.

Section 2 of the Domestic Violence Act covers each form of domestic violence aside from digital domestic violence. The named categories are physical abuse, sexual abuse and psychological abuse (including but not limited to intimidation, harassment, threats, property damage and financial abuse). While harassment, threats and intimidation can cover patterns of behaviour that amount to cyber abuse, omitting to specifically recognise systematic cyber abuse as a form of domestic violence may prove problematic. Perhaps the most concerning implication is that, as has been noted, victims tend to avoid reporting cyber abuse because they do not recognise that it amounts to an offence.

In instances where victims are able to overcome the definitional barrier and prove actual psychological harm, the Domestic Violence Act provides a framework of protections suitable for intimate partner cyber harassment. Under s 7, a victim of domestic violence is able to make an application for a protection order. The court has discretion to make a protection order if there has been domestic violence (subject to aforementioned definitional requirements) and an order is necessary to protect the victim.¹¹¹ The conditions of a protection order are established in s 19. Of particular relevance is the fact that the offender must not engage or threaten to engage in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person.¹¹² Once a protection order is granted, when the protected person and the respondent are not living on the same premises, the respondent is prohibited from making contact with the protected person.¹¹³ All electronic methods of contact are covered. A breach of a protection order qualifies as an offence and is punishable by up to three years in prison.¹¹⁴

Additionally, where the court makes a protection order, the applicant can request that a safety programme be authorised.¹¹⁵ These programmes will provide practical and useful information about how the protection order works. They also provide skills and tools aimed at rebuilding confidence, coping with the effects of abuse and ensuring safety.¹¹⁶ Such protections and programmes are significant steps forward in recognising the specialised protection needed for domestic violence survivors. While discussion surrounding the effectiveness of such orders and programmes fall outside the scope of this article, the specialised protection they aim to provide is necessary.

111 Section 14(1).

112 Section 19(2)(e).

113 Section 19(2)(e).

114 Section 49(3).

115 Section 51C.

116 Ministry of Justice "Domestic Violence: Safety help and non-violence courses" (2017) <www.justice.govt.nz>.

The court may also order a police safety order which is an "on-the-spot", temporary protection order.¹¹⁷ The person against whom the order is granted must not engage in several listed behaviours, most of which constitute domestic violence.¹¹⁸ The Family and Whānau Violence Legislation Bill proposes to amend the section governing police safety orders to explicitly prohibit making contact "via an Internet site or other digital communication".¹¹⁹

The Domestic Violence Act therefore provides specifically designed protections for victims of intimate partner violence and thus intimate partner cyber harassment. The Family and Whānau Violence Legislation Bill also takes a step forward in protecting against digital contact. Problems arise however in the higher level of harm required to qualify as violence and the Act's failure to fully appreciate digital domestic violence as a subset of domestic violence.

V LEGISLATIVE CHANGES

Intimate partner cyber harassment evidently warrants more effective legislative protection for victims. While New Zealand's current legislation is not wholly ineffective, it falls short of providing adequate protection. Legislative changes are therefore required to ensure such protection can be provided. A suite of legislative amendments to the current legislation is the most suitable response. Existing legislation establishes a framework which has the potential to provide sufficient protection for victims. Amending this legislation to better accommodate cases of intimate partner cyber harassment would ensure these protections are more accessible and effective.

The creation of a new offence, specifically for intimate partner cyber harassment, is not a desirable solution. Legislating to target one specific issue is dangerous. Issues can expand or evolve. New, related issues that may not have been in contemplation may arise. As the HDCA shows, a specific offence designed to tackle one issue may therefore not be flexible enough. Such a concern is exacerbated by the nature of intimate partner cyber harassment. Crimes involving technology such as this can change rapidly. A new criminal offence, while explicitly recognising the issue, fails to provide proactive and effective protections for the victim. It could be said to be acting as "ambulance at the bottom of the cliff".

There also may be little practical value in creating a new offence, as the current offence of criminal harassment provides a vehicle for the prosecution of offenders. While prosecuting offenders may be necessary for victims to feel justice, it will not provide the additional, ongoing protections for victims that are required.

117 Sections 124B and 124A.

118 Section 124E.

119 Clause 58.

A Recommended Amendments

A suite of legislative amendments is therefore recommended. The statutes to be amended are the Domestic Violence Act, the Harassment Act, and the HDCA. The following amendments ensure pre-existing protections better accommodate victims of intimate partner cyber harassment.

1 Domestic Violence Act 1995

The Domestic Violence Act should be amended to better incorporate understandings of intimate partner cyber harassment. The Domestic Violence Act is of vital importance as it has been specifically designed to deal with intimate partner violence. By including intimate partner cyber harassment as a form of domestic violence, victims are entitled to both the protection orders and safety programmes contained in this Act. Amending the Domestic Violence Act also has the potential to boost the understanding of digital domestic violence, specifically intimate partner cyber harassment. The definition of domestic violence in the Act not only determines who has access to protection orders and safety programmes, it also sets the tone for the general discourse surrounding domestic violence. Campaigns and information websites define domestic violence as it is defined in the statute.¹²⁰ Widening the definition to include digital domestic violence would alter how people saw the issue and encourage victims to seek help and be taken seriously. These consequences are vital and the changes will improve clarity in the Act.

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

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

Cyber harassment could be defined in the interpretation section as:

¹²⁰ Family Violence: It's Not OK "The law" (2016) <<http://areyouok.org.nz>>.

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

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

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

2 *Harassment Act 1997*

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

3 *Harmful Digital Communications Act 2015*

The final amendment in the suite of changes is to the HDCA. The civil enforcement regime should be amended so that protection orders are more accessible to victims of intimate partner cyber harassment. Changes to procedure may be enacted to better accommodate victims of intimate partner

cyber harassment. Section 11(1) should be amended so that a representative of the victim may apply for an order. Such cases could be limited to where a person is unable to personally apply due to fear of harm or another sufficient purpose. Further mandatory considerations the court must assess in making an order could be added to s 9(5). Such considerations could be: "the relationship between the affected individual and the defendant", and "previous patterns of behaviour directly related to the communication". These factors directly address intimate partner violence.

It is important to note however that, even after these amendments, the HDCA would still be relatively limited due to the previously discussed narrow definition of "posts a digital communication".¹²¹ Widening the definition to include "any threatening, abusive or other content which in the context in which it is used constitutes harassment" is a possible solution. It might however generate more problems than solutions. Such an amendment to the definition would be solely for the issue of intimate partner cyber harassment. As has been noted in the literature, amending a definition or piece of legislation to exclusively accommodate one issue is dangerous and triggers various complications.¹²² In this case, unanticipated situations not related to intimate partner cyber harassment may arise. Examples of such unintended consequences are rife in the literature surrounding the HDCA and could include robust debate, campaigns and ridiculously false allegations.¹²³ Further, amendments to the definition prove unnecessary. The definition in question relates to the new criminal offence under the HDCA. It does not relate to any further protections. There already exists an offence in the Harassment Act which sufficiently deals with such behaviour and is specifically designed to target it. The offences in both the HDCA and the Harassment carry a term of imprisonment not exceeding two years (although the HDCA offences carry an alternative fine not exceeding \$50,000).¹²⁴ Thus, the narrow definition of "posts a digital communication" in the HDCA does not prove a barrier to effective prosecution and so a wider definition is not justified.

VI CONCLUSION

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

121 Section 4.

122 Stephanie Frances Panzic "Legislating for E-Manners: Deficiencies and Unintended Consequences of the Harmful Digital Communications Act" (2015) 21 AULR 225 at 240.

123 At 243–244.

124 Harassment Act, s 8(2); and Harmful Digital Communications Act, s 22(4).

The most effective way to ensure such protections are provided is to amend the Domestic Violence Act, the Harassment Act and the HDCA. Explicitly including cyber harassment within the Domestic Violence Act would ensure that victims of intimate partner cyber harassment are entitled to protection orders and safety programmes specifically tailored for victims of domestic violence. It would also engender a more holistic understanding of what domestic violence is. Moreover, amending the Harassment Act would ensure that victims of intimate partner cyber harassment are entitled to the same protections and procedural processes as victims of stranger harassment. Finally, changing the HDCA will ensure wider access to orders provided by the District Court.