MEDIA RELEASE

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Hon Sir Grant Hammond KNZM
President
Law Commission

LAW MUST ADAPT TO COMBAT HARMFUL DIGITAL COMMUNICATION

New Zealanders who are victims of serious personal attacks in cyber-space will have access to a specialist Communications Tribunal with the power to issue takedown orders and to reveal the identities of anonymous offenders if the Law Commission’s latest recommendations to Government are adopted.

The proposal forms part of a package of reforms designed to help combat problems such as cyber-bullying and other harmful uses of new communication technologies, including social media platforms.

The Law Commission’s proposals are contained in a Ministerial briefing prepared for Justice Minister Judith Collins. In May, the Minister asked the Commission to fast-track its work in this area in response to growing concern from Police, Coroners and teachers about the impact of cyber-bullying.

Other key recommendations include:

- The creation of a new criminal offence tailored for digital communication;
- Amendments to the Harassment Act 1997, the Human Rights Act 1993, the Privacy Act 1993 and the Crimes Act 1961 to ensure that the provisions of these Acts can be readily applied to digital communications. Included in these amendments would be an offence to publish intimate visual recordings of another person without their consent. It would also become an offence to incite a person to commit suicide irrespective of whether the person does so.
- New legal requirements for all New Zealand schools to help combat bullying of all kinds, including cyber-bullying.
- The establishment of a Communications Tribunal, comprising a District Court Judge supported by a technical adviser, to provide citizens harmed by digital communications with speedy, efficient and cheap access to remedies such as
takedown orders and “cease and desist” notices.

- The establishment of an agency (the Commission recommends the cyber-safety NGO NetSafe) to triage, and, where possible, resolve complaints before they reach the Tribunal.

Project leader and media law expert Professor John Burrows said the reforms were designed to provide a graduated and proportionate response to harmful digital communications:

“One of the key conclusions we reach in this report is that new communication technologies can have effects which are more intrusive and pervasive, and thus more emotionally harmful than in the pre-digital era.

“As submitters to our review told us the impacts of such behaviour can derail lives and contribute to mental illness, suicide and self-harm.”

Professor Burrows said overseas jurisdictions, including the United Kingdom, Australia and some states in America were moving to criminalise communication causing serious distress and mental harm.

“We are recommending New Zealand follow this lead and criminalise “grossly offensive” digital communications when they cause serious mental or emotional distress.”

However, Professor Burrows says for reasons of principle and practicality, recourse to the law should be the last resort reserved for those who have suffered serious harm.

“We endorse the views expressed by Google and Facebook in their submissions that user empowerment, digital citizenship and self-regulatory solutions must be the first line of defence in tackling harmful communication in cyberspace. But there are significant power and information asymmetries in cyberspace which mean not all are able to harness these new technologies to defend themselves from illegitimate attack.

“NetSafe describes the sense of powerlessness and distress of those who come to them after exhausting every avenue available to them.”

Submissions and research show self-regulatory systems and tools are highly variable across the internet.

“When they are absent or ineffective, citizens who have suffered serious harm should, in our view, have a right to access effective legal remedies. These remedies must be proportionate, and provide meaningful solutions.”

The Commission is recommending a two-stage mechanism to help bridge the gap between the self-regulatory systems available online and the sanctions and remedies available through the courts. Stage one involves giving statutory recognition and funding to an approved agency whose function would be to assist the public in resolving problems involving harmful digital communications before they reach the proposed Communications Tribunal.

The Commission has recommended this role be given to NetSafe, which already has a strong track record working to promote the safe and responsible use of online technology and to
combat cyber-bullying. It has established relationships with a range of key stakeholders including the Ministry of Education, Police, the telecommunications sector, and global internet entities including Google and Facebook.

The second stage involves the establishment of a new Communications Tribunal which would operate like a “mini-harassment court” specialising in digital communication. The Tribunal would not have any powers to impose criminal sanctions; its powers would be limited to providing civil remedies including takedown and cease and desist orders; orders requiring retractions, apologies and rights of reply; and, in some cases, revealing the identity of an anonymous offender.

News media who are subject to one of the existing regulators, the Broadcasting Standards Authority, or the Press Council, would not be subject to the Tribunal.

The threshold for requiring content to be amended or taken down would be high, reflecting the fundamental right to freedom of expression.

“However, no right is absolute and the law already allows for the curtailment of freedom of expression when it interferes with other important human rights such as the right to one’s privacy, the right to one’s reputation and the right to be free from harassment.”

Professor Burrows said the Tribunal option, which could simply constitute a District Court Judge, assisted by a technical adviser, had strong support from the Police, Coroners, the Post Primary Teachers Association, the Human Rights Commission, Trade Me and many other submitters.

It would provide a back-stop for citizens who suffer real harm and who are unable to resolve the problem themselves using online reporting tools.

Finally, Professor Burrows said it was important to realise that while the law has a vital role to play in anchoring and reinforcing our collective values, it does not operate in a vacuum.

“Creating a civil cyberspace will require the active collaboration of users, educators, parents, and those global internet and telecommunications businesses whose profitability depends on the billions of people engaging online.”

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