

LEGISLATION NOTE

HARMFUL DIGITAL COMMUNICATIONS ACT 2015

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I INTRODUCTION

The Harmful Digital Communications Act 2015 (HDCA) is a modern enactment for a modern problem.¹ The title of the Act is in some ways self-explanatory: the purpose of the HDCA is to “deter, prevent, and mitigate harm caused to individuals by harmful digital communications” and to “provide victims of harmful digital communications with a quick and efficient means of redress”.² In order to achieve these ends, the HDCA establishes a comprehensive civil regime to manage complaints regarding harmful digital communications and creates a new offence that criminalises more serious misconduct. Early data suggests that the HDCA may provide a valuable tool for women who have been the target of harmful digital communications.

II BACKGROUND TO THE HARMFUL DIGITAL COMMUNICATIONS ACT 2015

The first reading of the Harmful Digital Communications Bill 2013 took place on 14 November and 3 December 2013.³ Coincidentally, this was only a few days after the “RoastBusters” scandal broke in New Zealand, involving a group of young men who boasted online about their sexual activities with intoxicated and under-aged girls.⁴ The close chronological connection between

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1 (30 June 2015) 706 NZPD 4850–4870.

2 Harmful Digital Communications Act 2015 [HDCA], s 3.

3 (14 November 2013) 694 NZPD 14747–14753 and (3 December 2013) 695 NZPD 15164–15173.

4 For a timeline of events, see Sophie Ryan “Roast Busters case: ‘Where was the respect?’ – police” *The New Zealand Herald* (online ed, Auckland, 29 October 2014).

those events and the introduction of the Bill led some commentators to believe that the HDCA represented Parliament’s response to the scandal.⁵

In reality, the legislative process had been initiated more than three years previously when the Law Commission was asked to review the adequacy of the regulatory regime governing news media in the digital age.⁶ In May 2012 the Minister of Justice, Hon Judith Collins, asked the Law Commission to fast-track the part of its report that would recommend solutions aimed at tackling the issue of cyberbullying.⁷ This led to the publication of a Ministerial Briefing Paper titled “Harmful Digital Communications: The adequacy of the current sanctions and remedies” in August 2012 (Briefing Paper).⁸ A draft bill named the Communications (New Media) Bill was included in the Briefing Paper and became the basis for the Harmful Digital Communications Bill the following year.

The Briefing Paper identified a number of concerns regarding the harms caused by digital communications and the inadequacies of existing remedies. These harms appeared in a variety of forms, including “attacks on reputation, malicious impersonation, sexual and racial harassment, and invasions of privacy”.⁹ This abusive behaviour amounted to more than simply “an extension of offline behaviours”.¹⁰ The characteristics of the online environment, including anonymity, permanence and ease of dissemination, created the potential for uniquely pervasive harms.¹¹ Additionally, the ubiquity of digital technology meant that cyberbullying and other abuse could cause significant, real life

5 See, for example, Nicholas Jones “Controversial cyberbullying law passes” *The New Zealand Herald* (online ed, Auckland, 30 June 2015) and “Cyberbullies face jail under new law” (1 July 2015) *The Wireless* <<http://thewireless.co.nz>>.

6 Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at 3.

7 New Zealand Government “Govt to take stand on cyber bullying” (press release, 11 May 2012). The impetus for this request is unknown; however, earlier in the same week, the *New Zealand Herald* ran a series of articles discussing the harms caused by bullying, including an article in which the then Chief Coroner identified a link between cyberbullying and New Zealand’s high rate of youth suicide: see Simon Collins and Vaimoana Tapaleao “Suicide link in cyber-bullying” *The New Zealand Herald* (online ed, Auckland, 7 May 2012).

8 Law Commission “Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies” (Ministerial Briefing Paper, 2012).

9 At [2.4].

10 At [1.35] and [2.96].

11 At [2.42].

detrimental effects. The Briefing Paper cited submissions from individuals describing fears for physical safety, harassment at work and via social media, loss of reputation and emotional turmoil.¹²

The Law Commission adopted the term “harmful digital communications” to describe these harmful interactions, which could occur via text, pictures and audio-visual content.¹³ The term “harmful” was said to describe the “full range of serious negative consequences which can result from offensive communication including physical fear, humiliation, mental and emotional distress”.¹⁴ The Law Commission noted that this was a departure from traditional criminal and civil law approaches, which tended to focus on physical or financial harm rather than emotional harm.¹⁵ Overall, the Law Commission determined “that when the level of emotional distress can be described as *significant*, the law has a role to play”.¹⁶

III THE SCHEME OF THE HDCA

The HDCA passed its final reading on 30 June 2015.¹⁷ Some provisions of the HDCA, including a new criminal offence provision, came into effect almost immediately on 3 July 2015.¹⁸ The remaining sections of the HDCA came into effect on 20 May 2016¹⁹ and 21 November 2016.²⁰

The HDCA can be separated into four broad components. First, ss 6–21 establish and regulate a new civil complaints regime in respect of harmful digital communications.²¹ Like the Privacy Act 1993, the civil regime is governed by

12 See [2.45]–[2.63] where the Law Commission identified a number of disturbing instances where digital communications had been used to cause harm.

13 At [15]–[16].

14 At [18] and [1.26].

15 At [4.66]–[4.69].

16 At [20]. See also at [1.27].

17 (30 June 2015) 706 NZPD 4850–4870.

18 Section 2(1) of the HDCA which provides that ss 22–25 and 29–41 would come into force the day after the Act received Royal assent. A number of key sections (including s 4, which defines “harm”) did not come into force immediately. Sections 3–6 came into effect more than three months later on 27 November 2015 in accordance with the Harmful Digital Communications Act Commencement Order 2015, s 2.

19 Section 7 came into force on 20 May 2016 pursuant to s 2(2) of the HDCA and Harmful Digital Communications Act Commencement Order 2016, s 2.

20 Sections 8–21 and 26–28 came into force on 21 November 2016 pursuant to s 2(2) of the HDCA and Harmful Digital Communications Act Commencement Order (No 2) 2016, s 2.

21 “Digital communication” is defined as “any form of electronic communication” and includes “any text

a series of 10 principles that discourage harmful online behaviours.²² The first stage of the complaints process will be conducted through a new Approved Agency, which will be empowered to receive and investigate complaints about harmful digital communications.²³ If the complaint cannot be resolved, or alternatively if the Agency determines that the complaint does not merit further investigation, the alleged victim may choose to refer the complaint to the District Court.²⁴ If there has been a serious or repeated breach of one or more communications principles resulting in harm to an individual, the District Court has jurisdiction to make a range of non-punitive orders against a defendant.²⁵ The District Court does not have the power to order compensation under the HDCA. However existing civil law causes of action, such as defamation, remain in place if a plaintiff wishes to recover financial damages in respect of a harmful digital communication.

The second component of the HDCA scheme is the new criminal offence provision, which is set out in s 22. Section 22(1) provides that a person commits an offence if:

- i) the person posts a digital communication with the intention that it cause harm to a victim;²⁶ and
- ii) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
- iii) posting the communication causes harm to the victim.

message, writing, photograph, picture, recording, or other matter that is communicated electronically”: HDCA, s 4.

- 22 Section 6(i). For example, principle 1 states that “[a] digital communication should not disclose sensitive personal facts about an individual”. The Schedule to the Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996 also adopts a similar scheme.
- 23 Section 8. Netsafe was appointed as the Approved Agency under the Harmful Digital Communications (Appointment of Approved Agency) Order 2016.
- 24 Sections 8(5), 11(1)(a) and 12(1). The Police or the Chief Coroner may apply directly to the District Court without first making a complaint to the Approved Agency: ss 11(1)(d), 11(2) and 12(1).
- 25 Section 19(1). For example, the Court may require a defendant to take down or disable harmful material (s 19(1)(a)) or alternatively to give a right of reply in respect of the affected material (s 19(1)(e)).
- 26 “Posts a digital communication” means “transfers, sends, posts, publishes, disseminates, or otherwise communicates by means of a digital communication — (i) any information, whether truthful or untruthful about a victim; or (ii) an intimate visual recording of another individual”: s 4. The definition also extends to attempts.

“Harm” is defined as “serious emotional distress”.²⁷ In a recent case, *New Zealand Police v B*, the High Court considered the meaning of “serious emotional distress” concluding “the phrase ... is a broad compendious expression that means what it says”.²⁸ Factors that may be relevant when considering whether the victim has suffered “serious emotional distress” include “the nature of the emotional distress; its intensity; duration; manifestation; and context, including whether a reasonable person in the complainant’s position would have suffered serious emotional distress”.²⁹ A person who is convicted of an offence under s 22 of the HDCA faces a sentence of up to two years’ imprisonment or a fine of up to \$50,000.³⁰

The third component of the HDCA scheme is the ‘safe haven’ regime, which protects content hosts from liability provided that they implement an approved complaints handling procedure as set out in the HDCA.³¹ However, the procedure is not compulsory and it seems likely that larger content hosts such as Facebook and Google will continue to utilise their existing complaints mechanisms, rather than creating new online infrastructure that is specific to New Zealand.

Finally, the HDCA amends a number of other statutes.³² Most of the amendments are minor changes to include electronic communications within the scope of existing laws. However, one significant amendment extends the offence of aiding and abetting suicide to include any instance of incitement to commit suicide, regardless of whether the victim actually acts on the incitement.³³

IV LEGISLATION IN ACTION

As of 24 July 2017, Police had laid charges in 125 cases under the HDCA.³⁴ Of the 84 prosecutions completed to that date, 65 resulted in a conviction

27 Section 4.

28 *New Zealand Police v B* [2017] NZHC 526, [2017] 3 NZLR 203 at [25].

29 At [24]; see also HDCA, s 22(2).

30 HDCA, s 22(3)(a). Or, in the case of a body corporate, a fine not exceeding \$200,000: s 23(3)(b).

31 Sections 23–25.

32 Sections 29–41.

33 Sections 29 and 30, amending the Crimes Act 1961, s 179.

34 Obtained under an Official Information Act 1982 request to the Ministry of Justice.

or discharge without conviction.³⁵ Nearly 30 individuals were sentenced to a community-based sentence, while four were sentenced to home detention. A further 14 individuals were sentenced to a term of imprisonment.

This early data shows that to date, offending under the HDCA has disproportionately been committed by males. Of the 56 individuals who have been convicted or discharged without conviction for offences under the HDCA, 49 were male. Information regarding the gender of victims is not publically available.³⁶

The age distribution of offenders convicted or discharged without conviction under the HDCA is similarly revealing. Of the 56 individuals who have been successfully prosecuted under the HDCA, only one was aged 18 years or younger. Thirty defendants were aged between 18 and 29 years of age while 24 defendants were aged 30 years or older.³⁷ These figures may come as a surprise to some observers. While many will be aware of concerns regarding cyberbullying amongst children and young people, the issue of harmful digital communications between adults has received comparatively less attention.

Who, then, is the HDCA working to protect? Although charges have been proved in 65 cases, only seven of those cases are publically available on legal databases. Significantly, six of those cases concerned offending by a male against a former female partner.³⁸ These cases suggest that the HDCA may provide a valuable tool to protect women from harassment and/or abuse in the digital sphere.

The effects of age and gender are also evident in early data produced by Netsafe, the Approved Agency appointed to receive and investigate complaints under the civil complaints regime. Between 21 November 2016 and 21 May 2017, the HDCA service received more than 900 complaints of personal harm.³⁹

35 In other words, the charge was proved.

36 The Ministry of Justice referred a request under the Official Information Act in respect of this information to the Police for consideration. The request was subsequently refused on the basis that the Police did not hold the information under s 18(g) of the Official Information Act.

37 The age of the final defendant is unknown.

38 *Waine v R* [2017] NZCA 287; *Britten v New Zealand Police* [2017] NZHC 2410; *New Zealand Police v B*, above n 28; *R v Faulkner* [2017] NZDC 10417; *New Zealand Police v Kelly* [2016] NZDC 12912; and *New Zealand Police v Tamihana* [2016] NZDC 6749, [2016] DCR 240. In the remaining case, the defendant was convicted of causing harm by a digital communication after sending a text to the complainant over a drug debt: *New Zealand Police v Bust* [2016] NZDC 4391.

39 Netsafe “Online bullying, abuse and harassment services receives over 900 reports in first six months” (press release, 31 May 2017).

Of those complaints, 61 per cent were lodged by women, 36 per cent by men and three per cent by individuals identifying as gender diverse. Only 33 per cent of complaints were received from individuals 21 years of age or younger, while 36 per cent of complaints were made by individuals aged between 22 and 40 years old, and 27 per cent by those aged between 41 and 64 years of age. Unlike criminal offending, there is no way of knowing whether the complaints to Netsafe under the HDCA have been proven to be true. However, the age distribution of complainants, in particular, suggests that the harms caused by digital communications affect individuals of all ages, not only children and young people.

V CONCLUSION

The HDCA is a 21st century enactment for 21st century harms. Whether the HDCA will achieve its stated aim of deterring, preventing and mitigating harm caused by harmful digital communications remains to be seen. However, the early indications are that the HDCA is fulfilling its second purpose, to provide a quick and efficient means of redress for those who have been victims of such communications. The early data suggests that the HDCA regime may prove to be particularly effective in protecting the interests of female victims, including in the context of domestic violence.