

16 December 2013

The Secretary
Justice and Electoral Committee
Parliament Buildings
Wellington

Dear Secretary

HARMFUL DIGITAL COMMUNICATIONS BILL

The Human Rights Commission ('the Commission') welcomes the introduction of the Harmful Digital Communications Bill and the opportunity to make this submission. The Bill addresses the issue of harmful digital communications by creating a new civil enforcement regime and two new criminal offences to deal with the most serious types of harm. It also establishes a number of communication principles to guide interpretation of the legislation.

The Commission is particularly concerned about the phenomenon of cyberbullying. It considers that the right to be free from bullying is fundamental to the realisation of human rights - everyone, particularly children, have a right to personal security. They have the right to be safe and to feel safe. Bullying and harassment, assault and abuse - irrespective of the medium in which it occurs - denies a child or young person that right.

The Commission is strongly supportive of the Bill and appreciates that some of the matters that it raised earlier have been addressed but it considers some warrant further comment. They include:

- the relationship of the Bill to freedom of expression;
- the efficacy of the mechanisms proposed for dealing with harmful digital communication; and
- amendments to the Human Rights Act 1993 (HRA).

Dealing with these in turn:

1. Freedom of expression

1.1 Very few human rights are absolute. Most can be restricted in some circumstances. Freedom of expression is one of these. The right to freedom of opinion and expression is set out in Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)¹. The ICCPR provides that:

- (a) Everyone shall have the right to hold opinion without interference;
- (b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;
- (c) The exercise of [these] rights carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- (d) for respect of the rights or reputations of others
- (e) for the protection of national security or of public order, or of public health or morals

¹ The New Zealand Bill of Rights Act 1990 affirms New Zealand's commitment to the ICCPR and replicates the majority of rights found in the Covenant making them enforceable domestically.

- 1.2 In 2011, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression presented a report to the UN General Assembly exploring the key trends and challenges to the right to seek, receive and impart information and the idea of Internet access as a human right².
- 1.3 Although the Special Rapporteur stressed the importance of the right to freedom of expression, he accepts that some type of restriction or regulation will be necessary to prevent the Internet being misused to cause harm to others, and that, "due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet"³.
- 1.4 Any restriction will need to comply with the following three-part, cumulative test:
- (a) It must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); and
 - (b) It must pursue one of the purposes set out in Art.19 of the ICCPR, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and
 - (c) It must be proven as necessary and the least restrictive means to achieve the purported aim (principles of necessity and proportionality).
- 1.5 The Special Rapporteur also notes that legislation which has the effect of restricting freedom of expression in this situation must be applied by "a body which is independent of any political, commercial or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and review against its abusive application."⁴
- 1.6 The Ministry of Justice vet for compliance with the New Zealand Bill of Rights (NZBORA) found that the right to freedom of expression was infringed by the Bill but that for a variety of reasons it could be justified⁵. The Commission agrees that there is potential for the right to freedom of expression to be breached in the Bill but that it is justified - not only under the NZBORA but also in terms of the requirements laid out by the Special Rapporteur.

2. Communication Principle 10

- 2.1 Communication principle 10 states that a digital communication should not denigrate a person on a number of grounds that are found in the HRA. Although there is no specific mention of the HRA, we find it hard to understand why some of the grounds have been included and not others. For example, age, employment status (which is defined as being unemployed or in receipt of a benefit) and political opinion are omitted.
- 2.2 Clause 6(2)(b) of the Bill will make it mandatory to act consistently with the rights and freedoms in the NZBORA. As the right to be free from discrimination in the NZBORA applies to all the grounds of unlawful discrimination in the HRA it seems logical to extend Principle 10 to those grounds as well. It could, for example, be difficult to explain why a beneficiary who is hounded or criticised in unpleasant terms online for living off the State, cannot complain.

3. Enforcement

² UN General Assembly, Human Rights Council *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue* (16 May 2011) A/HRC/17/27

³ *Supra* fn 1 at para 27

⁴ *Supra* fn 1 at para 24

⁵ See MOJ analysis at www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/harmful-digital-communications-bill.

- 3.1 As part of the civil enforcement regime, there will be a new approved agency which will field initial complaints about harmful digital communication. It will be able to investigate complaints and attempt to resolve them through negotiation, mediation and persuasion. If unsuccessful then a number of people (including the complainant) may apply to the District Court for a civil order. The Court can also make a declaration that a communication breaches a communication principle and creates two criminal offences of posting digital comments with the intention to cause harm and inciting suicide.
- 3.2 The Commission recognises the need to establish a mechanism to deal with harmful digital communications and that the suggestion of an Approved Agency is probably the best of a number of options but it has a concern about what is proposed. It relates to jurisdiction and the necessary threshold to access the complaints system. In particular, the requirement that someone has suffered “harm”.
- 3.3 “Harm” is defined as serious emotional harm. This is a subjective test and one that can be difficult to establish yet it will be the criterion for entry to the complaints system. The Approved Agency will have the function of assessing the harm caused to the complainant: cl.8(1)(a) and whether the subject matter or nature of the complaint is likely to cause harm: cl.8(1)(c)(ii).
- 3.4 The Commission faces a similar difficulty when dealing with sexual and racial harassment under the HRA even though they are defined more explicitly than what is proposed here. In deciding whether behaviour is detrimental the significance of an incident is determined by how the complainant experiences it. As the Tribunal has observed, assessment of whether behaviour had a detrimental effect involves a “subjective enquiry into the reaction of the particular plaintiff”⁶.
- 3.5 When the right to freedom of expression is taken into account: cl.6(2)(b), it becomes even more complicated and could well result in a reasonably high threshold being applied⁷. It would be unfortunate if people were denied access to a remedy because of the subjective understanding of what constitutes “harm”.
- 3.6 A person who alleges that they have suffered harm as a result of a digital communication can apply to a District Court for an order under ss.16 or 17. Presumably, people whose complaint has not been accepted by the Approved Authority because, for example, it may not be considered to reach the necessary level of harm could still take their complaint to the District Court. This is the case under the HRA with complaints that the Commission decides not to take any further action on - there is an explicit requirement under the HRA to inform the complainant of the right to take their complaint to the Human Rights Tribunal: s.80(4)(c). If we are correct about this we suggest a similar provision be included in the Bill for the avoidance of doubt.
- 3.7 Causing harm by posting digital communication: cl.19.** A person will be deemed to have caused an offence if they have intentionally posted a digital communication that they knew would cause harm to an “ordinary reasonable” person in the victim’s position and does in fact cause harm to the victim. These requirements are conjunctive – if one is not present then the offence is not established.

⁶ *Tahiatua v Nicholson & the New Zealand Maori Arts and Crafts Institute* HRRT Decision 33/03

⁷ For example in the US the Courts were still following the precedent set in an 1886 case, *The People v. B.F. Jones*, in recent cases involving the use of the internet, adopting the following quote to justify a conservative approach to dealing with online harassment:

It is not the policy of the law to punish those unsuccessful threats which it is not presumed would terrify ordinary persons excessively; and there is so much opportunity for magnifying undefined menaces that probably as much mischief would be caused by letting them be prosecuted as by refraining from it.

3.8 The Commission wonders whether it is necessary to add the requirement of actually causing harm. Again, from our experience in dealing with s.61 HRA – which is addressed below - it could be difficult to establish and could result in egregious postings going unpunished simply because evidence of emotional harm could not be established.

4 Application of the Human Rights Act

4.1 There are a number of procedural matters relating to the application of the HRA to the Bill that the Commission has already raised with the Law Commission and the Ministry of Justice. However, there is one matter that is more generic and relates to the limitation of ss.61, 62, and 63 which only deal with race and gender. Disability, religion and sexual orientation are all grounds which lend themselves to harassment and we wonder whether it would be possible to establish a similar mechanism to that for race and sex (or a provision that applied generally) which would allow these grounds to be included.

4.2 **Extension of s.61.** Section 61 (exciting racial disharmony) has been amended to apply to electronic communications to ensure that the section can be used to prohibit broadcasts by means of any electronic communications if it causes racial disharmony. There are considerable difficulties in implementing s.61 in practice as the material must be assessed to determine the possible effect on the recipients, taking into account matters such as the context in which the comments were made, or the material distributed⁸. Because of the constraints created by the wording and the need to take into account freedom of expression, the Commission has not pursued a complaint under s.61 for the past five years⁹. Similar difficulties can be anticipated in relation to electronic communications.

4.3 It is also worth noting that s.61 only applies to race and ethnicity even though a significant number of complaints relating to other grounds – particularly religious belief and sexual orientation – are received by the Commission. For example, complaints relating to Muslims cannot be addressed under this provision because technically it is not a race or ethnicity.

4.4 **Sections 62 and 63.** The Commission welcomes the amendments that are proposed to ss.62 and 63 as they clarify a potentially ambiguous situation – namely whether goods and services covered use of social media. The change places this beyond doubt.

5. Conclusion

5.1 The Commission recommends that:

- Communication Principle 10 applies to all the grounds in the HRA;
- A person can access the District Court if the Approved Agency does not accept their complaint because the threshold for accessing the complaints system is set too high (cf. s.80(4) HRA);
- Consideration is given to whether it should always be necessary to prove demonstrable harm for the criminal offence to apply;
- Consideration is given to extending harassment to other grounds in the HRA.

⁸ The Law Commission in its Ministerial Briefing paper recognised that there are likely to be some difficult issues in relation to the level of distress including when it will be deemed “harmful” and when it simply causes annoyance or irritation. This will presumably be addressed through increasing familiarity with the legislation when it comes into force (as has been the case with the Commission). The Commission applies an objective “reasonable person” test. The views of the “very sensitive” are not considered to be the appropriate yardstick to decide whether something is insulting. While this is similar to the test for an offence in the Bill, it does not require evidence of harm.

⁹ In 49 matters were reported to the Commission, in 2011 there were 82, and in 2012, 38. The Commission engaged with YouTube and Trade Me about material that had appeared on those sites and, in at least one case, the offending material was removed.

The Commission recognises that some of these issues are reasonably technical and is willing to expand on them further if necessary. Please contact Sylvia Bell at sylviab@hrc.co.nz or DDI 09 306 2650.

Yours sincerely,

David Rutherford
CHIEF COMMISSIONER