

Cabinet Social Policy Committee

Harmful Digital Communications

Proposal

1. This paper seeks Cabinet's agreement to policy and legislative changes to address harmful digital communications.

Executive summary

2. This paper responds to the Law Commission's Ministerial briefing paper entitled *Harmful Digital Communications: The adequacy of current sanctions and remedies*.
3. I propose a tiered approach as follows:
 - A. Measures to support schools in addressing cyber-bullying in schools.
 - B. New civil enforcement regime to deal with harmful digital communications.
 - C. Changes to existing legislation to ensure it responds appropriately to this behaviour and covers technological advances.
4. Education and community attitudes will always be a key factor in determining the impact and prevalence of bullying. Therefore, I think the proposed tiered approach places an appropriate emphasis on the role of education and the education sector in curbing cyber-bullying, with the support of the proposed legal changes and enforcement measures for the most serious cases.
5. On the whole, I am supportive of the Law Commission's recommendations, and note that in some areas, activity to combat cyber-bullying is already being undertaken. The Law Commission's proposal to establish a new Communications Tribunal, however, has been modified so that the District Court takes on this function.
6. The Law Commission's recommendations, and my recommended response to each, is summarised in the table in appendix A.

Background

7. In May 2012 following the release of submissions on the Law Commission's issues paper *The News Media meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27), I asked the Law Commission to expedite the part of its report dealing with cyber-bullying and digital communications harms.
8. In August 2012 the Law Commission produced a Ministerial briefing paper entitled *Harmful Digital Communications: The adequacy of the current sanctions and remedies*.

Comment

Problem

9. Harmful digital communications, cyber-bullying and digital harassment can take a variety of forms, including emails, texts, phone messages, blog sites, forums and social media sites like Facebook or Twitter. These mediums can be used to intimidate, spread damaging or degrading rumours, publish invasive and distressing photographs, and harass people.
10. What differentiates harmful digital communications and bullying from their offline counterparts is the:
 - 10.1. potential viral nature of the harassment;
 - 10.2. ubiquity and ease of access to technology in modern life;
 - 10.3. ease of dissemination to a global audience;
 - 10.4. persistence of the information and the great difficulty in removing it; and
 - 10.5. facility for anonymity.
11. In other words, the internet has provided a forum for a unique form of harassment that is easy to create and distribute and difficult to remove.
12. In addition, the courts can take a long time to reach a remedy. It is also often unrealistic for some people to take civil proceedings or lay a complaint with police. These individuals may not have the means or inclination to pursue someone through the courts. Often the material has already done the damage and the person would just like it removed.
13. The proposals in this paper form a tiered response to harmful digital communications. The first is through educating people about their behaviour online and where they can go for help. This education is through programmes in schools, such as Positive Behaviour for Learning, and the new approved agency which will have the role of providing education and advice on resolving these problems.
14. The second tier, if a problem still remains, is a complaint to the approved agency. The agency will provide assistance to resolve the dispute through negotiation, mediation and persuasion. If this is not effective, a small number of complaints may be dealt with by the new proposed function of the District Court, or for the most serious cases, through one of the new offences proposed.

A. Education Sector

15. Schools need to use new technology effectively for teaching and learning while helping their students to manage the rapidly-changing social environment that comes with it. The Ministry of Education's approach is to focus on strengthened accountability requirements as well as guidance and resources for schools to carry out their dual role of ensuring the safety of students and providing effective teaching and learning.
16. Cyber-bullying is of increasing concern to schools, their learners and parents. Learners who are distressed and anxious cannot learn and are vulnerable to depression, self-harm and suicide. Because of this, the Law Commission has made a number of

recommendations for the education sector. These recommendations complement and reinforce the actions currently being undertaken in the Youth Mental Health Project.

National Administration Guideline 5

17. The Law Commission recommended that National Administration Guideline 5 (NAG 5) be amended to require each Board of Trustees to implement an effective anti-bullying programme. The National Administration Guidelines (NAGs) are the Government's high-level requirements that all schools must follow. Each school's charter must set out how the Board is to give effect to them.
18. NAG 5 currently states that each Board of Trustees is required to provide a safe physical and emotional environment for students. This encompasses a broad range of actions a Board should take to ensure the safety of students, including anti-bullying programmes.
19. The Ministry of Education approves school charters annually and assesses how adequately Boards of Trustees are addressing the requirements of the NAGs. In its work on the Better Public Services target to have 85% of students achieving NCEA Level 2 by 2017, the Ministry of Education has been engaging with schools whose students need more help to achieve. This work has identified the need for a wide-ranging review of support for students at risk and this will look at contributing factors such as bullying, including cyber-bullying.
20. To assist Boards, the Ministry of Education is currently drafting a resource for NAG 5 ("the resource") that will provide information for Boards of Trustees in their governance role. It will cover health and safety concerns for all students and staff including practices to create a positive school environment aimed at reducing bullying and is due to be provided to schools early in 2013.

Objectives and performance indicators

21. The Law Commission also recommended that the Ministry of Education develop measurable objectives and performance indicators for school safety activities. Many schools use regular surveys to measure how safe their learners feel at school and report on the results, either through the annual report on their charter or elsewhere. To address the Commission's proposal, the Ministry of Education will recommend in the resource that this is good practice for all schools.
22. The resource will also address the Law Commission's recommendation that the Ministry of Education develop guidelines for reporting serious incidents of bullying and cyber-bullying. Schools currently use hazard registers which include recording bullying behaviour and responses to this behaviour. These are checked by the Education Review Office and Occupational Safety and Health.
23. Two recent programmes that specifically address bullying behaviour are Wellbeing@school and Positive Behaviour for Learning (PB4L). There are also a number of other Ministry of Education programmes, initiatives and guidance to support schools in taking a proactive approach to creating safe and secure environments that promote positive behaviour and the safe and effective use of technology.
24. Wellbeing@school provides an online self-review tool for schools based on an extensive review of New Zealand and international research and literature

25. PB4L provides programmes and initiatives for schools, teachers and parents across the country to turn around problem behaviour in children and young people and to encourage pro-social behaviour. The School-Wide strand of PB4L is a long-term approach that supports schools to create a culture where positive behaviour and learning thrive. Students are taught in very specific terms what behaviours are expected of them so that there is a consistent response to these behaviours across the school.

Definition of bullying

26. Work under PB4L also addresses the Law Commission's recommendation that the Ministry of Education work on an agreed definition for bullying and cyber-bullying, and encourage schools to use it in anti-bullying policies. The PB4L website provides an information sheet defining bullying behaviours. This includes standard types of bullying (verbal, physical and cyber), what bullying is not, and information to try and help understand why a person might be bullying others.

Data collection

27. The Law Commission recommended that the Ministry of Education establish ongoing and routine data collection systems with standardised methods for defining and measuring covert and overt forms of bullying.
28. Preliminary work is underway as part of PB4L School-Wide to capture the number of behaviour incidents in schools. This information will be recorded in current Student Management Systems. The Ministry of Education plans to collate this data in a way that meets the needs of schools as well as allowing the Ministry to monitor and identify specific behaviours or schools for a targeted response.

Information technology contracts

29. The Law Commission recommended that consideration should be given to further developing the educative potential of information and technology contracts to inform students about their legal rights and responsibilities with respect to communications.
30. NetSafe is contracted by the Ministry of Education to promote confident, safe, and responsible use of online technologies. Current work includes developing resources for schools and students, working directly in schools and responding to queries. NetSafe recommends the use of information technology contracts and provides a free template for schools to use. These contracts can be used to educate students about their legal rights and responsibilities. The decision to use the templates provided is up to each individual school. Ministry of Education information to schools will highlight the use of contracts as best practice, and once the legislation is in place the model contract can be updated to reflect the principles outlined in paragraph 54 below.

Registration of private schools

31. The Law Commission recommended including a criterion for registration of private schools that the school provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.
32. This recommendation was also included in the Law Commission's report on private schools considered by Cabinet in 2010 [CAB Min(10) 10/7]. Cabinet decided that "(r)equiring private schools to establish welfare policies and procedures would impose

an unnecessary cost on them when there is no evidence on any harm arising with the status quo.”

33. The implications of an amendment will be discussed with representatives of independent schools and advice to the Minister of Education will assess the need for an amendment.

Conclusion

34. A significant amount of work is already underway by the Ministry of Education to address the Law Commission's recommendations and concerns.
35. There will be implications for schools arising from the changes to legislation proposed elsewhere in this paper. Schools will need to help their learners understand that unwise behaviours and choices could, in the future, have potentially serious consequences. The Ministry of Education will focus on supporting schools to understand and implement these changes, as well as continuing with ongoing monitoring of the effectiveness of the anti-bullying programmes and resources already being implemented.

B. Civil Enforcement Regime

36. Alongside the availability of criminal sanctions, I agree with the Law Commission that the Government should develop a new enforcement regime to deal with harmful digital communications. This is especially important in the realm of digital communications where pursuing ordinary legal remedies is seen as ineffective as information can be disseminated easily and with little cost.
37. I recommend adopting many of the Law Commission's recommendations in this regard and set out below the process which I think should be adopted. The main departure from the Law Commission's recommendations is that I propose that the role undertaken by the proposed communications tribunal be undertaken by the District Court.

Approved Agency

38. I propose that complaints about harmful digital communications should initially be made to an approved agency. The approved agency could assist those harmed by digital communications to resolve their disputes through negotiation, mediation and persuasion.
39. The Law Commission recommends that NetSafe is the appropriate agency to undertake this role. Netsafe is an independent non-profit organisation that promotes confident, safe, and responsible use of online technologies. I acknowledge that Netsafe already performs some of the functions of the approved agency, for example, receiving complaints about electronic communications, and liaising with internet intermediaries to takedown offensive material. Netsafe is also currently contracted to provide cyber-safety services on behalf of the Government, for example, Ministry of Education, cyber-safety services to schools and their communities. Netsafe also has existing working relationships with industry partners such as Facebook, Google and Microsoft.
40. I propose that the Bill contain a regulation making power that allows Cabinet to appoint an approved agency and to specify the function, arrangements and processes for the agency. In this area it is appropriate for the functions of the agency to be set by

regulation to enable it to keep pace with emerging technology and new forms of communication. It would also allow Cabinet to focus the efforts and priorities of the agency but allow it to be flexible to address new forms of harmful communications. I anticipate that the approved agency's functions could include:

- 40.1. To advise people on steps they may take to resolve a problem caused by an electronic communication and whether they may have a ground of complaint.
 - 40.2. To receive complaints about electronic communications.
 - 40.3. To decline some complaints because the content of the communication is unlikely to cause harm, or is otherwise inappropriate for investigation.
 - 40.4. To investigate substantial complaints and attempt to achieve settlement between the complainant and the person responsible.
 - 40.5. To liaise with website hosts, ISPs and other internet intermediaries and request them to takedown or moderate posts which are clearly offensive.
 - 40.6. To liaise with other agencies such as schools, the Police, the Privacy Commissioner, the Ministry of Social Development, Ministry of Education and InternetNZ in attempts to resolve wider issues surrounding communications complained about.
 - 40.7. To advise the complainant to seek an order from the court requiring a website host, ISP or internet intermediary to identify the author of an offensive communication.
 - 40.8. To advise the complainant to refer appropriate matters to the court.
 - 40.9. To certify that it has recommended a referral of such a complaint to the court.
41. The Law Commission also proposes that the approved agency should have general oversight functions including education, publicity and research. In addition, it should work with intermediaries and content hosts to develop guidelines and protocols regarding their relationship to the approved agency and the court. I note that these general functions will be considered in any regulations made.
42. As the Law Commission's report noted, because corporations, such as Google and Facebook, are often outside of the jurisdiction of New Zealand courts it will be essential for the approved agency to develop relationships and protocols to work with these companies to remove content.
43. If a complaint cannot be resolved by the agency, and a threshold of seriousness is reached, it could proceed to the court. I anticipate that the majority of cases involving young people will be resolved by the approved agency, and that the court process described below would only be used as a last resort.

District Court

44. I agree that there needs to be a further avenue if the approved agency is unable to resolve the situation. This body needs to be capable of administering speedy, efficient and relatively cheap remedies.

45. I note that the Law Commission recommended the establishment of a "tribunal". However, even though it is described this way, it is envisaged by the Law Commission that the tribunal would consist of a District Court judge drawn from a panel of District Court judges designated for that purpose.
46. Rather than setting up a separate Tribunal or panel of judges, I recommend that this specialisation can effectively and efficiently be achieved as a function of the District Court. Existing District Court systems could be adapted to include a new application type. It is envisaged that in assigning cases account would be taken of a particular judge's interest, understanding and expertise in new media law. This would allow greater expertise in the subject matter to be developed over time.
47. There are the means to deal with urgent priority applications within District Court processes. In addition, requirements about timelines could be specified in the authorising legislation and associated regulations.
48. Concerns about costs to individuals can be partly addressed by having no filing fees. In addition, forms could be developed to assist those making applications. I am also interested to look at ideas for taking parts or all of this process online.
49. The jurisdiction of the court would cover all forms of electronic communication. This includes comments on website, message boards and blogs, social media as well as emails and texts. It would not cover telephone calls, hard copy correspondence and in person behaviour. The distinguishing feature is the capacity to spread communications beyond the original sender and recipient.
50. The ability to make a complaint to the court should lie with the victim and parents or guardians where the victim is a child or has a disability. In addition, the Police should be able to access the court, and school principals should be able to apply on behalf of students. The Chief Coroner should be able to make an application to the court for an order that material relating to suicide be taken down from the internet if publication is prohibited by the Coroners Act 2006.

Threshold

51. I propose that only serious cases that have already been considered by the approved agency should come before the court. Initial estimates are that approximately 100 cases will come before the court per year. In addition, the complainant will be required to show that the communication has caused, or is likely to cause, significant emotional distress. The interpretation of this could create evidential issues. However, the nature of the communication itself will often demonstrate sufficiency.
52. The Law Commission proposed statutory principles, derived from the criminal law, civil law and regulatory rules. The court will not be able to make an order unless there is a breach of at least one of these principles.

Principles

53. The principles are a plain language expression of New Zealand law. They are intended to be accessible to both internet users and victims, and will serve both an educational and a deterrent function.

54. I recommend adopting the principles as proposed by the Law Commission. The principles, and the laws from which they are derived are as follows:

- 54.1. *A communication should not disclose sensitive personal facts about an individual* – invasion of privacy; Privacy Act – information privacy principle 11; and Crimes Act – intimate covert filming.
- 54.2. *A communication should not be threatening, intimidating, or menacing* – Crimes Act and Summary Offences Act; including the proposed new offence.
- 54.3. *A communication should not be grossly offensive to a reasonable person in the complainant's position* – proposed new offence.
- 54.4. *A communication should not be indecent or obscene* – proposed new offence; and Crimes Act – sexual grooming.
- 54.5. *A communication should not be part of a pattern of conduct that constitutes harassment* – Harassment Act restraining orders.
- 54.6. *A communication should not make a false allegation* – proposed new offence; tort of intentional infliction of harm; law of false attribution; and defamation.
- 54.7. *A communication should not contain a matter that is published in breach of confidence* – law of breach of confidence.
- 54.8. *A communication should not incite or encourage anyone to send a message to a person with the intention of causing that person harm* – Crimes Act – incitement provisions.
- 54.9. *A communication should not incite or encourage another person to commit suicide* – Crimes Act section 179.
- 54.10. *A communication should not denigrate a person by reason of his or her colour, race, ethnic or national origins, gender, sexual orientation, or disability* – Human Rights Act sections 21, 61, 131.

Remedies

55. I recommend that the court be able to order a broad range of sanctions and remedies, these should be:

- 55.1. Order to takedown material – issued against either the perpetrator or the ISP.
- 55.2. Order that the defendant cease the conduct in question.
- 55.3. Order not to encourage others to engage in similar communications with the complainant.
- 55.4. A direction that the order may apply to other persons if there is evidence that they have been encouraged to engage in harmful communications.
- 55.5. A declaration that the communication breaches the statutory principles.
- 55.6. Order publication of a correction.

- 55.7. Order a right of reply to be given to the complainant.
- 55.8. Order publication of an apology.
- 55.9. An order that the identity of an anonymous communication be released.
- 55.10. An order that the names of any parties be suppressed.
- 56. The court will not have the power to impose criminal or monetary sanctions. However, failure to comply with an order would be an offence punishable by a fine.
- 57. Orders requiring material to be taken down from the internet can be made against the perpetrator, an internet service provider, a website host, or any other relevant internet intermediary. As noted above most complaints will involve individuals who know each other, I expect that court orders will only be made to websites or Internet Service Providers as a last resort and when the author of the communication cannot be identified.
- 58. In determining what remedy to apply, the court must have regard to the importance of freedom of expression. It should also take into account other relevant considerations as follows:
 - 58.1. Content of communication and level of harm caused;
 - 58.2. Purpose of communication – humour is different from malice;
 - 58.3. Occasion, context and subject matter of the communication;
 - 58.4. Extent to which it has spread from original comment;
 - 58.5. Age and vulnerability of complainant;
 - 58.6. Truth or falsity of statement;
 - 58.7. Is the communication in the public interest;
 - 58.8. Conduct of defendant, including attempts to minimise harm;
 - 58.9. Conduct of complainant.

Enforceability of Orders

- 59. In the main, the above orders will be directed at an individual – the perpetrator of the harmful communication. However, in some circumstances, the court may make an order against a website host, ISP or application service provider (ASP) (eg, web-based email or social media providers). Most website hosts and ASPs reside offshore and are therefore not subject to the jurisdiction of a New Zealand court. There are very few mechanisms to enforce such an order against an overseas service provider.
- 60. This is a growing issue currently faced by all countries, and the main solution is multilateral action and cooperation. New Zealand, as a "technology taker" rather than provider will be particularly reliant on its larger counterparts in this area. Current work to address this issue includes:
 - 60.1. Work to accede to the Budapest Convention on cyber-crime;

- 60.2. Work reporting to the Quinter of Attorneys-General (through the Cyber-crime Working Group);
 - 60.3. National Cyber Policy Office (NCPO) work on New Zealand's Cyber Security Strategy; and
 - 60.4. Ongoing dialogue with Australia and other jurisdictions.
61. More broadly, the ability of states to execute jurisdiction beyond their physical borders is an issue that goes well beyond the problem of cyber-bullying – and even cyber-crime – but is an issue that we will face more often with more activities taking place online.
- 62.
63. This work is on-going. Given this is a relatively new issue which can change rapidly as technology evolves, there is yet to be an approach that is considered to be effective or "international best practice". Officials advise that, with the extra-territorial nature of this issue, workable solutions will likely emerge from international cooperation, initially among a smaller group of like-minded partners, and that this will take time to achieve, given the absence of any international consensus in this area.

Procedures and powers

64. The rules of procedure of the court should facilitate speedy and relatively informal justice, ensuring however that the rules of natural justice are complied with.
65. It will be necessary for the court to have the ability to move very quickly, so it will be desirable for applications to be made without notice, for decisions to be made on the papers and for interim remedies to be available.
66. I agree with the Law Commission that the court would have the power to receive evidence which might not ordinarily be admissible in court. A similar approach is taken in the Disputes Tribunal and Employment Court where relevant evidence is admissible, whether strictly legal evidence or not.
67. Where appropriate, the court could sit with an expert technical adviser.
68. One matter which the court should have the ability to deal with is identification of people who make alleged harmful communications anonymously. In these situations the complainant is unable to seek redress, as there is no one to complain against. In these situations the Law Commission proposes a staggered response. First, the approved agency can pass on a request for removal, modification or correction of the harmful communication to an ISP, or other appropriate internet entity like Facebook, or Google. If that does not remedy the situation, the court can order that the internet intermediary provide identity details. Once provided, the court would have discretion to determine whether or not to remove anonymity.
69. Again, as noted above, enforcement of such orders is difficult if the provider is offshore. In addition to the measures noted above, initial discussions with the industry suggest that they are eager to be seen as responsive and responsible in this area. Indeed, their business depends on providing a safe place in which people can interact and want to return to.

70. The court would be required to give reasons for its decisions and publish these.
71. I agree with the Law Commission that there should be the ability to appeal the merits of a decision. Recognising that the original decision is from the District Court, any appeal should be to the High Court and any subsequent appeals to higher courts on points of law.
72. I recommend that a regulation making power be included in the legislation to allow for the development of specialist rules of process and procedure specific to these cases.
73. You will see from the process set out above that there are jurisdictional overlaps with the Privacy Act and other areas of law, but I am confident that they can be adequately managed.

C. Changes in the Law

74. The Law Commission's recommended changes do not propose fundamental change to the existing law. For the most part they are small modifications that ensure harmful communications are captured regardless of the medium over which they are conveyed. Most offences on the statute book are phrased in technology-neutral language and are able to cover this behaviour. However, the Law Commission has identified a small number of gaps and areas of clarification.

Criminal Law

Creating a new communication offence

75. I propose that a new offence of using a communications device with the intention to cause harm be created and be punishable by up to three months' imprisonment or a \$2000 fine. However, the Law Commission's proposed provision does not catch some behaviour that I consider should be caught.
76. The Law Commission recommends a new offence, in the Summary Offences Act 1981, of using a communications device to cause harm. This offence would apply to a person who sends a message to another person that is grossly offensive, indecent, obscene, menacing or knowingly false and intends the message to cause substantial emotional distress to the recipient.
77. The Law Commission proposes that this new offence be punished by a maximum of three months' imprisonment or a \$2000 fine.
78. The Law Commission has identified similar offences in the United States, United Kingdom and Australia that criminalise communications that cause serious distress or mental harm.
79. In particular, the proposal referred to sending a communication to the victim. This would not cover situations, for example, where something is posted on-line rather than sent to a person. In addition, the proposed provision requires the victim to actually see the communication; rather, I consider it should be sufficient that the victim is aware of the content of the communication. The Law Commission intended that these situations be covered, and I recommend that the new offence be drafted to catch this behaviour.
80. Young people who are charged with this new offence will be dealt with by the Youth Court in the same manner as young people charged with other offences. If a case is

particularly serious a Youth Court Judge has discretion to refer the case to the District Court for sentencing, where a more serious sentence can be imposed.

Intimate filming

81. The Law Commission recommended creating a new offence where an intimate recording that the subject has consented to, is published without their consent. I am not accepting the Law Commission's recommendation for the following reasons:
- 81.1. The modified communications offence discussed above will cover the behaviour of posting indecent photographs online with the intent to cause distress;
 - 81.2. The Law Commission's proposed new offence may criminalise some behaviour that could be more appropriately dealt with by existing civil remedies; and
 - 81.3. The proposed new offence is an uncomfortable fit with the covert filming offences, which require lack of knowledge of the filming itself.
82. My officials have discussed the above changes with the Law Commission, which is supportive of the modifications.

Incitement to suicide

83. I propose a new offence for incitement to suicide where suicide has not been attempted. I propose this new offence be punished by up to three years' imprisonment. Currently, it is only an offence to aid, abet or incite suicide under the Crimes Act, punishable by up to 14 years' imprisonment, if suicide is attempted or occurs. A separate offence would reserve the serious offence of incitement to suicide for situations where harm occurs but still criminalise this behaviour sending a message that it is not acceptable behaviour.
84. The Law Commission gave considerable thought to the question of incitement to suicide. The Law Commission considered that given the distress such behaviour can cause there is a case for making incitement to suicide an offence without the need for actual or attempted suicide results.
85. Therefore, the Law Commission recommends that the offence of aiding and abetting suicide (s 179 Crimes Act) be amended. The proposed amendment would remove the requirement that the person need to commit or attempt to commit suicide.
86. The Law Commission note that "incite" requires active and specific encouragement and the case law reflects this. Importantly, it requires a desire in the inciter that the subject actually commit suicide. This offence would only cover the incitement of a particular person to suicide, rather than a non-specific direction. The Law Commission does not expect that the provision would be used very often, because most messages referring to potential suicide are not sufficiently specific or do not go as far as actual incitement.
87. The penalty for this offence is a maximum of 14 years' imprisonment. This significant penalty recognises the seriousness of the consequences which flow from the behaviour. I consider that situations where there is incitement to suicide, with no resulting harm to the victim, should not be subject to such a substantial penalty.

88. I note that Ministry of Justice officials have discussed this with the Law Commission which is comfortable with this approach.

Grooming

89. The Law Commission identified a concern with the sexual grooming provisions as they are drafted in the Crimes Act (s 131B Crimes Act), and recommended an amendment to ensure that the process of grooming, without an overt act to meet the young person, can be criminalised.
90. That proposed amendment would overlap with the new offence of indecent communication with a person under 16 recently agreed to by Cabinet in the proposals to address child pornography [CAB Min (12) 29/7]. The Law Commission was unaware of this work when writing its Ministerial Briefing. Ministry of Justice officials have consulted with the Law Commission which is comfortable that the proposed new offence covers the targeted behaviour. As such, I recommend that this amendment is not necessary and should not be made.

Civil Law

Harassment Act 1997

91. The Law Commission identified instances in the Harassment Act 1997 where amendments are desirable to remove any uncertainty that it applies to electronic communications. In addition, explicitly including electronic communications will assist to raise awareness of the law and make it clear that potential liability may arise from making offensive comments online.
92. I propose the following four amendments to the Harassment Act 1997:
- 92.1. An amendment to section 4(1)(d) so that it is explicit that making contact with a person can include electronic communication;
 - 92.2. The addition of a further "specified act" of harassment in section 4 to the following effect: "giving offensive material to a person by placing the material in any electronic media where it is likely that it will be viewed by, or brought to the attention of, that person"
 - 92.3. An amendment to section 3 to provide that a continuing act over a protracted period is capable of constituting harassment (as recommended in the Law Commission's Invasion of Privacy report).
 - 92.4. To make a condition of a restraining order that applies to a continuing act that the respondent must take reasonable steps to prevent the specified act from continuing.

Privacy Act 1993

93. The Law Commission recommends two amendments to the Privacy Act 1993, both of which it had previously recommended in *its Privacy Act* report.¹

¹ *Review of the Privacy Act: Review of the Law of Privacy Stage 4* (NZLC R123, 2011).

94. The first is an amendment to the "publically available publication" exemption in Principle 10 and 11 of the Privacy Act so that the exemption is not available where the disclosure of personal information obtained from such a publication would be unfair or unreasonable.
95. The second is an amendment to section 56 of the Privacy Act so that the "domestic affairs" exception is not available where the disclosure of personal information would be highly offensive to an objective reasonable person.
96. The Ministry of Justice is currently preparing its response to stage 4 of the Law Commission's Review of the Law of Privacy, and Cabinet has not yet considered recommendations in relation to this. However, as the proposed amendments can stand alone, I propose that these amendments be made to the Privacy Act.

Human Rights Act 1993

97. The Law Commission recommends that three sections of the Human Rights Act 1993 should be amended to explicitly refer to electronic communication.
98. Section 61 of the Human Rights Act provides that it is unlawful to publish material that is likely to incite racial disharmony. Currently, this expressly refers to written and broadcast material. To avoid any doubt, I recommend that this should also refer to electronic communications in addition to other forms of publication.
99. In their report, the Law Commission notes that the Human Rights Commission submitted that this provision is currently difficult to use and should be reviewed in its entirety. This was outside of the scope of the Law Commission's report and that any review would be a matter best left to a fuller review of the Human Rights Act. I agree with the Law Commission.
100. Sections 62 and 63 of the Human Rights Act apply to sexual and racial harassment respectively. They provide that the harassment must have a detrimental effect on the person in relation to a number of specified benefits, including access to goods and services and education. This type of harassment has the potential to deter individuals, particularly young people, from using social media, thus limiting their interaction with their peers.
101. To make it clear that this applies to electronic media, I recommend adding to sections 62 and 63 a further item to the list of benefits that can be affected by the harassment "participation in any fora in the electronic media for the exchange of ideas and information".

Consultation

102. The New Zealand Police, the Crown Law Office, Department of Internal Affairs, Treasury, Department of Corrections, Ministry of Social Development, Ministry of Health, Ministry of Women's Affairs, State Services Commission, the Parliamentary Counsel Office, Law Commission, the Privacy Commissioner, and the Human Rights Commission have been consulted on the paper. The Department of Prime Minister and Cabinet has been informed of the paper.
103. The Ministry of Education has been closely involved in formulating the response to the Law Commission's recommendations relating to the education sector.

Financial implications

104. There will be financial implications of appointing an approved agency. When the regulations are promulgated appointing an approved agency and setting out its functions, the funding of this agency will also be agreed. As the agency could be an existing Government agency or a private agency, and its functions are yet to be finally agreed, it is too early to accurately identify the total cost of the agency. Though initial estimates of the cost are _____ to establish the agency and approximately _____ per annum to fund the agency.

However, I note that the costs could be significantly less if the functions are bolted on to an existing agency or Government department.

105. I expect that the funding of the agency and the appropriate sources of funding will be refined as the Bill progresses through the House, taking into account:

105.1. _____

105.2. Whether there is a fit with the functions of an existing Government department;

105.3. Whether an existing Government department could carry out some of the functions;

105.4. Whether the approved agency could be funded by industry contributions; and

105.5. Whether the establishment costs could be funded through a Justice Sector Fund bid.

106. In addition, the NCPO in implementing the Cyber-security Strategy also has work underway on cyber security awareness.

The NCPO work will contribute to effective coordination across the various strands of work to ensure appropriate funding and monitoring mechanisms are put into place.

107. Modelling completed by the Ministry of Justice indicates that the new offences proposed in this paper would only produce a small number of additional prosecutions per year, very few of which will receive a sentence of imprisonment, resulting in no tangible increase in the number of prison beds required.

108. The Ministry of Justice estimates that the costs of the District Court undertaking a role in the new civil enforcement regime would be \$115,000 per annum. This estimate is based on court staff and judicial time for 100 cases per year. This will be absorbed in Ministry of Justice baselines.

109. The Treasury notes Ministers are not being asked to make decisions on the establishment of an approved agency in this paper. However, as the justice sector has committed to managing within existing baselines until 2020, any future establishment or ongoing operating costs associated with this agency should be met from existing sources or through reprioritisation.

Human rights

110. The proposals raise issues with the New Zealand Bill of Rights Act 1990, in particular section 14 which guarantees the right to freedom of expression. However to the extent the proposal limits rights they are likely be justified and therefore consistent with the Bill of Rights Act.

Legislative implications

111. A Bill is required to implement many of these proposals. The proposed Bill has a priority 3 (to be passed if possible in the year) on the 2013 Legislation Programme.

Regulatory impact analysis

112. The Ministry of Justice's internal Regulatory Impact Statement (RIS) quality assurance panel has reviewed the RIS and associated material prepared by the Ministry of Justice. The Panel considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.
113. I certify that the proposals in the paper are consistent with the expectations set out in the Government Statement on Regulation.

Gender implications

114. Some of the changes proposed in this paper may impact women and girls differently from men and boys. These impacts could be positive if best practice is followed.
115. Anyone in an abusive relationship can be vulnerable in the digital environment. However, a higher proportion of women are in unsafe relationships and may have their actual or perceived safety compromised by their partners' use of technology (phone, text, email or make contact via social network media).
116. Abusive men may also use technology in less direct ways to control their partners, including tracking and monitoring their partners' movements by reading text messages and internet search histories, and reviewing GPS usage. In addition, technology can be withheld or destroyed by abusers to make it difficult for their partners to connect to support, information and help. Social networking technology is also reported to be used in the facilitation of sexual violence perpetration. The proposal to create a new offence of using a communication device with the intention to cause harm will go some way to protect the safety of women in the digital environment and to hold perpetrators who use technology to perpetrate violence, to account.
117. The proposal to create a new incitement to suicide offence without the requirement that a person needs to commit or attempt to commit suicide may go some way in addressing self harm as the Law Commission's Ministerial briefing makes a link between cyber-bullying and self-harm. The Ministry of Women's Affairs acknowledges that there are much higher rates of intentional self-harming, serious suicidal thoughts, suicide planning and suicide attempts among female students than male students (Youth 07 Survey). In addition, females have higher hospitalisation rates for intentional self-harm than males (according to Ministry of Health data, females were 86.2 percent more frequently hospitalised for intentional self-harm than males in 2010).

Disability perspective

118. The proposal has no disability implications.

Publicity

119. I will issue a press release about these proposals.

Recommendations

120. The Minister of Justice recommends that the Committee:

1. **Note** that in August 2012 the Law Commission produced a Ministerial briefing paper entitled *Harmful Digital Communications: The adequacy of the current sanctions and remedies*;

Education Sector

2. **Note** that schools need to use new technology effectively for teaching and learning while helping their students to manage the rapidly-changing social environment that comes with it;
3. **Note** that the Ministry of Education's approach to cyber-bullying is to support schools through the provision of advice and resources and through strengthened monitoring and accountability requirements;
4. **Note** that two new programmes already underway in the education sector (Positive Behaviour for Learning and Wellbeing@school) will help to meet many of the Law Commission's recommendations and ensure that schools provide the safe environments necessary for quality teaching and learning;
5. **Note** that an amendment to the registration requirements for private schools that requires a safe and supportive environment will be considered after discussion with representatives of independent schools;
6. **Note** that the legislative changes in this paper will mean that schools will need to help their learners understand that unwise behaviours and choices could have potentially serious consequences and that the Ministry of Education will focus on supporting schools to manage this;
7. **Note** that the above measures support and are complemented by the Youth Mental Health Project.

Civil Enforcement Regime

8. **Agree** that the Bill contain a regulation making power to allow Cabinet to appoint an approved agency to which complaints about harmful digital communications should go initially to be resolved through negotiation, mediation and persuasion;
9. **Agree** that the functions, arrangements and processes of the approved agency be specified by regulation;
10. **Agree** that if the approved agency cannot resolve the dispute and if a threshold of seriousness is reached the dispute can be referred to the District Court;

11. **Agree** that the jurisdiction of the court should be all forms of electronic communications;
12. **Agree** that individuals eligible to complain to the court be: victims, parents or guardians of child victims or those with a disability; the Police; school principals; and the Chief Coroner in specified circumstances;
13. **Agree** that to complain to the court the complainant is required to show that the communication has caused, or is likely to cause, significant emotional distress;
14. **Agree** that the court must not make an order unless it is satisfied that there has been a repeated or ongoing breach of one of the following principles:
 - 14.1. A communication should not disclose sensitive personal facts about an individual;
 - 14.2. A communication should not be threatening, intimidating, or menacing;
 - 14.3. A communication should not be grossly offensive to a reasonable person in the complainant's position;
 - 14.4. A communication should not be indecent or obscene;
 - 14.5. A communication should not be part of a pattern of conduct that constitutes harassment;
 - 14.6. A communication should not make a false allegation;
 - 14.7. A communication should not contain a matter that is published in breach of confidence;
 - 14.8. A communication should not incite or encourage anyone to send a message to a person with the intention of causing that person harm;
 - 14.9. A communication should not incite or encourage another person to commit suicide;
 - 14.10. A communication should not denigrate a person by reason of his or her colour, race, ethnic or national origins, gender, sexual orientation, or disability;
15. **Agree** that the court should not be able to impose criminal or monetary sanctions, but should be able to order a range of remedies against a perpetrator, and an internet service provider, or a website host, including orders to remove material from a website;
16. **Agree** that the court must have regard to freedom of expression and other relevant factors in exercising its functions, including whether and what remedy to grant;
17. **Agree** that applications to the court can be without notice and decided "on the papers" if necessary;

18. **Agree** that the court have the ability to receive evidence that may not normally be admissible in the District Court;
19. **Agree** that the court have the discretion to deal with the substance of the complaint in a manner that preserves the anonymity of the respondent;
20. **Agree** that the court should give reasons for its decisions and that they be published;
21. **Agree** that there be a right of appeal on the merits of the decision to the High Court;
22. **Agree** that a regulation making power be included in the legislation to allow for the development of specialist rules of process and procedure specific to these cases;

Changes in the law

23. **Agree** to create a new offence of using a communications device to cause harm punishable by up to 3 months' imprisonment or a \$2,000 fine;
24. **Agree** that the new offence of using a communications device to cause harm should cover the serious instances of publishing intimate recordings without consent;
25. **Agree** to create a new incitement to suicide offence which does not require an attempt or actual suicide to result from the incitement, punishable by up to 3 years' imprisonment;
26. **Agree** to amend the Harassment Act:
 - 26.1. Amend the definition of "harassment" to expressly include electronic communications;
 - 26.2. Amend the definition of "harassment" to recognise that a pattern of behaviour can be a single act of protracted harassment as well as two separate acts within 12 months;
 - 26.3. Amend the definition of "specified act" to include placing material in any electronic media where it is likely that it will be viewed by, or brought to the attention of that person;
 - 26.4. Include as a condition of a restraining order: taking all reasonable steps not to continue the specified act;
27. **Agree** to amend the Privacy Act:
 - 27.1. Amend Principle 10 and 11 so the exemption is not available where the disclosure of personal information obtained from publication would be unfair or unreasonable;
 - 27.2. Amend the domestic affairs exception in section 56 so that it is not available where the disclosure of personal information would be highly offensive to an objective reasonable person;

28. **Agree** to amend the Human Rights Act:

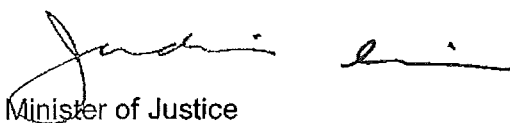
- 28.1. Amend section 61 to expressly include electronic communications as a method of publishing information that is likely to excite racial disharmony;
- 28.2. Amend sections 62 and 62 (sexual and racial harassment) to recognise that participation in any fora in the electronic media for the exchange of ideas and information is a benefit that can be affected by the harassment;

Financial Implications

- 29. **Note** that the approximate cost of an approved agency has been estimated at up to £100,000 to establish, and £100,000 per annum to fund;
- 30. **Note** that it is intended that the costs of any agency will be refined as the Bill progresses through the House, taking into account:
 - 30.1. Whether there is a fit with the functions of an existing Government department;
 - 30.2. Whether there is a fit with the functions of an existing Government department;
 - 30.3. Whether an existing Government department could carry out some of the functions;
 - 30.4. Whether the approved agency could be funded by industry contributions; and
 - 30.5. Whether the establishment costs could be funded through a Justice Sector Fund bid.
- 31. **Note** the justice sector has committed to managing within existing baselines until 2020 and, therefore, any future costs associated with an approved agency should be met from existing sources or through reprioritisation.

Legislative Implications

- 32. **Note** that this Bill has priority 3 on the 2013 Legislation Programme;
- 33. **Invite** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to these policy proposals.


Minister of Justice

Date signed: 21/3/13