



Position Paper on

the Law Commission's Ministerial Briefing Paper

*Harmful Digital Communications: The adequacy of
the current sanctions and remedies*

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Summary of Recommendations

This paper addresses selected Internet policy issues raised by the Communications (New Media) Bill. The consultation draft, prepared by the Parliamentary Council Office, was published alongside the Law Commission's Ministerial Briefing Paper *Harmful Digital Communications: The adequacy of the current sanctions and remedies*.¹

InternetNZ commends the Law Commission for its thorough examination of issues surrounding harmful digital communications. There is, however, further work to be done in the Government's response. Below is a summary of our recommendations:

1. That the Government fast-track measures to address cyberbullying alone, which seems to be the Government's intention, rather than the wider issues of harmful digital communications.
2. That one reason the proposal to set up a Tribunal should not be accepted is a lack of jurisdiction over the largest sites upon which harmful digital communications are frequently posted.
3. That the only orders applicable to ISPs and website hosts should be clause 16(1)(a) and only if orders first directed at the content author are unsuccessful.
4. That the method of removal of content by ISPs should be defined so as to exclude blocking and recognise that it is difficult, if not impossible, for an intermediary to guarantee that all copies will be removed from the Internet.
5. That if a Tribunal remains in any new legislation, the technical advisor should be required to complete a report, in collaboration with the subject intermediary, before any takedown is ordered. Such a report should explain the required steps and the anticipated effectiveness of the takedown. A further report would also be of use after any takedown, to at least assure authorities that the initial estimates of cost were accurate and to gain understanding of the effectiveness (or otherwise) of the takedown process.
6. That clause 16(1)(a), (b), (c) and (h) orders, to be issued, require a standard based on the proposed new criminal offence. This standard, with its burden of proof adjusted to suit the civil law setting, provides better safeguards for the human rights implicated by these orders.
7. That clause 18(1) of the consultation draft be amended to grant the defendant the right to appeal.

¹ Law Commission <http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media>

8. The Communications Principles should be used for guidance and education only, necessitating corresponding changes in any new legislation. The Tribunal (if there is one) should use the standard of the proposed new criminal offence, adjusting for a civil law context.
9. That the Approved Agency be required to observe requirements prescribed by regulation that ensures fair treatment of both parties to a dispute.
10. That provisions related to a Tribunal are removed from any new legislation developed. Further, a review should be held after two years to determine whether a Tribunal is in fact really needed.

Introduction

1. This paper addresses selected Internet policy issues raised by the Communications (New Media) Bill (hereinafter “the consultation draft”). The consultation draft, prepared by the Parliamentary Council Office, was published alongside the Law Commission’s Ministerial Briefing Paper *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (hereinafter “the Briefing Paper”) on 15 August 2012.² The consultation draft was reportedly created “to aid discussion” on recommendations made by the Law Commission in its Briefing Paper.³ The Government is currently formulating its response to these recommendations. Minister of Justice Judith Collins has indicated that a Bill will be prepared “if Cabinet accepts the Law Commission’s recommendations as expressed in its report and in the draft Communications (New Media) Bill”.⁴
2. Any such Bill will presumably amend or re-write the consultation draft considered by this paper to reflect the policy approved by Cabinet. This will provide further opportunity to submit on the details of the Bill via the normal Select Committee process.
3. InternetNZ has identified aspects of the consultation draft that raise public and technical policy issues requiring further attention from officials and Ministers. The Law Commission’s proposals could have far-reaching consequences for the future of Internet law and policy in New Zealand and beyond. As it stands, the consultation draft poses serious risks for the open Internet and Internet intermediaries. It does not contain sufficient safeguards for fundamental rights such as due process and freedom of expression. These proposals should not be taken lightly, and this paper explains why.
4. InternetNZ membership discussion on this has topic evoked a variety of stances, ranging from support for the Commission’s proposals to calls for their wholesale rejection. InternetNZ also hosted public workshops on the consultation draft on 17th and 18th September 2012 in Wellington and Auckland.⁵ In determining its position with respect to the consultation draft, InternetNZ took into account its member discussions, the views exchanged at the workshops, and feedback from its Policy Advisory Group. InternetNZ’s constitutional objects and policy principles underpin the analysis.
5. It is our hope that this position paper provides useful thinking points for officials and Ministers as they consider whether, and if so how, to proceed in response to the Briefing Paper.

² Law Commission *Harmful Digital Communications: the adequacy of the current sanctions and remedies* <http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media>

³ Stephen Bell “Red flags raised over ‘Cyberbullying Bill’” Computerworld (24 September 2012), available at <http://computerworld.co.nz/news.nsf/news/red-flags-raised-over-cyberbullying-bill>.

⁴ Ibid.

⁵ Stephen Bell “InternetNZ to hold workshops on draft cyberbullying Bill” Computerworld (20 August 2012), available at <http://computerworld.co.nz/news.nsf/news/internetnz-to-hold-workshops-on-draft-cyberbullying-bill>.

Framing the Issue

6. InternetNZ's analysis of the consultation draft revolves around the following questions:
 - A. What problem does it seek to address?
 - B. Does that problem warrant a regulatory response?
 - C. If yes, is the proposed response appropriate?

In the next section we address these questions. In the process of doing so we flag areas in the consultation draft that are of interest to InternetNZ. We believe that these issues should also be of interest to Government in developing well-targeted and effective legislation.

Analysis of the Communications (New Media) Bill

7. InternetNZ is operating on the assumption that the substance of the consultation draft would, to a large extent, inform any Bill developed to give effect to the Law Commission's recommendations. We will thus reserve detailed analysis of any legislative text for when it is presented in such a Bill. In the meantime, however, InternetNZ wishes to encourage constructive change to the proposed approach to harmful digital communications.
8. Parts A and B of the below analysis presume that the Government is moving ahead, in some form, with the Law Commission's proposals. In Part C we offer ways in which we believe the consultation draft may be improved.

A. Problem Definition

9. InternetNZ accepts that, with respect to the consultation draft, both the Law Commission and the Government have identified a problem.⁶ The Law Commission provided evidence of this problem in Chapter Two of the Briefing Paper, while the Government acknowledged it by electing to fast-track this aspect of the Law Commission's review of regulatory gaps and the new media.⁷

⁶ "The Government says it will fast-track a Law Commission report looking at ways of reducing the harm caused by cyber-bullying." APNZ "Government acts on cyber-bullying" (11 May 2012) New Zealand Herald, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10805302.

⁷ Law Commission *The News Media meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2012).

10. Unfortunately, the two define the problem differently. For the Government, the problem is “cyberbullying”,⁸ which the Briefing Paper defines as “the range of intentionally harmful communications which occur within the context of adolescent relationships”.⁹ For the Law Commission, and according to the consultation draft,¹⁰ the problem is “harmful digital communications”. The Briefing Paper uses the term “to cover the spectrum of behaviours involving the use of digital technology to intentionally threaten, humiliate, denigrate, harass, stigmatise or otherwise cause harm to another person”.¹¹ It goes on to note that it “reserve[s] the term cyberbullying for such abuses which occur within the context of adolescent peer relationships”.¹² Thus, the Law Commission’s recommendations relate to a wide set of harmful digital communications while the Government’s apparent interest is in specific issues related to cyberbullying.
11. This fundamental mismatch may simply be a matter of using the terms differently, or it may indicate a more substantive difference between the problems the Government wants to address compared to the problems the Law Commission’s recommendations address.
12. It also bears mentioning that non-digital harmful communications are not included within the problem definition. Thus, a harmful communication will be treated differently if it is communicated digitally as opposed to pencil and paper.¹³ For example, Part Two of the consultation draft proposes the new offence of “causing harm by means of communication device”, which would make it a crime to send “a message or other matter that is grossly offensive; or of an indecent obscene or menacing character; or knowingly false”.¹⁴ This only applies to electronic messages.¹⁵

⁸ “Justice Minister Judith Collins has today welcomed a Law Commission report with recommendations for reducing the harm caused by cyber-bullying.” Hon Judith Collins, Justice “Cyber-bullying must stop, says Collins” (press release, 15 August 2012), available at <http://www.national.org.nz/Article.aspx?ArticleID=39156>; “Young people’s lives are increasingly enmeshed in social media and they are particularly at risk from the significant harm that can be caused by cyber-bullying” [Collins] said.” Andrea Vance “Government to crackdown on cyber bullies” (11 May 2012) Stuff.co.nz, available at <http://www.stuff.co.nz/national/crime/6906540/Government-to-crackdown-on-cyber-bullies>.

⁹ Law Commission, above n 1, at [1.27].

¹⁰ “The purpose of this Act is to mitigate harm caused to individuals by electronic communications.” Communications (New Media) Bill 2012, cl 3. “Communication” is defined by the Bill as “an electronic communication, and includes any text message, writing, photograph, picture, audio-visual recording, or other matter that is communicated electronically”. Ibid, cl 4.

¹¹ Law Commission, above n 1, at [2.10].

¹² Ibid.

¹³ InternetNZ understands that the scope of work provided by the Government to the Law Commission was limited to the digital environment. “In 2012 the Law Commission was asked by the Government to review the adequacy of the regulatory environment in which New Zealand’s news media is operating in the digital era. As part of this review we were asked to deal explicitly with... whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies may be available.” Law Commission, above n 1, at [1.1, 1.2].

¹⁴ Communications (New Media) Bill 2012, cl 24.

¹⁵ “In this section, communication device means a device that enables any message or other matter to be communicated electronically.” Communications (New Media) Bill 2012, cl 24.

13. This disparity of treatment between electronic and non-electronic communications has sparked significant debate, the substance of which goes to the heart of the problem definition. The issue is whether harmful digital communications are separate and distinct from harmful communications of the non-electronic variety, and, if so, whether they deserve special legislation.
14. On one hand, we're reminded that bullying, harassment and general ill will predate the Internet. A number of InternetNZ members have argued that the place bullying occurs is irrelevant because bullying is bullying, regardless of whether it occurs offline or online. A further point made, less theoretical and more practical, is that laws should apply equally across the online and offline realms because "making separate laws for the internet and the real world ushers in a dangerous precedent and sets up the prospect of two different legal realms."¹⁶ Further, it is believed that most cases of bullying involve both digital and non-digital communications. By focusing on digital communications alone, the harm caused by non-digital communications (which could in fact be far more significant in a particular case) is completely ignored.
15. On the other hand, we hear that cyberbullying is a unique form of aggression made capable by new technology. It is argued that the Internet amplifies the effects of bullying¹⁷ and that, for this reason, cyberbullying is more problematic and deserving of regulation. The Law Commission has dispatched the notion that cyberbullying is a mere extension of bullying as "too simplistic", and goes on to state that the "facility to generate, manipulate and disseminate digital information – which can be accessed instantaneously and continuously – is producing types of abuse which simply have no precedent or equivalent in the pre-digital world."¹⁸
16. InternetNZ recognises that the Government has adopted cyberbullying as the problem, indicating support for the latter side of the "online/offline" debate. The consultation draft, however, is not confined to "cyberbullying," nor would the work of the Approved Agency and Tribunal be confined to disputes involving adolescents.
17. On balance, we believe there are real harms outlined in the Briefing Paper from cyberbullying that the Government should address as a priority and that they do deserve special legislation. This narrower focus is likely to be far more effective and minimise many of the issues raised in this paper. It is also likely to garner more community support.

¹⁶ Chris Barton "Cyber-bullying law a blunder" (6 September 2012) New Zealand Herald, available at http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=10831931.

¹⁷ "In fact it's this cyber element, the way the fight 'lives on' on video sharing websites despite the efforts of many to remove the recording, that possibly deepens the impact of what for many older commentators was a simple schoolyard fight." Chris Hails "Casey Heynes: how schoolyard bullying went viral" (21 March 2011) NetSafe Blog, available at <http://blog.netsafe.org.nz/2011/03/21/casey-heynes-how-schoolyard-bullying-went-viral/>. (commenting on a school fight that was recorded and subsequently posted to the web, attaining viral status).

¹⁸ Law Commission, above n 1, at [2.96].

Recommendation: That the Government fast-track measures to address cyberbullying alone, which seems to be the Government’s intention, rather than the wider issues of harmful digital communications.

B. Do Harmful Digital Communications require regulation?

18. The Briefing Paper outlines a three-tier approach, with the first one being “user-empowerment”. At the second level there are self-regulatory systems. The Law Commission concludes that these “cannot be the *only* line of defence. Citizens should have the right to legal protection and meaningful redress when they suffer harm as a result of communication abuses.”¹⁹
19. InternetNZ supports this view. Part C of this paper offers comment on what form that regulation should take, with the consultation draft as the starting point.
20. Before turning to that discussion, however, a brief word on the proposal’s potential effectiveness in addressing the problem is required, specifically with regard to some of the proposed Tribunal orders and their applicability to ISPs and website hosts under clause 16 of the consultation draft.
21. A Tribunal in New Zealand only has jurisdiction over ISPs and website hosts in New Zealand. This is a critical constraint in dealing with many Internet policy issues. This would not be a problem if the main objects to which regulatory powers were to be applied were exclusively in New Zealand. However, the largest sites upon which harmful digital communications are frequently posted, such as Google or Facebook, are headquartered abroad. New Zealand courts simply do not have the authority to require them to comply with a takedown order, or to fine them for non-compliance.²⁰ While Google and Facebook are likely to respond to a Tribunal order as good corporate citizens,²¹ they cannot be made to.
22. Regulation should only be introduced where it is shown that it can be effective. The Tribunal is limited in its effectiveness in terms of jurisdiction and, as explored in Part C below, some of the proposed orders would be impossible for Internet intermediaries to fully implement. Due to a lack of jurisdiction over the largest sites upon which harmful digital communications are frequently posted and other reasons detailed in Part C, the proposal to set up a Tribunal should not be accepted.

¹⁹ Law Commission, above n 1, at [3.80].

²⁰ Cf *A v Google New Zealand Ltd* [2012] NZHC 2352.

²¹ Note that Google refused a request from the White House to takedown the *Innocence of Muslims* from YouTube in America based on company policy. It did remove the video in Egypt and Libya, however, where the content stood in violation of those countries’ domestic laws. See Samantha Murphy “Google Refuses to Remove Anti-Muslim YouTube Video” (15 September 2012) Mashable.com, available at <http://mashable.com/2012/09/15/youtube-white-house/>.

Recommendation: That one reason the proposal to set up a Tribunal should not be accepted is a lack of jurisdiction over the largest sites upon which harmful digital communications are frequently posted.

C. Is the Communications (New Media) Bill the appropriate regulatory response?

23. As noted above, the Law Commission has concluded that existing laws, statutory and judge-made, are inadequate to address the problem at hand. Accordingly, it recommended three civil law amendments²² and two criminal law amendments.²³ It also suggested creating two statutory bodies, an Approved Agency and a Tribunal. Ten Communication Principles are designed to guide these bodies in their work. All of the above recommendations are found in the consultation draft.
24. InternetNZ at this time offers no comment on the text of the proposed amendments except to note that the Briefing Paper considers the new communications offence placed in the Summary Offences Act as the “primary mechanism to address egregious communications harms at the high end of the scale.”²⁴
25. In this paper we focus on Part 1 of the consultation draft, which contains the relevant provisions for the Communications Principles, the Approved Agency and the Tribunal. **InternetNZ does not believe that Part 1, in its current form, is an appropriate response to harmful digital communications.** The critical problem is the proposed Tribunal, its powers and its processes.
26. We approach this from two different contexts, first with respect to the potential burden on Internet intermediaries and second with respect to appropriate safeguards for the preservation of human rights. Generally, we support the expanded role of the Approved Agency as the primary component of the Government’s response, subject to the adjustments recommended below.

²² The Law Commission has proposed amendments to the Harassment Act 1997, the Privacy Act 1993, and the Human Rights Act 1993.

²³ These amendments would amend the Summary Offences Act 1981 and the Crimes Act 1961.

²⁴ Law Commission, above n 1, at [4.57].

Impact on Internet Intermediaries

27. The consultation draft would impact ISPs and website hosts (hereinafter referred to “Internet intermediaries” or “intermediaries”). The takedown power is one example. The question of whether Internet intermediaries should be obligated to remove harmful content is not new. For example, in the United States, the original Government policies in this area were more lenient than not for ISPs. Section 230 of the Communications Decency Act of 1996 virtually immunised ISPs from liability for the publications of others. Congress made clear at that time that the policy rationale behind Section 230 was “to promote the continued development of the Internet”.²⁵
28. The Internet has developed significantly since 1996, and continues to develop and expand in 2012. InternetNZ believes the policy rationale of limiting burdens on Internet intermediaries remains sound and relevant today. This light touch approach to intermediary responsibility has supported the expansion and growth of the Internet. The Government should be cautious when departing from this approach, lest intermediaries are saddled with enforcement obligations that detract from their primary purpose – to provide access.
29. We consider that the consultation draft, if implemented as is, would create an excessive burden on Internet intermediaries. Clause 16 of the consultation draft would empower the Tribunal to order them to:
- take down a communication,
 - cease publishing a communication or “substantially similar” communications,
 - not encourage other people to engage in similar communications with the complainant,
 - correct a factually incorrect statement,
 - give the complainant a right of reply, and/or
 - apologise to the complainant and to identify the author of the harmful communication.
30. InternetNZ suspects that the Parliamentary Council Office intended to only direct certain, but not all, of these orders towards intermediaries. It is difficult to imagine, for example, how an Internet intermediary would determine if one harmful communication is “substantially similar” to another. Would it be required to monitor all communications of its users proactively? Over what period of time? At what cost? By what technical means is this possible to do without human intervention? Is human intervention even possible to screen user-generated content before it is posted, given the volume of such content?

²⁵ 47 USC s 230(b)(1) (2000).

31. The Law Commission’s intention was that orders against intermediaries are only a last resort. “We emphasise that there must be no suggestion that the website host or intermediary should be the first point of call when an order is sought. The fact that they are easier to find is not a reason. An order should be made against them only if unsuccessful attempts have been made to seek an order against the content creator.”²⁶
32. It is clear that the wording of clause 16(2) of the consultation draft that allows orders to be made under clause 16(1) against all or any of the entities listed therein does not reflect the above intent of the Law Commission as no sequencing is specified.
33. Other complications would arise if intermediaries were forced to identify authors. Multiple people may use the same account and, as we have seen with those called before the Copyright Tribunal under the Copyright (Infringing File Sharing) Amendment Act, the account holder may or may not be the person committing the action that the law targets.
34. InternetNZ considers that of the possible orders under clause 16(1), only the takedown order would ever apply to intermediaries. This should be seen in the light of paragraph 21 and 22 where the lack of jurisdiction over the largest sites upon which harmful digital communications are frequently posted was noted.
35. The takedown power is a dangerous tool and can be used in ways that the legislation did not intend.²⁷ As one commentator has observed,²⁸

Based on experience from a range of other complaint based organisations, my pick would be that the "approved agency" and Tribunal will have an enormous caseload, very quickly. And the complainants will include the group intended by the policy makers, the vulnerable and their families and advocates, but they will have to fight their way past the axe grinders, the lobby groups and political interests presented with a new, cheap, and readily accessible forum for advancing their grievances and personal hobby horses.

Recommendation: That the only orders applicable to ISPs and website hosts should be clause 16(1)(a) and only if orders first directed at the content author are unsuccessful.

²⁶ ²⁶ Law Commission, above n 1, at [5.88].

²⁷ The US Digital Millennium Copyright Act (DMCA) establishes a notice and takedown regime for copyright infringement, wherein copyright owners notify intermediaries of infringing content and it is removed. A recent study of notices sent to Google show that 57% were sent by businesses targeting competitors. The mechanism meant to address copyright infringement is being used for other purposes. Cf Jennifer Urban and Laura Quilter “Efficient Process or ‘Chilling Effects’? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act” (Summary Report) available at <http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf>. Further, here and abroad, defamation is increasingly being used by people to demand a take down of material they find critical or offensive, though not necessarily defamatory.

²⁸ John Edwards “Worried about Hell Pizza? Help is on the way – the Law Commission’s New Media Bill” (15 August 2012) jcelaw’s posterous (blog), available at <http://jcelaw.posterous.com/worried-about-hell-pizza-help-is-on-the-way-t>.

36. The burden in terms of costs and complexity on intermediaries in implementing takedowns is often significantly under-estimated by policymakers and the public. The effectiveness of removing content from the Internet as a solution is also over-estimated. Permanent removal of content from the Internet is often impossible to guarantee, which the Law Commission seems to acknowledge in its report.²⁹ Internet content does not always reside in one place. For example, there may be multiple cached copies of a harmful communication, sitting on servers scattered around the world. It is difficult, if not impossible, for an intermediary to guarantee that all copies will be removed. As explored in Part B, such practicalities feed into the requisite policy question of effectiveness of addressing a problem. Further, ISPs, unlike content hosts, are essentially Internet access providers and do not host the offending content. The Government should take all of this into account if they develop standards that intermediaries must meet.
37. Further, it is important to define in the Bill what constitutes “removal” of content. InternetNZ is concerned that, absent clarification, removing content could be conflated with “blocking” access to content. We strongly recommend that removal be defined so as to exclude “blocking”, and that it be made clear that the Tribunal does not have the authority to issue that kind of order.
38. Removal and blocking employ different mechanisms and involve different parties. An intermediary removes content by deleting it from the webpage. A website owner, for example, can delete a blog post. Blocking is different. It may be implemented through filtering, or tampering with the domain name system in order to prevent people accessing a website or part of a website. The domain name “seizures” that would have occurred without proper due process under proposed US legislation called SOPA (the Stop Online Piracy Act) are an example. InternetNZ believes, as a matter of principle, that laws and policies should work with the architecture of the Internet, not against it.³⁰ Blocking involves disrupting how the Internet retrieves and delivers information by redirecting Internet traffic to incorrect locations. This can cause problems for a new security protocol called DNSSEC (Domain Name System Security Extensions), which has been developed to create a safer and more secure Internet.

Recommendation: That the method of removal of content by ISPs should be defined so as to exclude blocking and recognise that it is difficult, if not impossible, for an intermediary to guarantee that all copies will be removed from the Internet.

²⁹ “It may not always be possible to remove all traces of material from the various places to which it may have migrated on the internet.” Law Commission, above n 1, at [5.87].

³⁰ InternetNZ Policy Principle No. 4.

39. InternetNZ supports the intent of clause 21, which enables the Tribunal to appoint a technical adviser. We suggest that the duties of the technical adviser be explicitly expanded to assist the Tribunal when orders under clause 16 are made.

Recommendation: That if a Tribunal remains in any new legislation, the technical adviser should be required to complete a report, in collaboration with the subject intermediary, before any takedown is ordered. Such a report should explain the required steps and the anticipated effectiveness of the takedown. A further report would also be of use after any takedown, to at least assure authorities that the initial estimates of cost were accurate and to gain understanding of the effectiveness (or otherwise) of the takedown process.

40. Along the same lines, we support the Law Commission’s recommendation for the Approved Agency to work with private sector agencies to develop protocols and guidelines. We recommend, however, that this begin with an open call for consultation.

Impact on Human Rights

41. This section considers how the rights of end-users would be affected if the consultation draft were implemented as is.
42. As a matter of principle, human rights should apply online.³¹ The consultation draft raises a number of human rights issues. Freedom of expression and due process are two examples. Section 14 of Bill of Rights Act 1990 provides that “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”³² Section 27(1) of the same Act provides that “Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.” These rights “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.³³

³¹ InternetNZ Policy Principle No. 5.

³² Bill of Rights Act 1990, s 14.

³³ Ibid, s 5.

43. The traditional test for whether a limitation is reasonable has three steps, each of which must be met. The limitation must be:
- prescribed by law,
 - rational (conveying a clear objective, which the proposed measures will actually achieve), and
 - proportionate and fair.
44. Is a takedown order rational, for example, if it is practically impossible to implement? Another order would enable the Tribunal to order a prior restraint on the speech of parties not before the Tribunal.³⁴ Can this limitation be considered proportionate?
45. Under the three-part test in paragraph 43, the appropriateness of the clause 16(1)(a), (b), (c) and (h) orders is highly suspect. If the Tribunal ordered a takedown of a communication, it would be limiting someone's right to freedom of expression. While the consultation draft requires the Tribunal to "have regard to the importance of freedom of expression",³⁵ we find this insufficient.
46. Harmful digital communications, especially those on the Internet, are quick to injure but slow to redress through traditional judicial channels. InternetNZ appreciates that a major goal of the Law Commission's recommendations is to expedite relief for those aggrieved by harmful digital communications. However, it is important that, as we craft legislation for the Internet, human rights are not sacrificed in the interests of providing speedy remedies.
47. The jurisdictional basis of the proposed Tribunal, and the standards by which it can issue an order, are set too low. The Tribunal need only find that the complainant suffered or would likely suffer significant harm from the communication and that the defendant breached one or more of the ten Communications Principles listed in clause 7(1). The Communications Principles, however, are so simplified that they risk setting the bar too low for a Tribunal order that could limit free speech and otherwise burden intermediaries as explained above. We believe that the principles are better suited towards an educative function. The standard for Tribunal orders, however, should be higher.

Recommendation: That clause 16(1)(a), (b), (c) and (h) orders, to be issued, require a standard based on the proposed new criminal offence. This standard, with its burden of proof adjusted to suit the civil law setting, provides better safeguards for the human rights implicated by these orders.

³⁴ Cf Communications (New Media) Bill 2012, cl 16(1)(b), enabling the Tribunal to order "to cease publishing the same, or substantially similar, communications in the future". Clause 16(2) provides that this order may apply to "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."

³⁵ Communications (New Media) Bill 2012, cl 16(4).

48. Finally, Section 27(2) of the Bill of Rights Act provides that “Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.” This right is not provided to defendants in the consultation draft.

Recommendation: That clause 18(1) of the consultation draft be amended to grant the defendant the right to appeal.

“Stripped down law”

49. The Briefing Paper lays out ten Communications Principles which are to be enshrined in law by clause 7 of the consultation draft.

50. As “stripped down law”, the Principles in the consultation draft lack the nuance of the laws from which they are derived and the inherent checks and balances built into the parent laws. Over time, the Approved Agency’s and the Tribunal’s interpretation and application of these Principles may generate a different body of precedent, one running parallel to that developed traditionally in New Zealand courts.

51. Already we note that some experts have expressed concerns at a divergence between the proposed principles and the laws from which the Principles are derived. Further, some experts have pointed out that apparently obsolete tort cases, such as *Wilkinson v Downton* in relation to making false allegations, have been included in the Principles.

52. The Communications Principles should be used for guidance and education only. The Tribunal should not treat the Principles as quasi-legal elements that must be satisfied before issuing an order. Rather, as expressed above, the Tribunal (if there is one) should use the standard of the proposed new criminal offence, adjusting for a civil law context.

Recommendation: That the Communications Principles should be used for guidance and education only, necessitating corresponding changes in any new legislation. The Tribunal (if there is one) should use the standard of the proposed new criminal offence, adjusting for a civil law context.

The Role of the Approved Agency

53. InternetNZ generally supports the proposed statutory Approved Agency, though suggests that further consideration be given to the nature of the Agency's role. The Law Commission recommends that NetSafe assume the role of the Approved Agency.³⁶ In the interests of full disclosure, it should be noted that InternetNZ has a strategic partnership with NetSafe, including providing it with funding.³⁷
54. In the Briefing Paper, the Law Commission recommends that "complaints about offensive internet communications should go initially to an "approved agency" which would advise complainants and attempt to achieve a resolution by a process of negotiation, mediation and persuasion."³⁸
55. We find this description troublesome for the mere fact that negotiation and persuasion are fundamentally different than mediation. A capable Approved Agency would therefore have to wear two different hats: the first of an advocate (as a negotiator or persuader), and the second as a neutral arbiter (as a mediator).
56. The concepts of free speech, due process, and Communications Principles addressed in the section above find relevance to the Approved Agency as well.

Recommendation: That the Approved Agency be required to observe requirements prescribed by regulation that ensures fair treatment of both parties to a dispute.

The Need for a Tribunal

57. There is little evidence in the Briefing Paper that a Tribunal is essential to address the harms identified by the Law Commission. Issues to do with jurisdiction and general reservations about orders that can be passed by the Tribunal in relation to Internet intermediaries have already been noted in this paper.
58. We understand that typically 90% of complaints about harmful digital communications made to NetSafe involve parties that know each other well. However, the content is posted on overseas content hosts. Under these circumstances, most harmful communications can be addressed by an 'official' Approved Agency developing relationships and protocols for takedown requests with content hosts. A Tribunal cannot provide the intended backstop function as it has no jurisdiction over the content hosts, which is likely to lead to frustration and disappointment rather than resolution.

³⁶ Law Commission, above n 1, at [66].

³⁷ Details at <https://internetnz.net.nz/our-work/partnerships>

³⁸ Law Commission, above n 1, at 134 (emphasis added).

59. Noting that the Briefing Paper considers the proposed criminal provisions as the “primary mechanism to address egregious communications harms at the high end of the scale” (cf paragraph 24), the backstop for the Approved Agency should be the police and regular court channels rather than a Tribunal. We believe that most of the negative consequences for Internet intermediaries and end-users, including the potential chilling of free speech, come from the powers and role of the Tribunal. The proposed Tribunal adds little real benefit while presenting great negative potential. It does not meet the test of a proportionate and meaningful response to the harms identified.
60. In the event that the provisions of the consultation draft, excluding the Tribunal, are not sufficient to address the harms identified in the Briefing Paper in practice, the Government can review the Bill in, say, two years to re-assess the need for a Tribunal.

Recommendation: That provisions related to a Tribunal are removed from any new legislation developed. Further, a review should be held after two years to determine whether a Tribunal is in fact really needed.

Conclusion

Stories of teen suicide contribute gravity and urgency to the issue of cyberbullying. The Prime Minister’s and other Ministers’ intent to quash this harmful behaviour is likely to prompt quick legislative reaction.

InternetNZ believes the Law Commission’s proposals should be viewed in their entirety for their potential impact. In its current form the consultation draft could lead to serious interference with the Internet, its intermediaries, and the rights of its users. In this paper we have sought to explain how this is, and offer recommendations for how these issues can be addressed.

Overall, InternetNZ accepts that the Law Commission and the Government have identified a problem requiring a regulatory response, though we invite the Government to restrict the focus to cyberbullying. We take no issue with the proposed amendments to existing laws, or the proposed new offence, and support the proposals for the Approved Agency to assist in dealing with harmful online communications, provided the safeguards we have requested are implemented.

However, InternetNZ does not believe the Government should go ahead with setting up a Tribunal. It adds little real benefit while presenting great negative potential. A Tribunal will not meet the test of a proportionate and meaningful response to the harms identified. Further, regulation should only be introduced if it will be effective and the lack of jurisdiction over the largest sites upon which harmful digital communications are frequently posted is noted.

Further, the Communications Principles as “stripped down law” should be used for guidance and education only. The method of removal of content by ISPs should be defined so as to exclude blocking and recognise that it is difficult, if not impossible, for an intermediary to guarantee that all copies of the offending content will be removed from the Internet.