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**THE CRIMINALISATION OF INTENTIONALLY  
HARMFUL DIGITAL COMMUNICATIONS –  
ENCOURAGING THE RESPONSIBLE USE OF  
CYBERSPACE OR AN OFFENCE OF UNNECESSARILY  
LIMITED APPLICATION?**

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***Abstract:***

The Harmful Digital Communications Bill has recently been reported back from the Justice and Electoral Select Committee. The Bill seeks to deter, prevent and mitigate the harm caused to individuals through digital communications and to provide victims of harmful digital communications with a quick and efficient means of redress. In addition to modernising existing legislation and establishing a new civil enforcement regime, the Bill controversially introduces a new criminal offence of posting a harmful communication with the intent that the communication causes harm to a victim. Surprisingly, the offence differs significantly from comparable legislation abroad where neither a *mens rea* standard of intent is present nor a requirement that a victim must suffer serious emotional distress in order for an offender to be liable. This paper critiques the likely application of the offence and ultimately concludes that in light of differing legislation abroad and cases which have arisen since the enactment of the Communications Act in the United Kingdom, that the *mens rea* standard should be modified to include subjective recklessness, and the requirement that an intended victim must suffer actual harm should be removed.

***Key Words:***

Harmful Digital Communications, Cyberbullying, Criminal Offence.

## *I Introduction*

In recent decades the use of digital technology as a means of communication has grown exponentially. As the world becomes increasingly globalised, cyberspace is becoming populated by more and more people each day. Modern society has arrived at a point where individuals are heavily reliant on their phones, e-mails, social media accounts and other forms of internet communication in a formerly unprecedented manner.

While the growing prevalence of such technologies has allowed for far greater convenience, cyberspace has arguably become a “vast unsupervised public playground”.<sup>1</sup> Reported incidents of abuse and harassment through technological means has led to an overwhelmingly large number of victims being harassed, causing a multitude of harms such as: fear, humiliation, depression, and in the worst of cases, self-harm and suicide.

The current Government has rightfully acknowledged that like overseas jurisdictions seeking to address this issue, New Zealand must extend the law to better protect individuals from such harms. However, although the Harmful Digital Communications Bill seeks to modernise New Zealand’s outdated legislation and to introduce a criminal offence specifically targeted at those who use cyberspace as a forum for abuse, the Bill, particularly the new offence of intentionally causing harm, appears to fall well short of being an adequate solution to the problem of remedying the harms caused by harmful digital communications.

An examination of the Bill’s current format as reported by the Justice and Electoral Select Committee and a comparative analysis with cyberbullying laws in force in other jurisdictions highlight the deficiencies in the legislation. Particularly, the requirements that a defendant must have intended to cause harm to a victim, and that a victim must have suffered harm in order for an offender to be criminally liable, differ significantly from comparable legislation abroad, suggesting that the Bill must be strengthened prior to its eventual enactment if New Zealand is to truly make inroads into the ongoing problem of abuse through digital communication.

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<sup>1</sup> Report of the Nova Scotia Task Force on Bullying and Cyberbullying *Respectful and Responsible Relationships: There’s No App for That* (Nova Scotia, 29 February 2012) at 12.

## *II The Key Features of New Zealand's Proposed Legislation*

The Harmful Digital Communications Bill was initially drafted with the aim of mitigating the harm caused to individuals through digital communication.<sup>2</sup> Upon reflection, the Justice and Electoral Select Committee expanded the purpose of the Bill to include deterrence and prevention of harm inflicted through digital means.<sup>3</sup> Secondly, the Bill seeks to provide victims of harm caused by digital communication with a quick and efficient means of redress.<sup>4</sup> In order to achieve these objectives, the Bill proposes the introduction of: a civil enforcement regime, a criminal offence specifically targeted at the most serious harmful communications, and amendments to existing legislation to ensure their effective application to digital communications.<sup>5</sup>

### *A The Proposed Civil Enforcement Regime*

#### *1 The Approved Agency*

The Law Commission has rightfully acknowledged that the availability of timely, effective relief is equally as important as changing the law itself.<sup>6</sup> Further, existing web-based reporting systems are supposedly unable to adequately provide relief to victims in every instance of abuse.<sup>7</sup> Accordingly, the Bill seeks to introduce an approved agency that would operate in a civil jurisdiction with the ability to investigate complaints and attempt to resolve disputes pertaining to digital communication by means of negotiation, mediation and persuasion.<sup>8</sup> The Tribunal would also exist to: establish relationships with service providers, content hosts and agencies;<sup>9</sup> to educate and advise on policies relating to safe online behaviour and conduct;<sup>10</sup> and any other functions the Tribunal would be instructed to exercise through Order in Council.<sup>11</sup> The Tribunal would also have the ability to lodge

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<sup>2</sup> Harmful Digital Communications Bill 2013 (168-1) (explanatory note).

<sup>3</sup> cl 3.

<sup>4</sup> cl 3.

<sup>5</sup> Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC 2012) at 11.

<sup>6</sup> At 47(d).

<sup>7</sup> At 58.

<sup>8</sup> Harmful Digital Communications Bill, cls 8(1)(b), 8(1)(c).

<sup>9</sup> cl 8(1)(d).

<sup>10</sup> cl 8(1)(e).

<sup>11</sup> cl 8(1)(f).

complaints with online content hosts on behalf of those alleging they have been harmed and provide advice and assistance to the complainant.<sup>12</sup>

In exercising the prescribed functions, the Tribunal is to be guided by a set of principles stipulating the types of digital communications that are unacceptable. Among the principles are criteria stipulating that a digital communication shall not: disclose sensitive personal information, threaten or intimidate, be grossly offensive from the victim's point of view, be used as a means of harassment, or be used to either incite or encourage a person to harm themselves.<sup>13</sup>

## 2 *Orders Imposed by the District Court*

While the Bill does not permit the Approved Agency to remove allegedly harmful digital communications, victims and their representatives are given the ability to apply to the District Court in an attempt to have such material removed. Either the victim, one of their guardians, a school principal, or a member of the Police is able to apply for an order to have content removed.<sup>14</sup> In determining whether an order shall be granted, and what form the order will take, the Court must have regard to: the content of the communication; the communicator's purpose, the communication's context and subject matter, the extent to which (if any) the communication has spread beyond the initial intended audience, the age and vulnerability of the affected person, the truth or falsity of the statement, whether the communication is in the public interest, the conduct of both the defendant and the affected person, and the technical and operational practicalities of an order.<sup>15</sup> If satisfied that an order would be appropriate and not contrary to any of the rights and freedoms affirmed in the Bill of Rights Act 1990,<sup>16</sup> the Court may make one or more orders requiring the defendant to do any of the following: takedown or disable the material posted, cease the conduct concerned (if any), refrain from encouraging other people to engage in similar communications towards the victim, correct the publication, give a right of reply to the victim, or make an apology.<sup>17</sup> Interim orders can also be granted in the same manner, which expire upon the determination of the primary application.<sup>18</sup>

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<sup>12</sup> cl 20.

<sup>13</sup> cl 6(1).

<sup>14</sup> cl 10.

<sup>15</sup> cl 17(4).

<sup>16</sup> cl 17(5).

<sup>17</sup> cl 17(1).

<sup>18</sup> cl 16(3).

## ***B Amendments to Existing Legislation***

The Bill seeks to both modernise and strengthen four existing statutes to ensure their effective application to digital communications. Firstly, the Crimes Act 1961 currently sanctions any person who incites, counsels, or procures any person to commit suicide if that person commits, or attempts to commit suicide as a consequence.<sup>19</sup> Further, the aiding or abetting of any person in the commission of suicide is also an offence.<sup>20</sup> The Bill seeks to expand the provisions relating to the incitement or counsel of suicide by making it an offence to do so irrespective of whether or not the victim actually attempts to commit suicide in consequence of the defendant's conduct. A person who commits such an offence is liable on conviction to imprisonment for a term not exceeding three years.<sup>21</sup>

Secondly, the Harassment Act 1997 is to be amended in multiple ways. The meaning of harassment is to be expanded to include situations where a person engages in a pattern of behaviour directed against another which is a continuing act carried out over any period (unlike the current two separate occasions within a period of 12 months requirement). Additionally, the definition of a continuing act is to be expanded to include circumstances where a specified act is done in isolation, however continues to have effect over a protracted period.<sup>22</sup> In the context of digital communication, both amendments are to have the effect of ensuring that material being posted on electronic media which remains there for an extended period of time, constitutes harassment.<sup>23</sup> Further, the definition of "specified act" is to be expanded to include situations where a person is contacted through electronic communication, and to circumstances where offensive material is communicated and is likely to be seen by the allegedly harassed person.<sup>24</sup> Additionally, in relation to restraining orders issued under the Act, it is to become a condition of every order in relation to a continuing act, that the respondent take reasonable steps to prevent the specified act from occurring.<sup>25</sup> With respect to harmful digital communication, this amendment is intended to have the effect of requiring the defendant to remove content posted on the internet. However, the section acknowledges that the defendant may not be able to remove

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<sup>19</sup> Crimes Act 1961, s 179(a).

<sup>20</sup> s 179(b).

<sup>21</sup> Harmful Digital Communications Bill, cl 24.

<sup>22</sup> A specified act for the purposes of the Harassment Act is an act that causes a reasonable person to fear for his or her safety.

<sup>23</sup> cl 26(4).

<sup>24</sup> cl 27.

<sup>25</sup> cl 28.

the content from every individual forum in which it is posted, thus the “reasonable steps” limitation has been included.<sup>26</sup>

Thirdly, the Human Rights Act is to be modernised in a series of ways. The current “racial disharmony” discrimination provision that makes it unlawful to publish or broadcast by means of radio or television, words that distribute written matter which are threatening, abusive or insulting, is to be expanded to include broadcasting through other forms of electronic communication. Moreover, the sexual and racial harassment provisions are to be expanded to include “participation in fora for the exchange of ideas or information”.

Finally, the Privacy Act is to be amended in two ways. The Act currently contains twelve principles pertaining to agencies’ ability to collect personal information.<sup>27</sup> The tenth principle states that an agency holding personal information obtained in connection with a particular purpose should not be used for another, unless the agency reasonably believes that, among other criteria, the source of the information is a publicly available publication.<sup>28</sup> Further, the eleventh principle relates to limitations on disclosures of information and states that disclosure of information can occur where the source of the information is a publicly available publication. The Bill proposes to qualify both principles by requiring that in the circumstances of a particular case, it would not be unfair or unreasonable to either use or disclose the information.<sup>29</sup> These amendments are considered necessary as the Law Commission believes they would be useful in addressing online communication harms which significantly impact on a person’s privacy.<sup>30</sup> The Act also currently states that the privacy principles are inapplicable in respect of the collection of personal information by an agency that is an individual, or personal information that is held by an agency that is an individual, where the information is collected or held solely for the purpose of, or in connection with, the individual’s personal, family or household affairs.<sup>31</sup> The Bill seeks to qualify the domestic affairs requirement by ensuring that it ceases to apply once the personal information’s collection, disclosure or use would be highly offensive to an ordinary reasonable person.<sup>32</sup> Despite being considered a “crucial exception” by some commentators,<sup>33</sup> the Law Commission acknowledges that the exception currently allows

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<sup>26</sup> Law Commission, above n 5, at 4.114.

<sup>27</sup> Privacy Act 1993, s 6.

<sup>28</sup> s 6.

<sup>29</sup> Harmful Digital Communications Bill, cls 36(1), 36(2).

<sup>30</sup> Law Commission, above n 5, at 4.125.

<sup>31</sup> Privacy Act 1993, s 56.

<sup>32</sup> Harmful Digital Communications Bill, cl 35.

<sup>33</sup> Gehan Gunasekara and Alan Toy “MySpace” or “Public Space” [2008] 23 NZULR 191 at 213.



intimate pictures taken during a domestic relationship may be exempt from the Privacy Act principles if published upon the breakdown of the relationship.<sup>34</sup> Accordingly, this amendment is considered pivotal in relation to combatting cyber abuse.

### ***C The Introduction of Criminal Offences***

The Bill proposes the introduction of two criminal offences. Firstly, if, in the absence of reasonable excuse, a person fails to comply with an requiring that person to: take down material, correct a publication, give a right of reply, or issue an apology, then that person commits an offence and is liable on conviction to imprisonment for a term not exceeding six months, or a fine of up to \$5,000.<sup>35</sup> In the case of a body corporate, the maximum fine is \$20,000.<sup>36</sup>

Secondly, the Bill seeks to create a more punitive criminal offence specifically tailored towards the most serious offending. If a person: posts a digital communication with the intent of causing harm to a victim,<sup>37</sup> the posting of the communication would cause harm to an ordinary person in the victim's position,<sup>38</sup> and the communication does in fact cause harm to the victim,<sup>39</sup> then that person commits an offence and is liable on conviction to imprisonment for a term not exceeding two years.<sup>40</sup> In order for a person to be considered a victim, they must be the target of a posted digital communication.<sup>41</sup> Additionally, in assessing whether or not the communication would cause harm to a victim, the may take into account any factors it considers relevant, including: the extremity of the language used, the age and characteristics of the victim, whether the communication was anonymous or the author is identified, whether the communication was repeated, the extent of circulation, whether the communication is true or false, and the context in which the communication appeared.<sup>42</sup>

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<sup>34</sup> Law Commission, above n 5, at 4.123.

<sup>35</sup> cls 18(1), 18(2)(a).

<sup>36</sup> cl 18(2)(b).

<sup>37</sup> cl 19(1)(a).

<sup>38</sup> cl 19(1)(b).

<sup>39</sup> cl 19(1)(c).

<sup>40</sup> cl 19(3).

<sup>41</sup> cl 19(4).

<sup>42</sup> cl 19(2).

### *III Critique of the Proposed Criminal Offence of Intentionally Harming a Victim*

While the Harmful Digital Communications Bill seeks to bring New Zealand into line with other common law jurisdictions such as Australia, the United Kingdom and Canada, all of which have recently enacted legislation to combat cyber-bullying, there are numerous significant points of difference in New Zealand's proposed legislation. Additionally, the Bill's purpose, following Select Committee consideration, now includes deterrence in addition to prevention and mitigation of harm, and providing victims with a quick and efficient means of redress.<sup>43</sup> In light of both the initial provisions, and the changes made by the Justice and Electoral Select Committee, it is seriously questionable whether the current clauses in the Bill reconcile with the Bill's ultimate purposes.

Specifically, the introduction of a new criminal offence of causing harm by posting a digital communication requires detailed scrutiny in assessing whether the Bill will, in actuality, deter and mitigate harm caused by posting harmful material. Particularly, there are two requirements of the offence that require detailed assessment. Firstly, whether the condition that a digital communication must be posted with the *intent* of causing harm should exist, is highly contentious for a multitude of reasons.<sup>44</sup> Secondly, it is difficult to reconcile the requirement that posting a communication must actually cause harm to the victim, with the newly included purpose of deterrence.<sup>45</sup>

#### *A The Purpose of the Criminal Offence*

While the parliamentary debates, the Select Committee report, and other official materials are silent as to the overall purpose of the criminal offence, it is implicit from the legislation that the offence exists in order to punish misusers of digital communication networks, vindicate the wrong that has been done, and deter future offending. All of the unique civil law remedies such as takedown orders, apologies, and corrections, are concerned with putting right the wrong that has been caused to the victim. Furthermore, numerous academics submit that civil law is primarily considered to be compensatory in nature, and is not ordinarily viewed as a means of deterrence.<sup>46</sup> Conversely, one of the

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<sup>43</sup> cl 3.

<sup>44</sup> cl 19(1)(a).

<sup>45</sup> cl 3.

<sup>46</sup> B Atkin, G McLay, and B Hodge *Torts in New Zealand* (4<sup>th</sup> ed, Oxford University Press, 2006) at 4.

primary aims of criminal law is to deter future offending,<sup>47</sup> and given the structure of the proposed legislation, the offence of intentionally harming a victim appears to be no exception.

***B Should there be a requirement that a victim must have suffered actual harm in order for an offender to be liable under the new criminal offence?***

As the Bill is currently drafted, two requirements are necessary to be satisfied in addition to the defendant needing to have intended to cause harm. Firstly, the posting of a communication must cause harm to an ordinary person in the victim's position.<sup>48</sup> Secondly, the posting of the communication must actually cause harm to the victim.<sup>49</sup> The combination of both an objective and a subjective element with respect to a victim needing to have been harmed is unique when contrasted with legislation abroad. Furthermore, a person is considered to have been harmed only if they have suffered "serious emotional distress".<sup>50</sup> While commentary as to how "serious emotional distress" will be interpreted is merely speculation at present, and uncertainty surrounds whether this threshold will differ from the Law Commission's proposed standard of "significant emotional distress",<sup>51</sup> a requirement that a person must have suffered harm, irrespective of how harm is defined, seriously questions the achievability of deterrence.

In the event that a victim does not actually suffer "serious emotional distress", it is possible that a person posting a communication with harmful intent may be criminally liable under the law of attempts. In New Zealand, if a person, with intent to commit an offence, does an act for the purpose of accomplishing his object, that person is guilty of an attempt to commit the offence intended, irrespective of whether, in the circumstances, it was possible to commit the offence or not.<sup>52</sup> The offence in question is uniquely structured, however, the likely application of this provision to the offence, therefore, is that if a person posts a communication with the purpose of harming someone, they will be liable for an attempt even if a person is not offended by the content, despite potentially being considered offensive objectively. Those successfully convicted for attempts are liable to half the

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<sup>47</sup> A P Simester and W J Brookbanks *Principles of Criminal Law* (2<sup>nd</sup> ed, Brookers, Wellington, 2002) at 1.2.2.

<sup>48</sup> Harmful Digital Communications Bill, cl 19(1)(b).

<sup>49</sup> cl 19(1)(c).

<sup>50</sup> cl 4.

<sup>51</sup> Law Commission, above n 5, at 20.

<sup>52</sup> Crimes Act 1961, s 72(1).

maximum punishment they would have been liable for had they successfully committed the offence.<sup>53</sup> Therefore, a person could potentially be imprisoned for up to 12 months for attempting to harm someone by posting a digital communication.<sup>54</sup> However, if attempts are not readily prosecuted under this offence, or if the *mens rea* standard is modified to include recklessness as is later suggested, the necessity of a harm requirement becomes contentious.

### *1 Comparison with other jurisdictions*

Notably, like the requirement of intent, actual harm is not a requirement in the United Kingdom. The equivalent legislation is a purely objective assessment as to whether a communication is either grossly offensive or of an indecent, obscene, or menacing character.<sup>55</sup> The assessment is clearly much easier to satisfy than that in New Zealand as the objective element of our proposed legislation requires that a reasonable person in the victim's position must have been caused serious emotional distress.<sup>56</sup> Conversely, the United Kingdom legislation does not place any consideration on whether there is a victim, let alone whether that victim has been harmed. The rationale behind the inclusion of the objective element in New Zealand is most probably to ensure that trivial or unmeritorious complaints are not made by hyper-sensitive people regarding content that would ordinarily not be considered emotionally distressful, and that we are not policing victimless crimes.

However, the inclusion of the objective element casts doubt on the necessity of having a requirement that a person actually be harmed by a communication. The objective element ensures that the offence will only apply to situations where reasonable people would suffer harm. Therefore, as the Bill currently reads, even if harm is likely to result through an objective assessment, offenders will be immune from liability if the person they intended to harm, does not in fact suffer serious emotional distress. The removal of the subjective requirement would incentivise people to not post offensive content, as it would ensure that offenders do not post harmful content even in situations where there may be a particularly robust victim who is not harmed by the communication. Further, the "serious emotional distress" threshold is also likely to fail to account for victims who may suffer tangible economic harm. The removal of the subjective requirement would better achieve the purpose of deterrence in such cases, as it would ensure people refrain from posting

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<sup>53</sup> s 311.

<sup>54</sup> Harmful Digital Communications Bill, cl 19(3)

<sup>55</sup> Communications Act 2003 (UK), s 127.

<sup>56</sup> Harmful Digital Communications Bill, cls 19, 4.

offensive content, even where they suspect the intended victim might not suffer serious emotional distress or perhaps a lesser of different form of harm.

Furthermore, the offence does also not account for situations where a person has posted something which is clearly objectionable by reasonable standards, however potentially may not have been viewed by the intended victim/s. Theoretically, reasonable internet users could view a communication targeted at someone else and be fully appreciative that the content will likely harm the intended target, but because the intended victim/s have not seen the communication yet, nor suffered the serious emotional distress that is likely to ensue, the offender is not criminally responsible. If the purpose of the Bill is to not only deter, but mitigate and prevent harm, then it would be far more effective if the actual harm requirement were removed as this would incentivise users to not post offensive content in the first instance. Rather, for a person to be criminally liable at present, the communication must remain broadcasted up until the time an intended victim is harmed by it. It is arguable that the law will be sending the message that it is okay to post offensive material provided that the person to whom it was intended to harm, does not become aware of it. A much more satisfactory result would be to proactively deter harmful content being posted in the first instance by removing the subjective element which requires that the victim be harmed, as this would incentivise internet users to refrain from posting offensive content, as they would be aware that the communication need only be harmful to a reasonable person in the victim's position to be liable, not that the victim must actually suffer harm. This incentive would also prevent people suffering the harm of seeing content offensive to them posted on a public forum in the first instance.

## *2 Does the actual harm requirement assist to promote the wider purposes of the Bill?*

One of the most noteworthy revisions of the Bill at Select Committee stage was the inclusion of the purpose of deterring harm being caused to individuals through digital communication. The significant amendment made to the criminal offence, namely, the increase of the maximum penalty from either a fine of \$2,000 or three months imprisonment to a period of two years imprisonment, strongly accords with this view. However, despite the obvious apparent deterrent effect of potentially being subject to a much longer period of imprisonment, the retention of the actual harm requirement significantly questions the true achievability of deterrence.

One useful articulation of the operation of deterrence in the criminal law suggests that the actual harm requirement will hinder the Bill's deterrent effect. Deterrence in a criminal law context is broadly defined as a means of discouraging members of society from committing criminal acts out of fear of punishment.<sup>57</sup> A deterrent is considered to be anything which exerts a preventative force towards crime.<sup>58</sup> While deterrence is considered to be one of the primary rationales behind the imposition of criminal sanctions, significant doubts have been cast over the assertion that the possibility of a criminal sentence acts as a strong disincentive for potential criminals to engage in illegal conduct.<sup>59</sup> It has been suggested that for a criminal sanction to act as an effective deterrent there are three criterion that must be satisfied: first, potential offenders must directly or indirectly know what actions are criminalised and what conditions will excuse them, second, offenders must bring such understanding to bear on their conduct choices at the moment of making their choices, thirdly, the perception of their choices must be such that they are likely to choose compliance with the law rather than the commission of the criminal offence.<sup>60</sup>

The second requirement of the aforementioned test, namely, that the offender must bring an understanding of what is criminalised to bear on their conduct when making choices, is highly unlikely to be satisfied in relation to the offence in question.<sup>61</sup> If a person posts a communication not only does it need to be considered harmful objectively, but someone must also actually be harmed. This requirement would have the effect that if a post were objectionably offensive, irrespective of how extremely harmful it may be, if a victim does not suffer serious emotional distress, the offender will be immune from liability. Essentially, therefore, if an internet user knew that something would be considered harmful by objectionable standards, but was aware there was some possibility that the post may not harm anyone, then the potential imposition of a criminal sanction may not effectively deter those offenders. This problem is heavily exacerbated by the Bill's definition of "victim," which is defined as "the individual who is *the target* of a posted digital communication".<sup>62</sup> Therefore, for a person to be liable, the person harmed must be the

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<sup>57</sup> Legal Dictionary by Farlex "Deterrence" <[www.legal-dictionary.com](http://www.legal-dictionary.com)>.

<sup>58</sup> Kevin C. Kennedy, A Critical Appraisal of Criminal Deterrence Theory, 88 Dick. L. Rev. 1 (1983-1984) at 1.

<sup>59</sup> Paul H. Robinson and John M. Darley "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 2 Oxford Journal of Legal Studies 173 at 173.

<sup>60</sup> At 175.

<sup>61</sup> Kevin C. Kennedy, A Critical Appraisal of Criminal Deterrence Theory, 88 Dick. L. Rev. 1 (1983-1984) at 1.

<sup>62</sup> Harmful Digital Communications Bill, cl 19(4).

specific individual who the offender actually wanted to harm, which has the potential to lead to some alarming results.

For example, if a person posted an offensive publication such as naked picture of a toddler, a mentally disabled person, or someone otherwise incapable of understanding the distress or harm that may result because of such a post, and that person was the offender's target, the offender would not be liable. It is likely that the parents, guardians, or other people close to such victims would suffer serious emotional distress as a result of such posts, but if they are not the intended targets, then the offender will not be liable. Alarming, the Bill actually permits such people to make an application for a take down order,<sup>63</sup> which impliedly suggests that they may be harmed by such content, yet the offender will not be liable unless it can be proven that they intended to harm those people. The need to prove intent to harm such individuals would not be necessary if the requirement of actual harm was removed, as offenders would then only be required post material which would be reasonably capable of causing serious emotional distress to be subjected to criminal liability. Such a result would accord much better with the Bill's purposes as potential offenders would then be discouraged from posting offensive material, even if they considered that the specific person they intended to harm, may not suffer serious emotional distress. It would greatly overcome the evidential difficulties of proving intent and go a long way towards achieving not only the deterrence, but also the mitigation and prevention of harm in this context.

***C Should there be a requirement that the defendant must have intended to cause harm to be liable under the new criminal offence?***

***1 Comparison with other jurisdictions***

In contrast to New Zealand, many other common law countries criminalise harmful digital communications through statute in the absence of any proven intent by the defendant. In the United Kingdom it is a criminal offence to improperly use a communications network.<sup>64</sup> Specifically, if a person sends (or causes to be sent) by means of a public electronic communications network, a message or other matter that is grossly offensive or of an indecent or menacing character, that person is guilty of an offence and is liable upon summary conviction to either a term of imprisonment for a maximum period

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<sup>63</sup> cl 10.

<sup>64</sup> Communication Act 2003 (UK), s 127.

of six months,<sup>65</sup> or a fine not exceeding £5,000.<sup>66</sup> The United Kingdom equivalent focuses strictly on the nature and content of the communication, and does not, according to the statute, require the defendant to have desired a person to be harmed. Within the first eight years of enactment the provision led to more than 5,316 successful prosecutions,<sup>67</sup> and now appears to be the most frequently utilised provision to initiate criminal proceedings against misusers of networks in the United Kingdom.<sup>68</sup> Accordingly, in light of a number of controversial breaches of the provision, culminating in a case involving tweets criticising airport delays for the purpose of provoking humour,<sup>69</sup> judicial opinion has been divided over the last decade on whether an intent requirement should exist, despite the absence of any such requirement in the Communications Act.

The leading judgment on this issue saw the House of Lords split as to whether an intent requirement should exist in the Communications Act. In a case involving a man who continuously left voice messages to his local MP regarding his dissatisfaction with “Wogis”, “Pakis” and “Niggers” in his electorate, the House of Lords accepted the submission of the Director of Public Prosecutions that the defendant must either intend his or her words to be grossly offensive *or be aware* that they may be taken to be so.<sup>70</sup> Their Lordships adopted the well-known dicta of Lord Reid which states that in the absence of an express *mens rea* requirement, there is a presumption that Parliament’s intention is not to criminalise people free of blameworthiness.<sup>71</sup> Further, that in the context of grossly offensive content being sent via a communications network, Parliament cannot have intended to subject those who are unaware that the language they are using is grossly offensive, to criminal liability.<sup>72</sup> It is possible that the New Zealand legislature has included an intent requirement to prevent any ambiguity surrounding what the relevant *mens rea* standard is and avoid the inevitability of a similar case arising domestically where a court may “read-in” the need for a defendant to have intended to cause harm.

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<sup>65</sup> s 127(3).

<sup>66</sup> Criminal Justice Act 1982 (UK), s 37(2).

<sup>67</sup> (14 June 2010) Column 316W Crispin Blunt MP (UK); Open Rights Group “Communications Act 2003/Section 127” <[www.wiki.openrightsgroup.org](http://www.wiki.openrightsgroup.org)>.

<sup>68</sup> The IT Law Community “Section 127 of the Communications Act 2003: Threat or Menace?” (9 October 2012) <[www.scl.org](http://www.scl.org)>.

<sup>69</sup> *Chambers v DPP* [2012] EWHC 2157 (QB).

<sup>70</sup> *Director of Public Prosecutions v. Collins* [2006] UKHL 40 (19 July 2006) at 11.

<sup>71</sup> *Sweet v Parsley* (UK) [1970] AC 132 at 148.

<sup>72</sup> *Director of Public Prosecutions v. Collins*, above n 70, at 11.



However, with the exception of Lord Brown, the majority of the House of Lords in *Collins* did not appear to take account of numerous other provisions in United Kingdom statutes that expressly require intent in a cyber-abuse context. Almost all of the other cyber-abuse offences in the United Kingdom expressly require intent or knowledge on part of the offender. It is, therefore, also highly likely that the exclusion of a *mens rea* standard from the Communications Act was not a parliamentary oversight, and is owing to the fact that such a requirement was deemed to be undesirable.

Statutes indicative of the view that the United Kingdom legislature ordinarily includes an intent requirement in the digital communication context include the Malicious Communications Act which criminalises electronic communications of an indecent or grossly offensive nature where the defendant had the purpose of intending to cause distress or anxiety to the recipient or any other person to whom the matter was communicated to.<sup>73</sup> Additionally, the Protection from Harassment Act, albeit assessed objectively, requires that the defendant knows or ought to know that the course of conduct they are engaging in amounts to harassment of another.<sup>74</sup> Finally, and perhaps most convincingly, the less culpable improper use of a network offence in the Communications Act of causing annoyance, inconvenience or anxiety to another, expressly requires that to have been the defendant's purpose.<sup>75</sup>

The absence of an intent requirement in the Communications Act would also accord with many recent prosecutions such as a man jailed for creating a Facebook event to start riots in his locale,<sup>76</sup> and a person being arrested after setting up a webpage praising a murder suspect.<sup>77</sup> In neither case were the defendants' motives to harm a specific person through the communications themselves, yet people understandably took serious offence to both publications. The existence of an intent requirement would have likely ensured that both individuals in these cases were not subject to prosecution. Instances of this kind strongly suggest that an intent requirement should be absent from the New Zealand legislation as the alternative outcome would be that grossly offensive material of this kind would be permissible and the individuals posting such material would be free from any form of

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<sup>73</sup> Malicious Communications Act 1998 (UK), s 1(1).

<sup>74</sup> Protection from Harassment Act 1997 (UK), s 1.

<sup>75</sup> Communications Act (UK), s 127(2).

<sup>76</sup> BBC News "Facebook riot invitation lands Bangor man, 21, in jail" (23 August 2011) <[www.bbc.co.uk](http://www.bbc.co.uk)>.

<sup>77</sup> Stephen Wright, Liz Hull *et al.* "Detectives arrest man, 22, over 'offensive' Facebook page set up following deaths of shot policewomen" Mail Online (20 September 2012) <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

criminal prosecution or punishment whatsoever except perhaps the possibility of being subject to an order requiring them to apologise to those who have been harmed, or to remove the material.<sup>78</sup> Such a result would seriously question the achievability of both the prevention and deterrence of harm.

In Victoria, Australia, the equivalent provision sanctions the use of a carriage service (including mobile phones and the internet)<sup>79</sup> in circumstances where reasonable persons would consider that use to be menacing, harassing, or offensive. If convicted, a person faces imprisonment for a period of up to three years.<sup>80</sup> The offence carries a maximum term of imprisonment penalty that is longer than both the United Kingdom's six months and New Zealand's two years, yet there is no requirement that the defendant must have intended to cause harm. Subjecting a person to a potential period of imprisonment for a longer period than both New Zealand and the United Kingdom implies the offence carries greater culpability in Victoria, and the exclusion of an express intent requirement in such circumstances casts further doubt on whether one is necessary or indeed desirable in New Zealand.

Conversely, however, numerous jurisdictions in the United States require the defendant to have intended to harm another person. The relevant legislation in both Kentucky and Alabama criminalises harassing communications only if the defendant communicates with the intent of intimidation, harassment or annoyance.<sup>81</sup> However, both states are part of the relatively small minority of jurisdictions in the United States who have moved to either create cyberbullying laws or modernise existing laws to ensure their application to harmful digital communications.<sup>82</sup> It would be premature to assume that there will be unanimity in this approach as other states move to criminalise cyberbullying. Therefore, it is arguable New Zealand should instead replicate the provisions of our fellow Commonwealth jurisdictions and dispense with the intent requirement prior to the Bill's eventual enactment to achieve uniformity with both Australia and the United Kingdom.

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<sup>78</sup> cl 17(1)(f).

<sup>79</sup> Law Commission, above n 5, at 4.73.

<sup>80</sup> Criminal Code 1995 (Cth), s 474.17.

<sup>81</sup> KY. Rev. Stat. Ann. §525.080; ALA. CODE Sec.13A-11-8(b).

<sup>82</sup> National Conference of State Legislatures "Cyberbullying and the states" (9 July 2010) <[www.ncsl.org](http://www.ncsl.org)>.

## 2 *Does the intent requirement assist to promote the wider purposes of the Bill?*

Considering the aforementioned test of an effective deterrent in light of the intent requirement further questions whether the offence will effectively deter harmful digital communications. It has been submitted that:<sup>83</sup> first, potential offenders must directly or indirectly know what actions are criminalised and what conditions will excuse them, second, offenders must bring such understanding to bear on their conduct choices at the moment of making their choices, thirdly, the perception of their choices must be such that they are likely to choose compliance with the law rather than the commission of the criminal offence. In relation to the third criterion, given that the maximum term of imprisonment has been extended to two years, a rational cost-benefit analysis would suggest that it is likely that non-compliance with the law is not at issue. Rational people are incredibly unlikely to value making harmful posts with intent to cause harm to such an extent that they are willing to be subjected to imprisonment for two years.<sup>84</sup> However, whether the first and second criterion are satisfied in relation to the proposed offence is highly questionable.

Applying the first criterion, namely, that offenders know what actions are criminalised and what conditions will excuse them, to the provision in question casts doubt over whether the offence is going to act as an effective deterrent. As drafted, the offence is not going to deter people from posting objectively offensive content, if the communicator does not believe it to be so. If a person is oblivious to the fact that what they are posting is offensive, then a criminal offence restricting offenders from *intentionally* posting offensive content is not going to stop them. There are numerous recent convictions in the United Kingdom where offenders have posted content which is blatantly offensive, yet the offender has been unaware that the communication may be harmful. Examples include: the aforementioned case involving a Facebook event inviting people to partake in riots where the offender did not believe “people would take it seriously”,<sup>85</sup> a man posting on Facebook that “all soldiers

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<sup>83</sup> Paul H. Robinson and John M. Darley, above n 59, at 175.

<sup>84</sup> Robert Cooter and Thomas Ulen *Law and Economics* (6<sup>th</sup> ed, Pearson, Boston, 2012) at 462.

<sup>85</sup> WalesOnline “Man jailed for four months over Facebook attempt to start riots in Bangor” (23 August 2011) <[www.walesonline.co.uk](http://www.walesonline.co.uk)>.

should die and go to hell” which he believed not to be offensive,<sup>86</sup> and a famous footballer posting homophobic comments on Twitter believing them to be merely “humourous”.<sup>87</sup>

Furthermore, there is a growing concern in the United Kingdom surrounding the posting of sexually explicit content on social media.<sup>88</sup> Academics and lawyers have submitted that in many “revenge porn” cases it is not clear that the communicator is aware of the gross offence that can be taken by the participants in such videos and images, as the content is often posted with a view that it will just lead to humiliation.<sup>89</sup> This issue is exacerbated by cases where the communicator only sends the material to one other person who then disseminates it to a wider audience.<sup>90</sup> In such cases the original communicator may have abstained from sending the material to a wider audience owing to an apprehension that those in the video or image might take offence. However, if the second communicator of the information does not believe this to be the case, which is likely given they may not even know the sexual participants personally, the material may then go viral through cyberspace, despite the initial communicator not intending it to do so. Despite these concerns however, the United Kingdom has acknowledged that the existing offence under the Communications Act is adequate to deal with such cases and has decided against imposing a new offence of posting revenge porn.<sup>91</sup> Importantly, the Communications Act does not require intent on part of the communicator, unlike New Zealand’s proposed offence. Ultimately, therefore, if the intent requirement remains in our legislation, all instances where offenders are oblivious to the offensive nature of content are not going to be deterred from posting incredibly derogatory material of this kind.

Doubt as to whether the offence will be an effective deterrent is exacerbated by the second criterion which requires that the offender brings their understanding of what is criminalised on their conduct. This requirement is highly unlikely to be satisfied in the context of digital communications in the presence of an intent requirement. Intention requires that the person sought to bring about the relevant outcome, or that the defendant

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<sup>86</sup> BBC News “Azhar Ahmed sentenced over Facebook solider deaths slur” (9 October 2013) <[www.bbc.com](http://www.bbc.com)>.

<sup>87</sup> Crown Prosecution Service “DPP statement on Tom Daley case and social media prosecutions” The blog of the Crown Prosecution Service (20 September 2013) <[www.blogs.cps.gov.uk](http://www.blogs.cps.gov.uk)>.

<sup>88</sup> House of Lords Select Committee on Communications “Social Media and Criminal Offences Inquiry” at 8.

<sup>89</sup> At 31.

<sup>90</sup> At 8 and 9.

<sup>91</sup> Question More “UK Parliament shoots down ‘unnecessary’ anti-revenge porn laws” (29 July 2014) <[www.rt.com](http://www.rt.com)>.

appreciated that the *actus reus* of an offence was a virtually certain consequence of their actions.<sup>92</sup> This requirement does not accord with the motives of a significantly large number of people posting harmful digital communications both domestically and abroad.

There are a multitude of reported cases where victims have become depressed, humiliated, and even harmed themselves, owing to harmful communications where the defendant's purpose was not to harm or injure the victim, but merely provoke humour, embarrassment or to attract attention. A 20 year old was recently convicted in the United Kingdom for posting a photograph online of a police officer after drawing two penises on him. The post was shared by 1,700 people and caused considerable humiliation to the victim, yet the offender only posted the image because of his dissatisfaction with having to wait a long time at the police station.<sup>93</sup> Furthermore, a teenager was convicted for posting sexually depraved comments about a missing 5 year old who eventually died. He merely did so to get attention despite being told by numerous people how offensive the comments were.<sup>94</sup> Additionally, in rather ironic circumstances a famous footballer was racially abused on Twitter through being referred to as a "coon" by one of his fans who tweeted solely for the purpose of snaring the footballer and getting a reaction from him.<sup>95</sup> None of these offenders in the United Kingdom intended to harm their respective victims, and these successful convictions strongly suggest that there should not be an intent requirement in New Zealand if we are to truly deter offensive communications.

New Zealand has also recently witnessed an abhorrent misuse of social media where the offender's intent has been unclear. In 2012, two males supplied a 16 year old girl with alcohol, got her drunk, and sexually violated her with a hammer and a road cone despite her reluctance to co-operate.<sup>96</sup> The events were photographed and details were later posted on Facebook,<sup>97</sup> which led to the girl being disowned by her parents and her fleeing of the city to avoid public ridicule.<sup>98</sup> Alarming, the offender conceded to not thinking about the

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<sup>92</sup> A P Simester and W J Brookbanks *Principles of Criminal Law* (2<sup>nd</sup> ed, Brookers, Wellington, 2002) at 4.2.1.

<sup>93</sup> Daily Mail Reporter "Builder ordered to pay policeman £400 after drawing two penises on a picture of him and posting it on Facebook" MailOnline <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

<sup>94</sup> The Guardian "Facebook user avoids jail over April Jones comments" (7 November 2012) <[www.theguardian.com](http://www.theguardian.com)>.

<sup>95</sup> The Huffington Post "Joshua Cryer, Newcastle Student Who Called Stan Collymore 'Coon' In Racist Tweet, Spared Jail" <[www.huffingtonpost.co.uk](http://www.huffingtonpost.co.uk)>.

<sup>96</sup> *R v Broekman* [2012] NZCA 213 at [2] and [3].

<sup>97</sup> At [5].

<sup>98</sup> At [5].

girl's pain nor did he appreciate or realise the harm he was doing to her.<sup>99</sup> This case is a prime example of the extremities of harm that can arise from misusing social media. Accordingly, if the requirement of intent remains, offenders of this kind whose purpose cannot be proven may not be deterred from engaging in such despicable behaviour and subsequently posting it online.

Overall, although it may be unequivocally clear to viewers of content posted online that reasonable people would be offended by a particular communication, unless it can be proven beyond reasonable doubt that the communicator desired that another be harmed, they will not be subject to conviction under the provision.<sup>100</sup> While appreciative that subjecting a person to a penal offence requires culpability, if the offence is to truly assist in deterring harmful content being posted online and to reduce the incidence of such behaviour, the current *mens rea* standard must either be rid of made consistent with the motives of all of those who communicate content which is obviously of a harmful or offensive nature.

### 3 *Recommendation as to what mens rea standard should be prescribed in the offence*

The current requirement of intent not only questions whether the purpose of deterrence is truly achievable, but the exclusion of any other *mens rea* state in the offence is unique when compared with other, arguably less culpable, offences in New Zealand which can be committed in the absence of a proven willingness to commit crime.

In addition to intention, the two other mental states regularly prescribed in New Zealand law are recklessness and negligence. A person is reckless in law if that person does an act which creates an obvious and serious risk, and when that person does the act, they have either not given any thought to the possibility of there being any such risk, or has recognised that there was some risk involved and has nonetheless gone on to do it.<sup>101</sup> Additionally, a person is criminally negligent where a reasonable person in the same circumstances would have been aware of the risks of doing the *actus reus* of an offence and would not have run those risks.<sup>102</sup>

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<sup>99</sup> At [4] and [9].

<sup>100</sup> A P Simester and W J Brookbanks, above n 47, at 2.3.

<sup>101</sup> *R v Caldwell* [1981] 1 All ER 986, 967 (HL); *R v Lawrence* [1982] AC 510, 527; [1981] 1 All ER 974, 982 (HL).

<sup>102</sup> A P Simester and W J Brookbanks, above n 47, at 4.6.1.

As the Bill currently reads, the offence cannot be committed either recklessly nor negligently. This is very surprisingly given that other criminal offences which do not have the potential to cause the potentially irreparable harms that the Law Commission describes harmful digital communications as giving rise to. For example, current laws in New Zealand stipulate that people who behave offensively or disorderly in public or use language of that kind can be criminally liable if they do so recklessly.<sup>103</sup> Furthermore, a person's conduct can be criminalised if they publicly are in possession of an object which could possibly injure someone and recklessly does something with that object without reasonable excuse.<sup>104</sup> Finally and perhaps most convincingly, if a person damages property or sets fire to vegetation recklessly they too can be subject to a criminal sanction.<sup>105</sup> Simply put, if the Bill is enacted in its current format, New Zealand law will be in a position where somebody can potentially become a criminal for unintentionally setting fire to a plant, but people will not be subject to criminal liability, under this offence, for posting grossly offensive material which can, in the worst of cases, lead to self-harm and suicide, if they did not desire or contemplate that anyone be harmed or perhaps if the evidential difficulties of proving intent are not overcome. Such a result would seriously question the legitimacy of the New Zealand's criminal offence arrangements and strongly suggests that the *mens rea* element of this offence should be either removed or lowered to a lesser standard of culpability.

Given that the removal of the intent requirement and making the offence one of strict or perhaps even absolute liability would likely be considered too extreme, and that some culpability on part of the offender is obviously necessary, the introduction of a recklessness or a negligence standard may better achieve the object of deterrence. If the requirement of intent remains, then the offence does not account for situations where a person may post a communication which they know may harm someone, yet they post the content despite being aware of that risk. Additionally, those who are careless as to whether a communication will harm someone yet post that content where a reasonable person would not do so, are also immune from liability. Striking an appropriate middle-ground between a person needing to have wanted someone to be harmed and an offence where there is no moral blameworthiness on part of the defendant at all is undoubtedly necessary to deter harmful content being communicated and to set the right incentives for the users of cyberspace. Certain law and economics theorists advocate that criminalisation of

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<sup>103</sup> Summary Offences Act 1981, s 4(1)(c)(i).

<sup>104</sup> s 13.

<sup>105</sup> s 11(2).

recklessness incentivises potential criminals to not engage in behaviour where there is a risk of harming someone.<sup>106</sup> It ensures that where a person appreciates a risk of harm, they will act in a prudent manner to avoid that risk. Furthermore, criminalising negligence, albeit controversial, incentivises people to not act unreasonably.<sup>107</sup> In the context of harmful digital communication the imposition of either a recklessness or negligence standard would, therefore, encourage those contemplating posting or communicating offensive or hurtful material to not do so. It would render claims from defendants that they were not aware that what they were posting would be harmful, ineffective.

Overall, the imposition of a criminal negligence standard would likely be a step too far. Numerous academics have criticised doing so on the basis that it is excessively harsh to equate those who do wrong inadvertently to those who do so intentionally or recklessly.<sup>108</sup> Particularly, in a New Zealand context, manslaughter and sexual violation are the only notable serious criminal offences that criminalise with a negligence *mens rea* standard. Conversely, it could be argued that a person who negligently posts a harmful digital communication should be subject to the offence and the lesser culpability of a negligent offender is catered for during sentencing. However, even if a person's sentence is alleviated they are still subjected to the stigma of being a criminal therefore this is unlikely to be considered satisfactory. Therefore, the *mens rea* standard in the criminal offence should be expanded to include recklessness for multiple reasons. Firstly, this would ensure our legislation accords with both the United Kingdom and Australia.<sup>109</sup> Secondly, it would ensure that people who appreciate the risk of communications being harmful avoid posting them online where they can be disseminated and subjected to an exponentially growing audience. Finally, it would avoid the absurd result of not having a reckless standard in this offence, yet having one imposed for multiple crimes in the Summary Offences Act, the potential harms resulting from which are far less significant than those that can possibly result from harmful digital communications such as depression, self-harm and in the worst of cases, suicide.

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<sup>106</sup> Robert Cooter and Thomas Ulen, above n 84, at 457.

<sup>107</sup> At 458.

<sup>108</sup> A P Simester and W J Brookbanks, above n 47, at 4.6.1; Hall "Negligent behaviour should be excluded from penal liability" (1963) 63 Columbia LR 632; Turner, "The mental element in crimes at common law" in Radzinowics and Turner (eds).

<sup>109</sup> *Director of Public Prosecutions v. Collins* [2006] UKHL 40 (19 July 2006).



#### *IV Conclusion*

While the Harmful Digital Communications Bill does seek to make considerable inroads into the problem of cyberbullying by modernising existing legislation, introducing a civil enforcement regime and a new criminal offence, a critical analysis of the Bill's current provisions, and a comparison with legislation abroad seriously questions the achievability of the Bill's intended purposes.

The Justice and Electoral Committee's inclusion of the purpose of deterring harm is of particular significance when considered alongside the other amendments made during Select Committee revision. While the maximum penalty for the new criminal offence was significantly increased, little else was done by way of strengthening the Bill to achieve the object of deterrence.

While the proposed criminal offence cannot be considered in isolation though, it is by far the most practical means of achieving deterrence. Civil law and tortious liability are not primarily concerned with deterrence, only compensation.<sup>110</sup> Therefore, although the criminal offence is supplemented by the possibility of unique remedies such as takedowns of material, corrections of publications and giving the victim a right of reply, such orders do not seek to prevent society at large from engaging in the posting of harmful material online, only to set right the wrongs which misusers of digital communications have already caused.

Accordingly, it is imperative that the new criminal offence is strengthened. By introducing a standard of recklessness as opposed to intent and removing the requirement that an intended victim must actually be harmed, this would provide the correct incentives for digital communication users and promote wariness when people are posting content online which may be regarded as objectionable. Furthermore, such reforms would ensure our legislation is in conformity with comparable legislation abroad and would proactively ensure internet users are not harmed in the first instance. Ultimately, while the Government's inclusion of the intent and harm requirements in the legislation may be to ensure the Bill is not overintrusive on fundamental civil liberties such as freedom of expression,<sup>111</sup> this may come at the unaffordable cost of seeing numerous innocent users of cyberspace being subjected to abuse while offenders escape criminal liability. Such a

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<sup>110</sup> B Atkin, G McLay, and B Hodge *Torts in New Zealand* (4<sup>th</sup> ed, Oxford University Press, 2006) at 4.

<sup>111</sup> New Zealand Bill of Rights Act 1990, s 14.

result would seriously question New Zealand's commitment to making cyberspace a userfriendly forum, and ensuring that innocent internet users are free from the potentially irreparable harms that cyberabuse can bring rise to.

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The text of this paper (excluding table of contents, footnotes, appendices and bibliography) comprises approximately 7886 words.

## *V Bibliography*

### ***A Cases***

#### *1 New Zealand*

*R v Broekman* [2012] NZCA 213.

#### *2 United Kingdom*

*Chambers v DPP* [2012] EWHC 2157 (QB).

*Director of Public Prosecutions v. Collins* [2006] UKHL 40 (19 July 2006).

*R v Caldwell* [1981] 1 All ER 986, 967 (HL).

*R v Lawrence* [1982] AC 510, 527; [1981] 1 All ER 974, 982 (HL).

*Sweet v Parsley* (UK) [1970] AC 132.

### ***B Legislation***

#### *1 New Zealand*

Crimes Act 1961.

Harmful Digital Communications Bill 2013 (168-1).

Harassment Act 1997.

Privacy Act 1993.

New Zealand Bill of Rights Act 1990.

Summary Offences Act 1991.

#### *2 Australia*

Criminal Code 1995 (Cth), s 474.17.

#### *3 United Kingdom*

Communications Act 2003 (UK).

Criminal Justice Act 1982 (UK).

Malicious Communications Act 1998 (UK).

Protection from Harassment Act 1997 (UK).

#### 4 *United States*

ALA. CODE Sec.13A-11-8(b).

KY. Rev. Stat. Ann. §525.080.

#### ***C Books and Chapters in Books***

B Atkin, G McLay, and B Hodge *Torts in New Zealand* (4<sup>th</sup> ed, Oxford University Press, 2006).

A P Simester and W J Brookbanks *Principles of Criminal Law* (2<sup>nd</sup> ed, Brookers, Wellington, 2002).

Robert Cooter and Thomas Ulen *Law and Economics* (6<sup>th</sup> ed, Pearson, Boston, 2012).

#### ***D Journal Articles***

Gehan Gunasekara and Alan Toy “MySpace” or “Public Space” [2008] 23 NZULR 191.

Kevin C. Kennedy, A Critical Appraisal of Criminal Deterrence Theory, 88 Dick. L. Rev. 1 (1983-1984).

Paul H. Robinson and John M. Darley “Does Criminal Law Deter? A Behavioural Science Investigation” (2004) 2 Oxford Journal of Legal Studies 173.

Report of the Nova Scotia Task Force on Bullying and Cyberbullying *Respectful and Responsible Relationships: There’s No App for That* (Nova Scotia, 29 February 2012).

#### ***E Parliamentary and Government Materials***

##### *1 New Zealand*

Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC 2012) at 11.

## 2 *United Kingdom*

House of Lords Select Committee on Communications “Social Media and Criminal Offences Inquiry”.

(14 June 2010) Column 316W Crispin Blunt MP (UK).

### ***F Internet Materials***

BBC News “Azhar Ahmed sentenced over Facebook solidier deaths slur” (9 October 2013) <[www.bbc.com](http://www.bbc.com)>.

BBC News “Facebook riot invitation lands Bangor man, 21, in jail” (23 August 2011) <[www.bbc.co.uk](http://www.bbc.co.uk)>.

Crown Prosecution Service “DPP statement on Tom Daley case and social media prosecutions” The blog of the Crown Prosecution Service (20 September 2013) <[www.blogs.cps.gov.uk](http://www.blogs.cps.gov.uk)>.

Daily Mail Reporter “Builder ordered to pay policeman £400 after drawing two penises on a picture of him and posting it on Facebook” MailOnline <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

Legal Dictionary by Farlex “Deterrence” <[www.legal-dictionary.com](http://www.legal-dictionary.com)>.

National Conference of State Legislatures “Cyberbullying and the states” (9 July 2010) <[www.ncsl.org](http://www.ncsl.org)>.

Open Rights Group “Communications Act 2003/Section 127” <[www.wiki.openrightsgroup.org](http://www.wiki.openrightsgroup.org)>.

Question More “UK Parliament shoots down ‘unnecessary’ anti-revenge porn laws” (29 July 2014) <[www.rt.com](http://www.rt.com)>.

Stephen Wright, Liz Hull *et al.* “Detectives arrest man, 22, over ‘offensive’ Facebook page set up following deaths of shot policewomen” Mail Online (20 September 2012) <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

The Guardian “Facebook user avoids jail over April Jones comments” (7 November 2012) <[www.theguardian.com](http://www.theguardian.com)>.

The Huffington Post “Joshua Cryer, Newcastle Student Who Called Stan Collymore ‘Coon’ In Racist Tweet, Spared Jail” <[www.huffingtonpost.co.uk](http://www.huffingtonpost.co.uk)>.

The IT Law Community “Section 127 of the Communications Act 2003: Threat or Menace?” (9 October 2012) <[www.scl.org](http://www.scl.org)>.

WalesOnline “Man jailed for four months over Facebook attempt to start riots in Bangor” (23 August 2011) <[www.walesonline.co.uk](http://www.walesonline.co.uk)>.

## *VI Appendices*

Harmful Digital Communications Bill 2013 (168-1).