

Communications (New Media) Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Communications (New Media) Act 2012.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

Part 1

Approved Agency and Tribunals

Preliminary provisions

3 Purpose

The purpose of this Act is to mitigate harm caused to individuals by electronic communications.

4 Interpretation

In this Act, unless the context otherwise requires,—

Agency means a person or an organisation appointed as an Approved Agency under section 8

Appeal Tribunal means an Appeal Tribunal constituted under section 18

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

communication means an electronic communication, and includes any text message, writing, photograph, picture, audio-visual recording, or other matter that is communicated electronically

harm includes emotional distress

individual means a natural person

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

Tribunal means a Tribunal constituted under section 12.

5 **Application**

This Act applies to electronic communications.

6 **Act binds the Crown**

This Act binds the Crown.

Communication principles

7 **Communication principles**

(1) Every Agency or Tribunal performing functions or exercising powers under this Act must take account of the following communication principles:

Principle 1

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

Principle 2

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

Principle 3

A communication should not be grossly offensive to a reasonable person in the complainant's position.

Principle 4

A communication should not be indecent or obscene.

Principle 5

A communication should not be part of a pattern of conduct that constitutes harassment.

Principle 6

A communication should not make a false allegation.

Principle 7

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

Principle 8

A communication should not incite or encourage anyone to send a message to a person with the intention of causing that person harm.

Principle 9

A communication should not incite or encourage another person to commit suicide.

Principle 10

A communication should not denigrate a person by reason of his or her colour, race, ethnic or national origins, religion, ethical belief, gender, sexual orientation, or disability.

- (2) Section 13(2) states how the communication principles affect the exercise of functions or powers of the Tribunal.

Approved Agency

8 Agency

- (1) The Minister may, by notice in the *Gazette*, appoint any person or organisation as an Approved Agency for the purposes of this Act.
- (2) Before appointing an Agency, the Minister must be satisfied that the person or organisation to be appointed has the appropriate knowledge, skills, and experience to carry out the Agency's functions under this Act.
- (3) An Agency holds office for the term, and has the functions, specified in the notice under subsection (1).
- (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 Agency.

9 Functions of Agency

The functions that may be conferred on an Agency by notice under section 8 are—

- (a) to help people to resolve problems caused to them by electronic communications:
- (b) to receive and assess complaints about electronic communications:
- (c) to investigate complaints, unless the Agency considers the subject-matter of the complaint is unlikely to cause harm or the complaint is otherwise inappropriate for investigation:
- (d) to liaise with website hosts and internet service providers and, if appropriate, to request them to take down or amend posts that are clearly offensive:
- (e) to liaise with schools, departments, and other agencies to resolve wider issues surrounding communications complained about:
- (f) to advise a complainant in an appropriate case to apply to a Tribunal for an order under section 16 requiring a website host, internet service provider, or telecommunications provider to identify the author of an offensive communication:
- (g) to advise a complainant to refer a complaint to a Tribunal if the Agency is satisfied that—
- (i) the complaint meets the appropriate level of seriousness and has proved incapable of resolution by other means; or
- (ii) the complaint is so serious, and the resolution of it is so urgent, that it should be referred directly to the Tribunal without mediation:
- (h) to certify that it has recommended the referral of a complaint to a Tribunal:
- (i) to use education and publicity to improve online conduct and safety on the Internet:

- (j) to undertake research relevant to the purpose of this Act, particularly in order to keep abreast of developments in technology and patterns of internet use:
- (k) to provide advice to the Government on matters relating to this Act and to recommend changes to legislation or Government policy where appropriate.

10 Powers of Agency

- (1) An Agency has all the powers necessary for carrying out the Agency's functions.
- (2) An Agency may delegate the Agency's functions to any other person or organisation, subject to any limitations or conditions imposed by the Minister.

11 Agency may decide to take no action

- (1) An Agency may decide to take no action or, as the case may require, no further action, on any complaint if the Agency considers that—
 - (a) the complaint is frivolous or vexatious or is not made in good faith; or
 - (b) the subject-matter of the complaint would not cause significant distress, humiliation, or harm to a reasonable person.
- (2) An Agency may decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Agency that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.
- (3) If an Agency decides to take no action or no further action on a complaint, the Agency must inform the complainant of that decision and the reasons for it.

Tribunals

12 Tribunals

- (1) Every Tribunal consists of a District Court Judge designated for the purpose of this Act by the Chief District Court Judge.
- (2) The Judge must be designated from a panel of District Court Judges maintained by the Chief District Court Judge.
- (3) The Chief District Court Judge may at any time add or remove a Judge from the panel.

13 Functions, duties, and powers of Tribunals

- (1) The functions of a Tribunal are—
 - (a) to consider and determine applications for any order under section 16:
 - (b) to exercise and perform any other functions, powers, and duties that are conferred or imposed on it by or under this Act or any other enactment:
 - (c) to do any other thing necessary for performing, or reasonably incidental to, the Tribunal's functions.
- (2) The Tribunal must not consider or determine any application for any order under section 16 unless it is satisfied that—
 - (a) a communication principle has been breached; and
 - (b) that breach has caused or is likely to cause significant harm to an individual.
- (3) The Tribunal has all the powers that are reasonably necessary to enable it to perform its functions.

14 Complaints and applications

- (1) Any of the following may make a complaint to a Tribunal about any offensive or harmful online communication:
 - (a) the victim of the communication;
 - (b) a parent or guardian of the victim;
 - (c) the principal of an educational establishment, if any student of that establishment is a victim of the communication;
 - (d) the Police, if the communication constitutes a threat to the safety of any person.
- (2) The Chief Coroner may apply to a Tribunal for an order under section 16(1)(a) or (b) in respect of a communication that contravenes a provision of the Coroners Act 2006.
- (3) A complaint must not be made by a person to whom subsection (1)(a), (b), or (c) applies unless an Agency has considered the subject-matter of the complaint and determined what action (if any) to take.
- (4) A complaint is not within a Tribunal's jurisdiction if—
 - (a) the complainant and the victim are not individuals or, if the complainant and the victim are the same person, that person is not an individual; or
 - (b) the subject-matter of the complaint can be dealt with under the complaints procedure of the Broadcasting Standards Authority or the Press Council.
- (5) A complaint must be—
 - (a) made in or on a form provided or approved by the chief executive; and
 - (b) identify the complainant; and
 - (c) state the subject-matter of the complaint.
- (6) A Tribunal may require a complainant to complete a statutory declaration stating either or both of the matters in subsection (5)(b) and (c).

15 Consideration and determination of complaints by Tribunal

- (1) A Tribunal must conduct a formal hearing about a complaint if the complainant so requests, but the Tribunal may proceed without a formal hearing if one is not requested.
- (2) A Tribunal must consider and determine a complaint with as little formality and technicality, and as speedily, as is permitted by—
 - (a) the requirements of this Act; and
 - (b) a proper consideration of the complaint; and
 - (c) the principles of natural justice.

16 Orders that may be made by Tribunal

- (1) A Tribunal may, on a complaint or an application, make 1 or more of the following orders:
 - (a) an order requiring that material specified in the order be taken down from any electronic media;
 - (b) an order to cease publishing the same, or substantially similar, communications in the future;
 - (c) an order not to encourage any other person to engage in similar communications with the complainant;
 - (d) a declaration that a communication breaches a communication principle;
 - (e) an order requiring that a factually incorrect statement in a communication be corrected:

- (f) an order that the complainant be given a right of reply:
 - (g) an order to apologise to the complainant:
 - (h) an order requiring that the author of a particular communication be identified.
- (2) A Tribunal may apply an order or part of an order under this section to all or any of the following:
- (a) the defendant:
 - (b) an internet service provider:
 - (c) a website host:
 - (d) any other person, if the Tribunal considers that the defendant is encouraging, or has encouraged, the other person to engage in offensive communication towards the complainant.
- (3) In deciding whether or not to make an order, and the form of an order, a Tribunal must take into account the following:
- (a) the content of the communication, its offensive nature, and the level of harm caused by it:
 - (b) the purpose of the communicator in communicating it:
 - (c) the occasion, context, and subject-matter of the communication:
 - (d) the extent to which the communication has spread beyond the original communicator and recipient:
 - (e) the age and vulnerability of the complainant:
 - (f) the truth or falsity of the statement:
 - (g) the extent to which the communication is of public interest:
 - (h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:
 - (i) the conduct of the complainant, including the extent to which that conduct has contributed to the harm suffered.
- (4) In exercising its functions, the tribunal must have regard to the importance of freedom of expression.
- (5) A Tribunal must give reasons for its decisions and those reasons must be published.

17 Evidence

- (1) A Tribunal that is satisfied, on an application made by the Agency or on its own motion, that any person can provide information, documents, or things, or give evidence, that will or may be relevant to its consideration of a complaint, may make an order—
- (a) requiring that person to produce to the Tribunal any information, or documents, or things specified in the order; or
 - (b) requiring that person to give evidence to the Tribunal about matters that, in the opinion of the Tribunal, are relevant to its consideration of the complaint.
- (2) If an order is made under subsection (1)(a), the Tribunal may, as a condition of the order, require the chief executive to reimburse the person who is the subject of the order for the actual and reasonable expenses incurred by that person in complying with the order or in producing any specified class of information, documents, or things.
- (3) An application by the Agency for an order under subsection (1) must be in writing and must—

- (a) set out the reasons why the order is sought; and
 - (b) if an order is sought under subsection (1)(a), set out the information, documents, or things in respect of which the order is sought; and
 - (c) explain why the information, documents, things, or evidence in question will or may be relevant.
- (4) A Tribunal may receive as evidence any statement, document, information, or matter that, in the Tribunal's opinion, may help the Tribunal to determine a complaint, whether or not it would be admissible in a court of law.

18 Right of appeal to Appeal Tribunal

- (1) A complainant who considers that a Tribunal's determination of his or her complaint is wrong in law may appeal, in accordance with the rules of court, to a District Court consisting of 2 Judges sitting as an Appeal Tribunal.
- (2) Any District Court Judge other than the Judge who sat as the Tribunal appealed from may be a member of an Appeal Tribunal.

19 Power to refer matter to court

- (1) A Tribunal or an Appeal Tribunal may refer a complaint to a District Court or other court for its determination if it considers that the complaint would be more appropriately dealt with by that court.
- (2) Subsection (1) does not prevent a Tribunal or an Appeal Tribunal from making any order under section 16 pending the court's determination of the complaint.
- (3) The court to which the complaint is referred may make any orders it thinks fit in the interests of justice, including any order that a Tribunal can make under section 16.

20 Transfer of proceedings from court

- (1) If proceedings within the jurisdiction of a Tribunal have been commenced in a District Court before a complaint in respect of the same issues between the same parties has been lodged in a Tribunal, or transferred to a Tribunal under this section, a Judge or Registrar of that court may, on the application of either party or of the Judge's or Registrar's own motion, order that the proceedings be transferred to a Tribunal.
- (2) If proceedings within the jurisdiction of a Tribunal have been commenced in the High Court before a complaint in respect of the same issues between the same parties has been lodged in a Tribunal, or transferred to a Tribunal under this section, that Court or a Judge of that Court may, on the application of either party or of its or that Judge's own motion, order that the proceedings be transferred to a Tribunal.
- (3) A Tribunal to which proceedings are transferred under subsection (1) or (2) may have regard to any notes of evidence transmitted to it and it is not necessary for that evidence to be given again in the Tribunal unless the Tribunal so requires.

21 Technical advisers

- (1) A Tribunal or an Appeal Tribunal may appoint a technical adviser who specialises in electronic communication to assist it in considering and determining a complaint or an appeal.
- (2) The duties of a technical adviser are—

- (a) to sit with the Tribunal; and
 - (b) subject to subsection (3), to act in all respects as an extra member of the Tribunal.
- (3) A Tribunal’s determination of a complaint or an appeal must be a determination of the Judge or Judges alone.
- (4) The chief executive must pay technical advisers the remuneration and allowances determined from time to time by the Minister.

22 Offence of non-compliance with order

- (1) A person who fails to comply with an order made under section 16 or 19 commits an offence.
- (2) A person who commits an offence against this section is liable on conviction to [imprisonment for a term not exceeding 3 months or a fine not exceeding \$5,000].

Part 2

**Amendments to other enactments to regulate harmful behaviour
in new media**

Subpart 1—Summary Offences Act 1981

23 Principal Act

This subpart amends the Summary Offences Act 1981.

24 New section 21A inserted

After section 21, insert:

“21A Causing harm by means of communication device

- “(1) A person (**person A**) commits an offence if person A sends or causes to be sent to another person (**person B**) by means of any communication device a message or other matter that is—
- “(a) grossly offensive; or
 - “(b) of an indecent, obscene, or menacing character; or
 - “(c) knowingly false.
- “(2) The prosecution must establish that—
- “(a) person A either—
 - “(i) intended to cause person B substantial emotional distress; or
 - “(ii) knew that the message or other matter would cause person B substantial emotional distress; and
 - “(b) the message or other matter is one that would cause substantial emotional distress to someone in person B’s position; and
 - “(c) person B in fact saw the message or other matter in any electronic media.
- “(3) It is not necessary for the prosecution to establish that the message or other matter was directed specifically at person B.
- “(4) In determining whether a message or other matter is grossly offensive, 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 message or other matter was anonymous;
 - “(d) whether the message or other matter was repeated:

- “(e) the extent of circulation of the message or other matter:
 - “(f) whether the message or other matter is true or false:
 - “(g) the context in which the message or other matter appeared.
- “(5) A person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000.
- “(6) In this section, **communication device** means a device that enables any message or other matter to be communicated electronically.”

Subpart 2—Crimes Act 1961

25 **Principal Act**

This subpart amends the Crimes Act 1961.

26 **New section 131C inserted**

After section 131B, insert:

“131C **Conduct aimed at procuring young person for unlawful sexual activity**

A person (**person A**) is liable to imprisonment for a term not exceeding 7 years if he or she—

- “(a) exposes a person under the age of 16 years (the **young person**) to indecent material or provides the young person with an intoxicating substance; and
- “(b) does so with the intention of making it easier to procure the young person for unlawful sexual activity with person A or any other person.”

27 **Section 179 amended (Aiding and abetting suicide)**

In section 179(a), delete “, if that person commits or attempts to commit suicide in consequence thereof”.

28 **Section 216J amended (Prohibition on publishing, importing, exporting, or selling intimate visual recording)**

After section 216J(1), insert:

“(1A) A person (**person A**) who takes a visual recording of another person (**person B**) with person B’s knowledge or consent is liable to [imprisonment for a term not exceeding 3 years] if—

- “(a) person A publishes the recording without person B’s consent; and
- “(b) the recording is of a kind described in section 216G(1)(a) or (b) and would be an intimate visual recording if taken without person B’s knowledge or consent.”

Subpart 3—Harassment Act 1997

29 **Principal Act**

This subpart amends the Harassment Act 1997.

30 **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 1 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).”

31 Section 4 amended (Meaning of “specified act”)

(1) In section 4(1), definition of **specified act**, paragraph (d), after “correspondence,”, insert “electronic communication,”.

(2) In section 4(1), definition of **specified act**, after paragraph (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:”.

32 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 4—Human Rights Act 1993

33 Principal Act

This subpart amends the Human Rights Act 1993.

34 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”.

35 Section 62 amended (Sexual harassment)

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

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

36 Section 63 amended (Racial harassment)

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

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

Subpart 5—Privacy Act 1993

37 Principal Act

This subpart amends the Privacy Act 1993.

38 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”.

39 Section 56 amended (Personal information relating to domestic affairs)

In section 56, insert as subsection (2):

- “(2) Subsection (1) does not apply if—
- “(a) the personal information is disclosed to or used by any person other than the individual or his or her immediate family; and
 - “(b) that disclosure or use would be highly offensive to an ordinary reasonable person.”