

House of Representatives

# Supplementary Order Paper

Tuesday, 23 June 2015

## Harmful Digital Communications Bill

*Proposed amendments for the consideration of the Committee of the whole House*

**Key:**

- **this is inserted text**
- **~~this is deleted text~~**

**Note:** This Supplementary Order Paper shows amendments to the Bill that are being proposed by the Minister for the purposes of consideration in Committee of the whole House. This document does—

- **NOT have official status in terms of unamended text**
- **NOT have the status of an as-reported version of the Bill.**



## Explanatory note

This Supplementary Order Paper proposes amendments to improve the operability of the legislation, including the following:

- clarifying some drafting in *clause 6*:
- clarifying the application of *clause 7(5)* to delegates of the Approved Agency:
- extending *clause 10(1)* so that a person who alleges that he or she will suffer harm as a result of a digital communication (rather than one who has suffered harm) can apply to the District Court for an order:
- amending *clause 11(1)* so that proceedings in the court may not be taken unless the Approved Agency has received a complaint and had a reasonable opportunity to assess it and decide what action to take:
- amending the threshold in *clause 11(2)* so that there has to be a threatened serious breach, a serious breach, or a repeated breach of 1 or more communication principles:
- inserting new *clause 12A* to enable the court to require the Approved Agency to provide information for the purpose of proceedings:
- providing in *clause 15(5A)* for terms of office of technical advisers and related matters:
- providing in *clause 17A(3)* that the court can vary the duration or conditions of a court order on its own initiative:
- replacing *clause 19(3)* with a provision that includes fines of up to \$50,000 for an individual and up to \$200,000 for a body corporate convicted of an offence against this clause:
- replacing the safe harbour provisions in *clauses 20 and 20A* with the provisions in *new clauses 20 to 20B* in order to improve their clarity and effectiveness:
- providing in *new clause 20* that the process in *new clause 20A* must be followed if an online content host wants to enjoy its protection, but failure to take advantage of this process does not give rise to any legal liability or affect any other legal rights or defences available to the online content host (such as a contractual indemnity or immunity):
- setting out the safe harbour process in *new clause 20A* (the matters formerly in *clause 20(2) to (5)*), and including in *new subclause (5)* a requirement for an online content host to obtain a court order before disclosing law enforcement information:
- setting out in *new clause 20B* the general provisions that apply to the safe harbour process (formerly in *clauses 20 and 20A*):
- providing in *new clause 22(2)(ab)* for forms to be prescribed by rules of court for the purposes of *new clause 12A*:
- making technical drafting improvements.

**Departmental disclosure statement**

The Ministry of Justice considers that a departmental disclosure statement is not required to be prepared for this Supplementary Order Paper.

**The Honourable Minister, in Committee, to propose the amendments shown in the following document.**

*Hon Amy Adams*

# **Harmful Digital Communications Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Harmful Digital Communications Act **2013**.

**2 Commencement**

- (1) **Sections 19 to 20A, 20B and Part 2** come into force on the day after the date on which this Act receives the Royal assent.
- (2) The rest of this Act comes into force on the earlier of—
  - (a) a date appointed by the Governor-General by Order in Council; and
  - (b) 2 years after the date on which this Act receives the Royal assent.
- (3) One or more Orders in Council may be made under **subsection (2)** appointing different dates for different provisions.

**Part 1**

**Approved Agency and enforcement**

Subpart 1—Purpose, interpretation, the Crown, and communication principles

**3 Purpose**

The purpose of this Act is to—

- (a) deter, prevent, and mitigate harm caused to individuals by digital communications; and
- (b) provide victims of harmful digital communications with a quick and efficient means of redress.

**4 Interpretation**

In this Act, unless the context otherwise requires,—

**applicant** means anyone who makes an application under **section 10**

**application** means an application to a District Court under **section 13**

**Approved Agency** or **Agency** means a person, organisation, department, or entity appointed as an Approved Agency under **section 7**

**chief executive** means the chief executive of the department that is for the time being responsible for the administration of this Act

**defendant**, in relation to an application made to, or an order made by, a court under this Act, means a person against whom an order is sought or made

**digital communication**—

- (a) means any form of electronic communication; and
- (b) includes any text message, writing, photograph, picture, recording, or other matter that is communicated electronically

**harm** means serious emotional distress

**individual** means a natural person

**intimate visual recording**—

- (a) means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—
  - (i) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is—
    - (A) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or
    - (B) engaged in an intimate sexual activity; or
    - (C) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
  - (ii) an individual's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—
    - (A) from beneath or under an individual's clothing; or
    - (B) through an individual's outer clothing in circumstances where it is unreasonable to do so; and
- (b) includes an intimate visual recording that is made and transmitted in real time without retention or storage in—
  - (i) a physical form; or
  - (ii) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing

**IPAP** has the same meaning as in section 122A(1) of the Copyright Act 1994

**Minister** means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

**online content host**, in relation to a digital communication, means the person who has control over the part of the electronic retrieval system, such as a website or an online application, on which the communication is posted and accessible by the user



**posts a digital communication—**

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

**professional leader** has the same meaning as in section 120 of the Education Act 1989

**registered school** has the same meaning as in section 2(1) of the Education Act 1989.

## **5 Act binds the Crown**

This Act binds the Crown.

### *Communication principles*

## **6 Communication principles**

- (1) The communication principles are—

### *Principle 1*

A digital communication should not disclose sensitive personal facts about ~~an~~ another individual.

### *Principle 2*

A digital communication should not be threatening, intimidating, or menacing.

### *Principle 3*

A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual.

### *Principle 4*

A digital communication should not be indecent or obscene.

### *Principle 5*

A digital communication should not be used to harass an individual.

### *Principle 6*

A digital communication should not make a false allegation.

### *Principle 7*

A digital communication should not contain a matter that is published in breach of confidence.

*Principle 8*

A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual.

*Principle 9*

A digital communication should not incite or encourage ~~another~~an individual to commit suicide.

*Principle 10*

A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

- (2) In performing functions or exercising powers under this Act, the Approved Agency and courts must—
- (a) take account of the communication principles; and
  - (b) act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

## Subpart 2—Enforcement provisions

### *Approved Agency*

#### 7 **Approved Agency**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister,—
- (a) appoint as the Approved Agency for the purpose of this Act—
    - (i) any person or organisation:
    - (ii) any department:
    - (iii) any Crown entity:
  - (b) prescribe the functions of the Approved Agency that are in addition to the functions specified in **section 8(1)** and are related to the purpose of this Act:
  - (c) prescribe any reporting requirements, accountability measures, or other terms or conditions~~and accountability measures~~ that the Approved Agency must comply with.
- (2) Before recommending the making of an Order in Council under **subsection (1)**, the Minister must be satisfied that the appointee has the appropriate knowledge, skills, and experience to carry out some or all of the functions of the Approved Agency under this Act.
- (3) The Approved Agency holds office for the term specified in the order made under **subsection (1)**.

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- (4) A person is not to be regarded as being employed in the service of the Crown for the purposes of the State Sector Act 1988 or the Government Superannuation Fund Act 1956 solely because of his or her appointment as the Approved Agency.
- (5) The Approved Agency is subject to the Ombudsmen Act 1975, the Official Information Act 1982, and the Public Records Act 2005 in respect of functions ~~that the Agency or any delegate of the Agency performs~~ under this Act.

## **8 Functions and powers of Approved Agency**

- (1) The functions of the Approved Agency are—
- (a) to receive and assess complaints about harm caused to individuals by digital communications:
  - (b) to investigate complaints:
  - (c) to use advice, negotiation, mediation, and persuasion (as appropriate) to resolve complaints:
  - (d) to establish and maintain relationships with domestic and foreign service providers, online content hosts, and agencies (as appropriate) to achieve the purpose of this Act:
  - (e) to provide education and advice on policies for online safety and conduct on the Internet:
  - (f) to perform the other functions conferred on it by or under this Act, including functions prescribed by Order in Council made under **section 7**.
- (2) The Agency may, subject to any other enactment, seek and receive any information that the Agency considers will assist it in the performance of its functions.
- (2A) The Agency may refuse to investigate, or cease investigating, any complaint if the Agency considers that—
- (a) the complaint is trivial, frivolous, or vexatious; or
  - (b) the subject matter or nature of the complaint is unlikely to cause harm to any individual; or
  - (c) the subject matter or nature of the complaint does not contravene the communication principles.
- (3) The Agency may decide not to take any further action on a complaint if, in the course of assessing or investigating the complaint, it appears to the Agency that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.
- (4) If the Agency decides not to take any further action on a complaint, it must notify the complainant of the right to apply to the District Court for an order under this Act.

**8A Power of Approved Agency to delegate**

- (1) Subject to the approval of the Minister, the Approved Agency may delegate to any person or organisation any of its functions and powers except this power of delegation.
- (2) Before delegating any functions or powers, the Approved Agency must be satisfied that the delegate has the appropriate knowledge, skills, and experience to carry out those functions or powers.
- (3) A delegation—
  - (a) must be in writing; and
  - (b) is subject to any restrictions and conditions specified by the Approved Agency that it thinks fit, including conditions that relate to the Approved Agency's obligations under **section 7(5)**; and
  - (c) is revocable at any time, in writing; and
  - (d) does not prevent the performance or exercise of a function or power by the Approved Agency.
- (4) A person or organisation performing or exercising any delegated functions or powers may perform and exercise them in the same manner and with the same effect as if they had been conferred directly by this Act and not by delegation.
- (5) A person or organisation who acts under a delegation given under this section is presumed to be acting in accordance with its terms in the absence of evidence to the contrary.
- (6) Any action or decision of a delegate under the delegation is treated as an action or decision of the Approved Agency under this Act.
- (7) A delegate must comply with all reasonable requests or requirements of the Approved Agency for the purpose of enabling the Agency to comply with the Ombudsmen Act 1975, the Official Information Act 1982, and the Public Records Act 2005 in respect of functions to which the delegation applies.

**9 Protection for employees of Approved Agency**

- (1) This section applies if the Approved Agency is not a department or Crown entity.
- (2) If this section applies, no civil action lies against any employee of the Agency, or against any employee of a delegate of the Agency, for any act done or omitted by the Agency, or by the delegate, or by him or her, in good faith in the performance or intended performance of the functions, duties, or powers of the Agency.
- (3) However, **subsection (2)** does not prevent a person from filing an application for review under section 4 of the Judicature Amendment Act 1972 in relation to the exercise, refusal to exercise, or proposed or purported exercise by the Approved Agency of a statutory power within the meaning of that Act or otherwise affect the operation of that Act.

*Proceedings may be brought in District Court*

**10 Who may bring proceedings**

- (1) Any of the following may apply to a District Court for an order under **section 16 or 17**:
  - (a) an individual (the **affected individual**) who alleges that he or she has suffered or will suffer harm as a result of a digital communication;
  - (b) a parent or guardian on behalf of the affected individual;
  - (c) the professional leader of a registered school or his or her delegate, if the affected individual is a student of that school and consents to the professional leader or delegate bringing the proceedings;
  - (d) the Police, if the digital communication constitutes a threat to the safety of an individual.
- (2) The chief coroner may apply for an order under **section 16 or 17(1)(a) or (b) or (2)(a)** in respect of a digital communication that contravenes a provision of the Coroners Act 2006.

**11 Threshold for proceedings**

- (1) An applicant referred to in **section 10(1)(a), (b), or (c)** may not apply for an order under **section 16 or 17** in respect of a digital communication unless the Approved Agency has first ~~considered~~received a complaint about the communication and had a reasonable opportunity to ~~consider~~assess the complaint and decide what action (if any) to take.
- (2) In any case, a District Court must not grant an application from an applicant referred to in **section 10(1)(a), (b), or (c)** for an order under **section 16 or 17** unless it is satisfied that—
  - (a) there has been a ~~serious, repeated, or threatened~~ threatened serious breach, a serious breach, or a repeated breach of 1 or more communication principles; and
  - (b) the breach has caused or is likely to cause harm to an individual.
- (3) The court may, on its own initiative, dismiss an application from an applicant referred to in **section 10(1)(a), (b), or (c)** without a hearing if it considers that the application is frivolous or vexatious, or for any other reason does not meet the threshold in **subsection (2)**.
- (4) The court may, on its own initiative, dismiss an application under **section 10** from the Police if satisfied that, having regard to all the circumstances of the case, the application should be dismissed.

**12 District Court may refer matter back to Approved Agency**

- (1) This section applies when a District Court considers an application under **section 10** that arises from the subject matter of a complaint that has been ~~consid-~~

~~ereceived~~ by the Approved Agency (as ~~required by~~ whether or not the complaint has been assessed under **section 11(1)**).

- (2) The court—
- (a) must consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise); and
  - (b) may adjourn the proceeding and refer the matter back to the Approved Agency unless satisfied that attempts at resolution, or further attempts at resolution, of the matter by the parties and the Agency—
    - (i) will not contribute constructively to resolving the matter; or
    - (ii) will not, in the circumstances, be in the public interest; or
    - (iii) will undermine the proceedings before the court.

### **12A Court may require Approved Agency to provide information**

- (1) A District Court or any Registrar or Deputy Registrar of the court may require the Approved Agency to provide information for the purposes of satisfying the court of any matters referred to in **sections 11 and 12**.
- (2) The Approved Agency must provide the information in the form (if any) prescribed by rules of court.

### *Procedure*

### **13 Applications**

- (1) Applications for any orders under **section 16 or 17** must—
  - (a) be filed in a District Court; and
  - (b) be in the prescribed form (if any).
- (2) The court may give directions as to service and, if the court considers it appropriate to do so in the circumstances, having regard to the principles of natural justice, the court may consider an application made on a without notice basis.
- (3) No filing fee is payable for an application.

### **14 Mode of hearing and evidence**

- (1) The court must, having regard to the circumstances of the particular case, direct that an application be determined—
  - (a) just on the basis of written material provided to it; or
  - (b) by way of a hearing involving oral submissions.
- (2) The court may deal with an application in any manner that it thinks will preserve the anonymity of ~~the applicant, victim, or respondent~~ a party so that the party's identity is not released to any other party during the proceedings.
- (3) The court must give reasons for any decision it makes in the proceedings .
- (3A) The decision, including the reasons, must be published.

- (4) **Subsections (3) and (3A)** are subject to **subsection (2)**.
- (5) The court may receive any evidence or information that may in its opinion assist it to deal effectively with any proceedings under this Act, whether or not the evidence or information would be otherwise admissible in a court of law.

## 15 Technical advisers

- (1) A District Court or the High Court, as the case may be, may appoint a technical adviser to assist it in considering and determining an application for an order under **section 17** or any appeal under section 72 of the District Courts Act 1947.
- (2) The duties of a technical adviser are—
  - (a) to sit with the court; and
  - (b) subject to **subsection (4)**, to act in all respects as an extra member of the court.
- (3) The court or any Registrar or Deputy Registrar of the court must appoint a technical adviser if the court is considering an application for an order under **section 17(2)(a) or (b) or (2A) or (3)(a)**.
- (4) The Judge may give any weight to the technical adviser's advice that the Judge thinks fit, and the Judge alone must determine the application or appeal.
- (5) The Minister must maintain a panel of persons who may be appointed under this section as technical advisers, and only persons named on the panel may be appointed under this section as technical advisers.
- (5A) A technical adviser may be appointed to the panel for up to 5 years, and the appointment continues until—
  - (a) the person is reappointed; or
  - (b) a successor to the person is appointed; or
  - (c) the person is informed in writing by the Minister that the person is not to be reappointed and that a successor to that person is not to be appointed;  
or
  - (d) the person resigns by notice in writing to the Minister; or
  - (e) the person is removed from the panel by the Minister for incapacity that affects the person's performance of duty, for neglect of duty, or for misconduct, proved to the satisfaction of the Minister; or
  - (f) the person dies.
- (6) The chief executive must pay technical advisers the remuneration and allowances determined from time to time by the Minister.

**16 Interim orders**

- (2) A District Court may, if the court considers it is desirable to do so, grant any interim orders pending the determination of the application for orders under **section 17**.
- (3) An interim order under this section may do anything that may be done by order under **section 17** and expires when the application under that section is determined.

**17 Orders that may be made by court**

- (1) The District Court may, on an application, make 1 or more of the following orders against a defendant:
  - (a) an order to take down or disable material:
  - (b) an order that the defendant cease or refrain from the conduct concerned:
  - (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:
  - (d) an order that a correction be published:
  - (e) an order that a right of reply be given to the affected individual:
  - (f) an order that an apology be published.
- (2) The District Court may, on an application, make 1 or more of the following orders against an online content host:
  - (a) an order to take down or disable public access to material that has been posted or sent:
  - (b) an order that the identity of the author of an anonymous or pseudonymous communication be released to the court:
  - (c) an order that a correction be published in any manner that the court specifies in the order:
  - (d) an order that a right of reply be given to the affected individual in any manner that the court specifies in the order.
- (2A) The District Court may, on application, make an order against an IPAP that the identity of an anonymous communicator be released to the court.
- (3) The court may also do 1 or more of the following:
  - (a) make a direction applying an order provided for in **subsection (1) or (2)** to other persons specified in the direction, if there is evidence that those others have been encouraged to engage in harmful digital communications towards the affected individual:
  - (b) make a declaration that a communication breaches a communication principle:
  - (c) order that the names of any specified parties be suppressed.



- (4) In deciding whether or not to make an order, and the form of an order, the court must take into account the following:
- (a) the content of the communication and the level of harm caused or likely to be caused by it:
  - (b) the purpose of the communicator, in particular whether the communication was intended to cause harm:
  - (c) the occasion, context, and subject matter of the communication:
  - (d) the extent to which the communication has spread beyond the original parties to the communication:
  - (e) the age and vulnerability of the affected individual:
  - (f) the truth or falsity of the statement:
  - (g) whether the communication is in the public interest:
  - (h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:
  - (i) the conduct of the affected individual or complainant:
  - (j) the technical and operational practicalities, and the costs, of an order:
  - (k) the appropriate individual or other person who should be subject to the order.
- (5) In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

#### **17A Court may vary or discharge order**

- (1) Any applicant who obtains an order under **section 16 or 17** or any other party to that order may apply for an order under **subsection (2)**.
- (2) The District Court may, by order, do any of the following things to an order made under **section 16 or 17**:
- (a) vary the duration of the order:
  - (b) vary any conditions of the order:
  - (c) discharge the order.
- (3) The court may make an order referred to in **subsection (2)(a) or (b)** on its own initiative, whether or not an application is made.

#### *Offences*

#### **18 Offence of non-compliance with order**

- (1) A person who, without reasonable excuse, fails to comply with an order made under **section 16 or 17** commits an offence.
- (2) A person who commits an offence against this section is liable on conviction to,—

- (a) in the case of a natural person, imprisonment for a term not exceeding 6 months or a fine not exceeding \$5,000;
- (b) in the case of a body corporate, a fine not exceeding \$20,000.

### **19 Causing harm by posting digital communication**

- (1) A person commits an offence if—
  - (a) the person posts a digital communication with the intention that it cause harm to a victim; and
  - (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
  - (c) posting the communication causes harm to the victim.
- (2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—
  - (a) the extremity of the language used;
  - (b) the age and characteristics of the victim;
  - (c) whether the digital communication was anonymous;
  - (d) whether the digital communication was repeated;
  - (e) the extent of circulation of the digital communication;
  - (f) whether the digital communication is true or false;
  - (g) the context in which the digital communication appeared.
- ~~(3) A person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 2 years.~~
- (3) A person who commits an offence against this section is liable on conviction to,—
  - (a) in the case of a natural person, imprisonment for a term not exceeding 2 years or a fine not exceeding \$50,000;
  - (b) in the case of a body corporate, a fine not exceeding \$200,000.
- (4) In this section, **victim** means the individual who is the target of a posted digital communication.

Compare: 1961 No 43 s 216G; Michigan Penal Code 1931 S750.411s

#### *Liability of online content host*

### **20 Liability of online content host for content posted by user**

- ~~(1) This section and **section 20A** apply to the liability of an online content host for the content of a digital communication posted by a person and hosted by the online content host.~~
- ~~(2) No civil or criminal proceedings may be brought against the online content host in respect of the content complained of (the **specific content**) unless—~~

- (a) the person who provides the specific content does so on behalf, or at the direction, of the online content host; or
- (b) the online content host—
  - (i) receives a notice of complaint about the specific content; and
  - (ii) does not comply with **subsections (3) and (4)**.
- (3) The requirements of this subsection are that—
  - Host to notify author of complaint*
  - (a) the online content host must, as soon as practicable but no later than 48 hours after receiving a notice of complaint,—
    - (i) provide the author of the specific content with a copy of the notice of complaint; and
    - (ii) notify the author that the author may submit a counter-notice to the host within 48 hours after receiving that notification:
  - (b) if the host is unable to contact the author (for example, because the identity of the author is unknown) after taking reasonable steps to do so, the host must take down or disable the specific content as soon as practicable after taking those steps:
    - Author's counter-notice consenting to removal of content*
    - (e) if the author submits a valid counter-notice no later than 48 hours after receiving the host's notification under **paragraph (a)**, in which the author consents to the removal of the specific content, the host must take down or disable the specific content as soon as practicable after receiving that counter-notice:
      - Author's counter-notice refusing consent to removal of content*
      - (d) if the author submits a valid counter-notice no later than 48 hours after receiving the host's notification under **paragraph (a)**, in which the author refuses to consent to the removal of the specific content, the host must leave the specific content in place and, as soon as practicable after receiving that counter-notice,—
        - (i) notify the complainant of the author's decision; and
        - (ii) if the author consents, provide the complainant with personal information that identifies the author:
          - Author failing to submit valid counter-notice*
          - (e) if the author does not submit a valid counter-notice in accordance with this subsection (whether by failing to submit a counter-notice or by submitting an invalid counter-notice), the host must take down or disable the specific content as soon as practicable but no later than 48 hours after notifying the author under **paragraph (a)**.
- (4) A notice of complaint must—

- (a) ~~state the name and address for service of the complainant; and~~
  - (b) ~~state the specific content, and explain why the complainant considers that the specific content—~~
    - (i) ~~is unlawful; or~~
    - (ii) ~~breaches 1 or more communication principles and has caused harm; and~~
  - (c) ~~sufficiently enable the specific content to be readily located; and~~
  - (d) ~~state whether the complainant consents to personal information that identifies the complainant being released to the author; and~~
  - (e) ~~contain any other information that the complainant considers relevant.~~
- (5) ~~A counter-notice must state—~~
- (a) ~~the name and address for service of the author; and~~
  - (b) ~~whether the author consents to personal information that identifies the author being released to the complainant; and~~
  - (c) ~~whether the author consents to the removal of the specific content.~~
- (6) ~~The protection conferred on an online content host by this section does not apply if the host does not provide an easily accessible mechanism that enables a user to contact the host about specific content as provided in this section.~~

**20A Further provisions relating to liability of online content host**

- (1) ~~If consent to the release of personal information that identifies the party giving the notice is withheld under **section 20**, the online content host must hold that personal information as confidential information that is not to be released except by order of a District Court Judge or High Court Judge made on an application under this subsection.~~
- (2) ~~The Approved Agency may lodge a notice of complaint under **section 20** on behalf of a complainant and provide advice and assistance to the complainant in relation to the complaint.~~
- (3) ~~The fact that an online content host does not take advantage of **section 20(2)** does not of itself create any civil or criminal liability for hosting the specific content.~~
- (4) ~~Nothing in **section 20** or this section affects—~~
  - (a) ~~section 211 of the Criminal Procedure Act 2011; or~~
  - (b) ~~section 19 of the Bail Act 2000; or~~
  - (c) ~~copyright liability, or any proceedings, under the Copyright Act 1994; or~~
  - (d) ~~any enactment that expressly overrides **subsection (2)**.~~
- (5) ~~Nothing in **section 20** or this section limits the right of an individual to injunctive relief in relation to the content of a digital communication posted by another person and hosted by the online content host.~~

**20** Liability of online content host for content posted by user

- (1) Section 20A provides protection for an online content host in respect of any specific content of a digital communication posted by a person and hosted by the online content host if the host follows the process in that section.
- (2) The fact that an online content host does not take advantage of **section 20A** does not of itself create any civil or criminal liability for hosting the specific content.
- (3) Section 20A does not affect any rights or defences otherwise available to the online content host in respect of the hosting of the specific content (for example, the removal of content or the creation, exercise, or taking advantage of any contractual indemnity or immunity or any other term of use).
- (4) This section is subject to **section 20B(5)**.

**20A** Process for obtaining protection against liability for specific content

- (1) No civil or criminal proceedings may be brought against an online content host in respect of the content complained of (the **specific content**) if the online content host—
  - (a) receives a notice of complaint about the specific content; and
  - (b) complies with **subsection (2)**.
- (2) The requirements of this subsection are that—
  - Host to notify author of complaint*
    - (a) the online content host must, as soon as practicable but no later than 48 hours after receiving a notice of complaint,—
      - (i) provide the author of the specific content with a copy of the notice of complaint, altered to conceal personal information that identifies the complainant if the host has received confirmation that the complainant does not consent to the host providing that information to the author; and
      - (ii) notify the author that the author may submit a counter-notice to the host within 48 hours after receiving that notification;
    - (b) if the host is unable to contact the author (for example, because the identity of the author is unknown) after taking reasonable steps to do so, the host must take down or disable the specific content as soon as practicable after taking those steps but no later than 48 hours after receiving a notice of complaint;
  - Author's counter-notice consenting to removal of content*
    - (c) if the author submits a valid counter-notice no later than 48 hours after receiving the host's notification under **paragraph (a)** in which the author consents to the removal of the specific content, the host must take

down or disable the specific content as soon as practicable after receiving that counter-notice:

*Author's counter-notice refusing consent to removal of content*

- (d) if the author submits a valid counter-notice no later than 48 hours after receiving the host's notification under **paragraph (a)** in which the author refuses to consent to the removal of the specific content, the host must leave the specific content in place and, as soon as practicable after receiving that counter-notice,—
- (i) notify the complainant of the author's decision; and
  - (ii) if the author consents, provide the complainant with personal information that identifies the author:

*Author failing to submit valid counter-notice*

- (e) if the author does not submit a valid counter-notice in accordance with this subsection (whether by failing to submit a counter-notice or by submitting an invalid counter-notice), the host must take down or disable the specific content as soon as practicable but no later than 48 hours after notifying the author under **paragraph (a)**.
- (3) A notice of complaint must—
- (a) state the complainant's name and a telephone number, a physical address, and an email address for the complainant; and
  - (b) state the specific content, and explain why the complainant considers that the specific content—
    - (i) is unlawful; or
    - (ii) breaches 1 or more communication principles and has caused harm; and
  - (c) sufficiently enable the specific content to be readily located; and
  - (d) state whether the complainant consents to personal information that identifies the complainant being released to the author; and
  - (e) contain any other information that the complainant considers relevant.
- (4) A counter-notice must state—
- (a) the author's name and a telephone phone number, a physical address, and an email address for the author; and
  - (b) whether the author consents to personal information that identifies the author being released to the complainant; and
  - (c) whether the author consents to the removal of the specific content.
- (5) An online content host must not disclose any personal information about the complainant or author under privacy principle 11(e)(iv) in section 6 of the Privacy Act 1993, except by order of a District Court Judge or a High Court Judge made on an application under this subsection.

- (6) Nothing in **subsection (5)** affects the application of any other provision in the Privacy Act 1993.
- (7) This section is subject to **section 20B(5)**.

**20B Further provisions related to section 20A**

- (1) The Approved Agency may lodge a notice of complaint under **section 20A** on behalf of a complainant and provide advice and assistance to the complainant in relation to the complaint.
- (2) The protection conferred on an online content host by **section 20A** does not apply if the host does not provide an easily accessible mechanism that enables a user to contact the host about specific content in the manner provided in that section.
- (3) The protection conferred on an online content host by **section 20A** does not apply if the person who provides the specific content does so on behalf, or at the direction, of the online content host.
- (4) Nothing in **section 20 or 20A** or this section affects—
- (a) section 211 of the Criminal Procedure Act 2011; or
  - (b) section 19 of the Bail Act 2000; or
  - (c) copyright liability, or any proceedings, under the Copyright Act 1994; or
  - (d) any enactment that expressly overrides **section 20A**.
- (5) Nothing in **section 20 or 20A** or this section limits the right of an individual to injunctive relief in relation to the content of a digital communication posted by another person and hosted by the online content host.

*Regulations and rules*

**21 Regulations**

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing the practice and procedure for the conduct of matters under this Act before the Approved Agency;
- (b) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

**22 Rules**

- (1) The power to make rules of court under section 51C of the Judicature Act 1908 and section 122(1) of the District Courts Act 1947 includes the power to make rules regulating the practice and procedure of courts in the exercise of jurisdiction conferred by this Act.
- (2) Without limiting the generality of **subsection (1)**, rules made in accordance with that subsection may—

- (a) prescribe forms for applications and orders under this Act;
- (ab) prescribe a form for the purposes of **section 12A**:
- (b) prescribe the practice and procedure for the conduct of matters under this Act before the District Court.

## 22A Consequential amendments to other Acts

Amend the Acts specified in the Schedule as set out in that schedule.

## Part 2

### Amendments to other Acts concerning use of digital communications

#### Subpart 1—Crimes Act 1961

##### 23 Principal Act

**This subpart** amends the Crimes Act 1961.

##### 24 Section 179 amended (Aiding and abetting suicide)

In section 179, insert as subsections (2) and (3):

- (2) A person commits an offence who incites, counsels, or procures another person to commit suicide, even if that other person does not commit or attempt to commit suicide in consequence of that conduct.
- (3) A person who commits an offence against **subsection (2)** is liable on conviction to imprisonment for a term not exceeding 3 years.

#### Subpart 2—Harassment Act 1997

##### 25 Principal Act

**This subpart** amends the Harassment Act 1997.

##### 26 Section 3 amended (Meaning of harassment)

After section 3(2), insert:

- (3) For the purposes of this Act, a person also harasses another person if—
  - (a) he or she engages in a pattern of behaviour that is directed against that other person; and
  - (b) that pattern of behaviour includes doing any specified act to the other person that is one continuing act carried out over any period.
- (4) For the purposes of **subsection (3)**, **continuing act** includes a specified act done on any one occasion that continues to have effect over a protracted period (for example, where offensive material about a person is placed in any electronic media and remains there for a protracted period).



**27 Section 4 amended (Meaning of specified act)**

- (1) In section 4(1)(d), after “correspondence,”, insert “electronic communication,”.
- (2) After section 4(1)(e), insert:
  - (ea) giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person:

**28 Section 19 amended (Standard conditions of restraining orders)**

After section 19(1), insert:

- (1A) It is a condition of every restraining order that applies to a continuing act within the meaning of section 3 that the respondent must take reasonable steps to prevent the specified act from continuing.

Subpart 3—Human Rights Act 1993

**29 Principal Act**

**This subpart** amends the Human Rights Act 1993.

**30 Section 61 amended (Racial disharmony)**

- (1) In section 61(1)(a), after “radio or television” insert “or other electronic communication”.
- (2) In section 61(2), after “radio or television” insert “or other electronic communication”.

**31 Section 62 amended (Sexual harassment)**

After section 62(3)(j), insert:

- (k) participation in fora for the exchange of ideas and information.

**32 Section 63 amended (Racial harassment)**

After section 63(2)(j), insert:

- (k) participation in fora for the exchange of ideas and information.

Subpart 4—Privacy Act 1993

**33 Principal Act**

**This subpart** amends the Privacy Act 1993.

**34 Section 6 amended (Information privacy principles)**

- (1) In section 6, Principle 10(a), after “publicly available publication”, insert “and that, in the circumstances of the case, it would not be unfair or unreasonable to use the information”.

- (2) In section 6, Principle 11(b), after “publicly available publication”, insert “and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information”.

**35 Section 56 amended (Personal information relating to domestic affairs)**

In section 56, insert as subsection (2):

- (2) The exemption in subsection (1) ceases to apply once the personal information concerned is collected, disclosed, or used, if that collection, disclosure, or use would be highly offensive to an ordinary reasonable person.

**Schedule  
Consequential amendments to other Acts**

**s 22A**

**Ombudsmen Act 1975 (1975 No 9)**

In Schedule 1, Part 2, insert in its appropriate alphabetical order: “Approved Agency under the Harmful Digital Communications Act **2013**, in its role under that Act”.

**Public Records Act 2005 (2005 No 40)**

In section 4, definition of **public office**, after paragraph (c)(x), insert:

- (xa) the Approved Agency under the Harmful Digital Communications Act **2013**, in its role under that Act; and