

Departmental Disclosure Statement

Harmful Digital Communications Bill

2013 No 168

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

23 October 2013.

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Part One: General Policy Statement

Introduction

This Bill implements the Government's decisions on addressing harmful digital communications, which were largely based on the Law Commission's 2012 Ministerial Briefing paper *Harmful Digital Communications: The adequacy of the current sanctions and remedies*.

Harmful digital communications, cyber-bullying and digital harassment can take many forms, including communicating through emails, texts, blog sites, forums and social media sites such as Facebook and Twitter.

Modern technology has therefore provided an outlet for a unique form of harassment with its own challenges. This is due to the:

- ubiquity and ease of access to technology in modern life;
- ease and speed of dissemination and the potential to go "viral" to a global audience;
- persistence of the information and difficulty in removing it; and
- facility for anonymity.

The victims of harmful digital communications are often children and young people, who are particularly vulnerable and require appropriate protections.

Purpose and overview of the Bill

The purpose of this Bill is to mitigate the harm caused to individuals by electronic communications and to provide victims of harmful digital communications with a quick and efficient means of redress.

To achieve that purpose, this Bill:

- creates a new civil enforcement regime to quickly and effectively deal with harmful digital communications;
- creates new criminal offences to deal with the most serious harmful digital communications; and
- makes some small amendments to existing legislation to clarify their application to digital communications and cover technological advances.

Civil enforcement regime

The key policy objectives of the new civil enforcement regime are ensuring:

- effective and accessible remedies for victims of harmful digital communications;
- the response is proportionate to the harm; and
- remedies are cost effective and quick.

This Bill sets out ten new communication principles to guide the functions of the court and approved agency. For example, Principle 5 states that a digital communication should not be part of a pattern of conduct that constitutes harassment.

The new civil enforcement regime provides for initial complaints about harmful digital communications to be made to an approved agency. The approved agency may investigate a complaint and attempt to resolve it by negotiation, mediation and persuasion.

Where the approved agency cannot resolve the complaint, an individual may make an application to the District Court for a number of civil orders, including:

- requiring harmful digital communications to be taken down;
- requiring the defendant to cease the harmful conduct;
- ordering the identity of the author of an anonymous communication be released.

The court may also make a declaration that a communication breaches a communication principle. While not a mandatory authority, this would have significant persuasive power in relation to website hosts or ISPs operating outside of New Zealand jurisdiction.

The court will:

- have jurisdiction over all forms of digital communication;
- be able to use an expert technical adviser to ensure any remedies are technically achievable and appropriate; and
- operate according to rules that will facilitate speedy, cheap and informal justice.

Criminal offences

In addition to a new offence of failing to comply with an order of the court, this Bill creates two further offences to deal with the most serious forms of harmful digital communications:

- an offence of posting a harmful digital communication with the intention to cause harm; and
- an offence in the Crimes Act 1961 of inciting a person to commit suicide where suicide has not been attempted (this will complement the existing offence in the Crimes Act 1961 which criminalises incitement to commit suicide where it has been attempted).

Safe harbour provision

This Bill also clarifies the law relating to the liability of internet content hosts for content they host but which is posted by third parties. The purpose of this is to ensure that a content host cannot be held liable for content they host that is posted by another person, but which the host does not know about.

This Bill contains a “safe harbour” provision stating that a content host is not liable for content they host, unless the content host has received a notice of complaint about the content, and fails to take reasonable steps to remove it.

The protection provided by the safe harbour does not apply if:

- a content host does not provide an easily accessible mechanism for users to report such content to them; or
- the provision is inconsistent with the express provisions of another enactment relating to the responsibilities of an online content host for content posted by others.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The Law Commission's Ministerial briefing <i>Harmful Digital Communications: The adequacy of the current sanctions and remedies</i> (2012): http://lawcom.govt.nz/sites/default/files/publications/2012/08/ministerial_briefing_-_harmful_digital_communications.pdf</p> <p>The Law Commission's issues paper <i>The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age</i> (NZLC IP27, 2011): http://ip27.publications.lawcom.govt.nz/uploads/files/downloads/LC-IP27-ALL.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>A Regulatory Impact Statement was completed by the Ministry of Justice and is available on the Ministry of Justice website.</p>	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
<p>There is an additional amendment to be included in the Bill to provide that a content host will not be a publisher of, or liable for, content where it is hosted by them but was put there by a third party and the content host does not know of that content. Further detail on this proposal is available in Appendix One.</p>	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>Detail on the potential costs and benefits of the Bill can be found in: The Regulatory Impact Statement – [insert once published] The Cabinet Social Policy Committee paper – http://www.justice.govt.nz/publications/global-publications/h/harmful-digital-communications-cabinet-social-policy-committee-paper/publication The Law Commission’s Ministerial Briefing <i>Harmful Digital Communications: The adequacy of the current sanctions and remedies</i> (2012) - http://lawcom.govt.nz/sites/default/files/publications/2012/08/ministerial_briefing_-_harmful_digital_communications.pdf</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>(a) Because a large number of online content hosts – where harmful digital communications occur – are based overseas, they are outside of the jurisdiction of New Zealand courts. The Bill provides for court orders that may constitute an official request for them to remove content.</p> <p>(b) The effectiveness of the approved agency in seeking the removal of harmful content will be contingent on its ability to build constructive relationships with online content hosts.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The policy proposals in the Bill were consulted with Police, the Ministry of Foreign Affairs and Trade and the Crown Law Office to ensure consistency with New Zealand's international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Justice considered principles of the Treaty of Waitangi during the policy development and drafting of the Bill and consider it consistent with the principles.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	
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Advice provided to the Attorney-General by Crown Law, or a Bill of Rights Act 1990 section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon a Bill's introduction. Any such advice, or reports, will be accessible on the Ministry's website at:

http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p><i>Offences and penalties</i></p> <p>Clause 18 creates an offence punishable by a fine of up to \$5,000 for an individual and \$20,000 for a body corporate, for failing to comply with an order made by the court without a reasonable excuse.</p> <p>Clause 19 creates an offence of posting a harmful digital communication with intent to cause significant emotional distress punishable by up to 3 months imprisonment or a fine of up to \$2,000.</p> <p>Clause 24 amends section 179 of the Crimes Act 1961 to add an offence of incitement to suicide where an attempt to commit suicide does not occur. This new offence is punishable by up to 3 years imprisonment.</p> <p><i>Jurisdiction of a court or tribunal</i></p> <p>The new civil enforcement regime in the Bill involves the District Court making a number of orders as remedies for harmful digital communications. The civil jurisdiction of the court is expanded to cover digital communications where they have been posted or sent and it may grant an application for an order where:</p> <ul style="list-style-type: none"> • there has been a serious or repeated breach of one of more communication principles; and • the breach has caused or is likely to cause harm to a person. <p>Clause 17 allows the court to make a range of civil orders upon application.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice is the responsible department and has led the policy development of the Bill. Internal consultation occurred.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Clause 34 amends Principle 10(a) (which allows an agency to use personal information for a purpose other than the purpose for which it was collected) and 11(b) (which allows an agency to disclose personal information) of the Privacy Act 1993 as they relate to personal information that is publically available. The amendments limit these exceptions so that they are only available where the use or disclosure of that information would not be unfair or unreasonable.</p> <p>Clause 35 amends 56, which is the “domestic affairs” exception to the information privacy principles. This exception ceases to apply if the disclosure or use of that information would be highly offensive to an ordinary reasonable person.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Privacy Commissioner was consulted during the Law Commission's drafting of its Ministerial briefing paper, during the Ministry's policy development and during the drafting of the Bill.</p> <p>The Privacy Commissioner was supportive of the proposals and comments were incorporated into the Bill.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
Appendix 2 sets out further details of external consultation.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
The Ministry of Justice has consulted with technical experts (listed in Appendix Two) to ensure that the provisions and orders put in place by the Bill will be workable and effective.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Clause 9 provides for a civil immunity for employees of the approved agency for any good faith actions or omissions in exercising their duties, functions, or powers. This provision will not affect the ability for somebody to bring judicial review proceedings of a decision of the approved agency, or a criminal prosecution against an employee or the approved agency itself.</p> <p>The approved agency was granted this immunity due to it exercising statutory duties in relation to assessing and investigating complaints regarding harmful digital communications. The benefits of the approved agency being able to independently consider complaints are considered to outweigh the ability for complainants to bring civil proceedings against employees of the approved agency.</p> <p>This immunity is largely consistent with the immunities of a Crown Entity or public service department.</p> <p>The Bill also contains a “safe harbour” provision which relates to the liability of content hosts for content that is posted by others. Further information can be found in Appendix One.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 7 allows the Governor-General to, by Order in Council:</p> <ul style="list-style-type: none"> • appoint a person, organisation, department or Crown entity as the Approved Agency; • prescribe additional functions of the approved Agency; and • prescribe any reporting requirements and accountability measures the Approved Agency must comply with. <p>Clause 21 allows for the making of regulations to prescribe the practice and procedure for the conduct of matters before the Approved Agency.</p> <p>These regulation making powers were considered necessary because they relate to matters of implementation.</p> <p>Clause 22 provides that the existing powers to make rules of court under the Judicature Act 1908 and the District courts Act 1947 include a power to make rules relating to:</p> <ul style="list-style-type: none"> • the practice and procedure of the courts under the Bill, and • the forms for applications and orders. <p>The Rule-making power was considered necessary because:</p> <ul style="list-style-type: none"> • it is not entirely appropriate that the practice and procedure of the courts be set down in primary legislation given the complexity and detail of such procedures; • any amendments to such practice and procedure would require further primary legislation, and would result in inefficient use of Parliamentary time; and • the practice and procedure of the courts is a matter best dealt with by the courts themselves by way of court rules, rather than in regulations or primary legislation. 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>There is currently nothing similar to the regime proposed in the Bill anywhere in the world. The Bill is a response to the unique challenges posed by harmful digital communications which provide an outlet for unique forms of harassment with their own very unique challenges. This is due to the:</p> <ul style="list-style-type: none"> • ubiquity and ease of access to technology in modern life; • ease and speed of dissemination and the potential to go “viral” to a global audience; • persistence of the information and great difficulty in removing it; and • facility for anonymity. 	

Appendix One: Further Information Relating to Part Two

Question 2.3.2: Aspects not included in the Regulatory Impact Statement

1. The Bill includes a “safe harbour” provision for content hosts in clause 20. This provides that a content host will not be a publisher of, or liable for, content where it is hosted by them but was put there by a third party and the content host does not know of that content.
2. Case law in New Zealand and overseas is inconsistent and unclear about when a website or service provider is a “publisher” of content that they host online. The rapid changes in technology and the nature of interactions online have meant that the courts in a number of jurisdictions have struggled keep up, and are often interpreting statutes that predate blogging and social media.
3. The most recent court decisions in the context of defamation law in New Zealand suggest that a website or service provider will be liable as publisher when they ought to have known that they are hosting unlawful content. The provider does not necessarily need to actually know they are hosting such content, or know that the content is unlawful.
4. This has implications for a broad range of content hosts, from people with their own Facebook or Twitter page, to blog hosts, forum hosts and search providers.
5. It is not feasible for many of these hosts to monitor every communication posted by others to determine whether it is unlawful. Requiring content hosts to monitor all communications may also make them overly risk-averse in removing content too readily in order to protect themselves from liability, and result in the stifling of online discussions and the freedom of expression.
6. The Bill contains a safe harbour provision to remedy this uncertainty. It consists of a “notice and takedown” system. A content host will not be able to claim safe harbour if it is notified of unlawful content and fails to take reasonable steps to act as soon as practicable. Content hosts also must ensure that there is an easily accessible mechanism for users to report such material to them.
7. This safe harbour will apply broadly, but will not cut across existing legislative frameworks such as the Copyright Act 1994 relating to copyright infringement, and the provision in the Criminal Procedure Act 2011 relating to liability for breaching name suppression.
8. This safe harbour provision strikes a balance between the need for clarity and certainty in the law for those who host content and the rights of complainants to take action to remove unlawful content.

Appendix Two: Further information relating to Part Three

Question 3.6

The Law Commission's consultation

1. The Law Commission's Ministerial briefing paper *Harmful Digital Communications: The adequacy of the current sanctions and remedies* was part of its broader review of regulatory gaps and new media. The Law Commission invited public submission on its issues paper (published in December 2011) and many of the submissions commented on both aspects of the review.
2. 72 submissions were received, from private persons, media organisations, internet organisations and companies, government entities, and education groups.
3. While submitters generally agreed that harmful digital communications posed unique challenges and were relatively prevalent, not all submitters were fully supportive of the proposals relating to harmful digital communications.

Ministry of Justice consultation

4. The Ministry of Justice also engaged in very limited external consultation on the Bill during its drafting with some stakeholders in the information technology sector to ensure the proposals in the Bill were technically workable and appropriate for the internet. This consultation included InternetNZ, Trade Me, Vodafone and Netsafe.
5. The Law Commission and the Office of the Privacy Commissioner have also been consulted throughout the development of the Bill.