



Hon. Judith Collins  
Minister of Justice

22 November 2012

### **Harmful Digital Communications**

Dear Minister,

This letter is in relation to the Ministerial Briefing Paper on 'Harmful Digital Communications: The adequacy of the current sanctions and remedies' submitted to you by the Law Commission ("the Briefing Paper") in August 2012.

The views in this letter broadly represent those of over 60 people attending public workshops organised by InternetNZ in Auckland and Wellington in September 2012, as well as those of InternetNZ itself.

#### **Focus on cyber-bullying**

In May 2012, you asked<sup>1</sup> "the Law Commission to fast-track its recommendations for reducing the harm caused by cyber-bullying... 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."

We note that the Briefing Paper's scope is significantly wider. It covers all types of harmful digital communications directed at people of all ages. The Briefing Paper recognises cyber-bullying as a subset of harmful digital communications, specifically those that occur within the context of adolescent peer relationships.

There are real harms outlined in the Briefing Paper from cyber-bullying that the Government should address as a priority. However, the full package of measures recommended by the Briefing Paper, targeting the much bigger problem of harmful digital communications, goes far wider than addressing cyber-bullying alone.

We therefore recommend that the Government fast-track only those measures that address your intended focus on cyber-bullying. This narrower response is likely to be far more effective; minimise many of the potential negative impacts raised in this letter; and garner more community support.

#### **Tiered response and low awareness are key issues**

Chapter 3 of the Briefing Paper agrees in-principle with a three tier approach to dealing with harmful digital communications. Extending the law is seen as bridging the gap left by the first two tiers of 'user empowerment' and self-regulatory mechanisms. Whether or not the Government accepts our recommendation to focus on cyber-bullying alone, the Government's response must emphasise the importance of the first two tiers and consider how they can be further strengthened.

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<sup>1</sup> Release dated 11 May 2012 at <http://www.beehive.govt.nz/release/govt-take-stand-cyber-bullying>

Extending the law should be seen as a necessary step, but not the only step. Consequently, moving forward with the legislative changes recommended by the Law Commission alone will be an incomplete and potentially damaging response to the Briefing Paper.

In this regard, the findings of independent research commissioned by the Law Commission and quoted in para 3.43 to 3.52 of the Briefing Paper are particularly important. The findings show that New Zealanders have low awareness of:

- laws, rules or standards that apply to harmful speech on the Internet;
- online safeguards and reporting tools; and
- where to go for help.

We recommend that tackling awareness in these areas needs to be a key part of the Government's comprehensive response. This will require effort and resources from Government over a sustained period. However, without such commitment and support, legislative change alone is unlikely to have the desired impact. The Government should seek to collaborate with online service providers and industry bodies to complement its efforts.

### **Schools need to take lead in tackling bullying**

The proposals put forward by the Law Commission deal with minimising the impact of harm after it has occurred. This highlights the need for other steps to try and prevent harm from occurring in the first place.

Notwithstanding the extended scope of the Briefing Paper on addressing harmful communications beyond the Government's intended focus on cyber-bullying, it recognises the "compelling reasons for prioritising resources and tailoring solutions for adolescents"<sup>2</sup>. It notes that "cyber-bullying must be addressed within the broader context of strategies for combating adolescent aggression and bullying. The law performs a critical part in anchoring educational strategies for combating bullying, but it can only go so far when dealing with minors."<sup>3</sup> We are told by experts that cyber-bullying peaks around Year 9 to 10. Schools therefore need to be another critical component of the Government's response.

It is clear that cyber-bullying cannot be addressed in the education sector without simultaneously, as the Briefing Paper says<sup>4</sup>, being "viewed as a whole school problem, requiring a whole school solution." In other words, the Government's efforts need to be directed at addressing bullying as a whole, not cyber-bullying alone.

We therefore support the recommendations R31 to R34 in the Briefing Paper but suggest that the Ministry of Education proactively collaborate with schools and relevant organisations when undertaking the work envisaged by recommendation R33.

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<sup>2</sup> Para 6.4

<sup>3</sup> Para 6.7

<sup>4</sup> Para 6.13

## Policy issues

InternetNZ's detailed position in relation to the Internet policy issues raised by the legislative proposals contained in the Briefing Paper, the proposed Communications (New Media) Bill, is attached<sup>5</sup>. In summary, our recommendations are:

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.
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.

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<sup>5</sup> It is also published online at [https://internetnz.net.nz/system/files/workstreams/inz\\_position\\_paper\\_on\\_communications\\_new\\_media\\_bill.pdf](https://internetnz.net.nz/system/files/workstreams/inz_position_paper_on_communications_new_media_bill.pdf)

## Overall position

Bullying is a result of human behaviour, not technology, and predates the Internet. The Internet makes bullying worse as it provides amplification to “envelop the recipient in an environment that is pervasive, insidious and distressing... producing types of abuse which simply have no precedent or equivalent in the pre-digital world... and inflict enduring psychological and emotional damage.”<sup>6</sup>

There have been a range of reactions to the Briefing Paper, ranging from outright rejection on grounds of free speech and doubts over their real-life effectiveness to wholehearted support that “something must be done”. On balance, we support the Government fast-tracking and prioritising a package of measures to address the specific focus area of cyber-bullying, subject to the recommendations and caveats in this letter. We also support the Briefing Paper’s emphasis of its recommendations being treated as a package<sup>7</sup>. In particular, we reiterate the call for a tiered response; raising awareness; and schools’ leadership above.

Some of the proposals put forward by the Law Commission are “novel”<sup>8</sup>. It is our opinion, as detailed in this letter, that some aspects of the proposed Communications (New Media) Bill pose serious risks to the open Internet and Internet intermediaries. It also does not contain sufficient safeguards for due process and freedom of expression. We therefore hope that you and your officials will consider the recommendations we have made in this regard.

We seek a meeting with you and your officials to discuss this letter and an opportunity to provide you any clarifications or further information. It is hoped that this can occur before the Government finalises its policy position in response to the Briefing Paper.

Yours Sincerely,

Sd/

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Chief Executive, InternetNZ

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<sup>6</sup> Para 17, 31 and 32 of the Summary

<sup>7</sup> Para 10 of the Summary

<sup>8</sup> Para 12 of the Summary