

## New cyber-bullying legislation may have unintended effects

July 2015

### Speed read

Despite political opposition from unexpected quarters, the Harmful Digital Communications Bill was recently passed into law. The Act addresses widespread concerns about cyber-bullying and online exploitation.

Below, we overview the key provisions of the Act. We also consider how the offences introduced by the Act affect the wider legal landscape. One possible unintended consequence of this legislation is the establishment of a new legal avenue for recipients of defamatory digital content.

The new law contains responsibilities upon many websites, including some that don't even expect it.



### The Detail

#### Scope of the Harmful Digital Communications Act

The Harmful Digital Communications Act deals with cyber-bullying and online exploitation. It provides a complaints mechanism for recipients of digital communications which are threatening, obscene, harmful, grossly offensive, or which denigrate race, religion, gender, sexual orientation, or disability. Also included are digital communications which disclose sensitive personal facts, make false allegations, or are published in breach of confidence.

#### Role of the Approved Agency (Netsafe?)

An "Approved Agency"- it could be Netsafe- will soon be appointed under the Act.<sup>1</sup> The role of the Approved Agency is to:

- Receive and investigate complaints made under the Act.
- Resolve complaints by operating as an advocate for complainants.
- Work with online content providers and other agencies to uphold the Act.
- Educate internet users and providers about online safety.

#### Escalation to the District Court

Where the Approved Agency is unable to resolve a serious complaint, it can be escalated to the District Court. Court proceedings can be brought by the complainant, their parent or guardian, the head of the victim's school, or the Police.

The District Court has a variety of remedies

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available, including ordering the online material to be removed or corrected.

If the author harms, or intends to harm, the recipient of the digital communication, this constitutes an offence under the Act, and can result in a fine of up to \$50,000 (up to \$200,000 for a body corporate), or imprisonment for up to 2 years. If the digital communication incites suicide, the possible prison sentence is up to 3 years.

**“Safe harbour” for online content hosts**

Online content hosts include not only the likes of Facebook and Twitter, but any online community where users can express themselves, such as TradeMe, Stuff, and other websites which permit comments and user input.

Where user-posted content is the subject of a complaint under the Act, the online host is protected from liability (a “safe harbour” provision) as long as they comply with a specified notification procedure. This includes forwarding the complaint to the content’s author as soon as is practicable (but no later than 48 hours), then either removing the content, or escalating the situation if the author refuses to consent to the content’s removal.

We’ll address these issues in more detail in a later article.

**When does the Act take effect?**

The Act’s new offences and online content host requirements came into immediate effect on 2 July 2015. The other provisions will take effect once the Approved Agency is appointed.

**How will the Act affect the legal landscape?**

The purpose of the Act is well-intentioned. Parliament has deemed cyber-bullying and online exploitation to be serious issues which require a serious response. But will the Act suppress more than cyber-bullying?

The Act requires courts and the Approved Agency to pay due regard to the Bill of Rights Act 1990, which includes the right to freedom of expression. However, given the Act’s wide scope and overlap with existing criminal, privacy, and defamation law, it remains to be seen whether it could be used to suppress digital content normally considered permissible, or even protection-worthy.

The media receive no exemptions under the Act, nor is there an explicit public interest defence. A public figure, for example, could invoke the Act in response to online investigative journalism, on the basis the digital communication caused them harm or emotional distress.

Last year, the UK House of Lords stated that “what is not an offence off-line should not be an offence online”.<sup>2</sup> To what extent will the Harmful Digital Communications Act establish different legal avenues for complainants to seek remedies for defamatory digital content, compared to what could otherwise be claimed in non-digital scenarios?

It’s difficult to predict, but we think the courts might soon be required to clarify the applicability of the Act to a range of situations beyond the domain of cyber-bullying.

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1. The Law Commission has already recommended that NetSafe be appointed as the Approved Agency. No deadline has been set for the official decision to be made.

2. UK Parliament, House of Lords - Communications Committee, *Social media and criminal offences - First Report* (2014) at 94(d) (accessible <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3702.htm>)

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