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Hon Paul Goldsmith
Minister of Justice
paul.goldsmith@parliament.govt.nz

Tēnā koe e te rangatira

Netsafe briefing to incoming Minister of Justice – the Harmful Digital Communications Act 2015, online harm and crime

Congratulations on your election and appointment as Minister of Justice. You're likely scanning briefings from officials to inform your thinking about priorities. As you do, please also consider this briefing from Netsafe (the approved agency appointed under Order in Council), as online harm and victims of online crimes is a significant issue for the Justice portfolio. As Minister of Justice you have legislative and awareness raising levers at your disposal to reduce the likelihood of online harm and provide remedies for those who experience it.

The attached briefing to incoming ministers tells you about Netsafe, the work we do with government and community, and rising levels of online harm in Aotearoa New Zealand.

I have also valued through the course of the past 18 months being able to speak direct with you to the work Netsafe does in person over coffee and also at the Tech Summit held this time last year. Thank you for making time to do that as an Auckland based Member of Parliament.

In this letter we focus on issues for the Justice portfolio, the work we do under the Harmful Digital Communications Act 2015 (HDCA), and the areas where we think you can make a difference.

Netsafe work under the Harmful Digital Communications Act

The HDCA was passed by the last National Government in 2015 to tackle some of the ways people use technology to hurt others. Such as online bullying, harassment, abuse and intimidation. The aim of the HDCA is to "deter, prevent and mitigate harm caused to individuals by digital communications", and "provide victims of harmful digital communications with a quick and efficient means of redress without having to go to court".

Netsafe is the approved agency under the HDCA and the public's one stop shop for harmful digital communication complaints. We provide a seven-day-a week helpline, community presentations, resources for the victims of harm online, proactive advice on how to stay safe online, and an alternative dispute resolution service to resolve complaints between individuals and with the internet industry (e.g. platforms).

Key issues for your portfolio

The key online harm issues for the Justice portfolio are the need to update and strengthen the HDCA, increasing harm reports, support for victims of online crimes and enhancing alternative dispute resolution practices, social media and youth offending, victim support, and stalking and harassment. We discuss each below.

The Harmful Digital Communications Act urgently needs an update

The HDCA has a number of limitations and is in need of updates. The limitations include its focus on individuals, not groups as targets of online harm. There have also been advances in technology being used to cause online harm. For example, the HDCA does not explicitly prohibit abuse using artificial intelligence (AI), which is becoming increasingly common. AI allows the creation of deep fake or synthetic intimate images depicting real people in situations that are not real. These can then be shared online and used for threats or blackmail.

Netsafe recommends a review of the HDCA and has attached a high-level summary of some potential topics that could be considered as part of the scoping for any review.

The previous Government's [Safer Online Services, Media and Platforms discussion paper](#) does not seek to reform any laws where content is already objectionable and harmful, or provide more support for victims. This necessitates strengthening the HDCA and existing structures dealing with illegal content and activities. This would be a better course compared to the untested Safer Online Services, Media and Platforms change agenda.

Harm reports to Netsafe are at record numbers. Complaint forecasts to the end of the financial year 30 June 2024 have us on track to record more than 7000 HDCA complaints. This will see us exceed our 3.9 million appropriation by approximately \$200,000. We have signalled this to the Ministry at the end of quarter one and sought assurance that the Ministry of Justice will seek funds from its broader appropriation in which the Netsafe contract sits to pay for peak complaint demand.

Social media and youth offending

There are two youth offending issues you need to be aware of:

- There is concern that social media is contributing to youth offending, through youth using social media platforms (such as TikTok) to share their offending and make themselves famous with followers. To date, no one in government has taken responsibility for understanding or addressing the issue. Like many social media issues, this is falling between the cracks of individual agency responsibility. We recommend that the Ministry of Justice partner with Netsafe to break the cycle of offending by way of social media to fill this gap, and commission research and rehabilitation programmes to better understand the role of social media in youth offending and develop solutions.
- The second issue concerns sentencing. With social media now an aggravating factor at sentencing, it is important to educate youth about the implications. This could be done through funding a Netsafe Youth Justice and Social media Programme and ensuring Young Offender Military Academies include social media content. Netsafe already develops education programmes taught in schools and has a youth network, the [Youth Action Squad](#), that could help roll this out. We also recommend a diversion programme for internet and social media crimes committed by youth.

Stalking and harassment

We are seeing a dramatic increase in the amount of stalking and harassment online, which can lead to physical and sexual violence. At the moment harassment is covered in a piecemeal way, across different pieces of legislation, including the Harassment Act, the Family Violence Act and the HDCA.

Since 2020, successive Ministers of Justice have acknowledged the legislation needs to be reviewed, but work has stalled. We recommend you add stalking and harassment to your law reform programme.

Victim recovery

There is a gap at the moment in victim recovery programmes for people who experience online harm. Survivors of online harm (many of whom are repeat victims) are asking Netsafe to do more to support them recover from online harm.

If Netsafe was funded to place greater focus on victim remediation Netsafe would like to partner with the likes of the Victims Support agency and other victim-centric Justice sector agencies to develop guides (in various languages) that are not victim blaming, and help victims understand their rights and get access to recovery materials and support so they can rebuild their lives.

Justice responses to image-based sexual abuse often fall short of expectations.

We need trauma-informed approaches to policies and practices across all sectors responding to image based sexual abuse. Better training and education of law enforcement is needed.

The HDCA needs to be revisited again to consider whether the Act could be more victim-centric when it comes to image based abuse.

Finally consideration should be given to inclusion in law of an expansive definition of what constitutes an "intimate image" in line with different cultural norms and standards.

Netsafe's funding contract with the Ministry of Justice (and decision of former government to transfer contract to DIA)

Netsafe is currently funded by the Ministry of Justice to do our work under the HDCA until 2026. We very much value our contract and relationship with the Ministry. The services we provide are grounded in the legislation the Ministry administers, and the Netsafe process under the HDCA is an integral part of the justice system (as individuals must first complain to Netsafe if they want to pursue a case in the District Court).

Near the end of the last parliamentary term, the previous Government made a decision to transfer Netsafe's funding contracts to the Department of Internal Affairs DIA on 3 July. In a subsequent Ministerial briefing process various Labour Ministers decided between themselves that this decision would take effect in July 2024 without going back to Cabinet. We understand this decision was collateral damage resulting from a broader piece of work to align cybersecurity work across government and a throwaway comment related to cyber safety.

As mentioned, cabinet was supposed to consider implementation issues related to the decision on 31 August (last Cabinet sitting day) but instead various Ministers signed off a Ministerial briefing prepared by the Department of Internal Affairs and no cabinet discussion occurred.

We therefore ask as the Incoming Justice Minister with responsibility for the HDCA and the Netsafe contract that you reverse the decision, so that Netsafe continues to contract solely with the Ministry of Justice for our HDCA work.

Keeping the existing contractual arrangements minimises contractual administration expenses which will increase if DIA is left administering the contract on behalf of the Ministry of Justice. It also enables us to seek to be paid from the broader Justice appropriation for peak demand without the uncertainty of whether the DIA will have enough appropriation. The contract realignment decision also blurs accountability and reporting lines and poses risks to freedom of expression given the DIA has portfolio responsibilities for New Zealand's censorship regime.

A meeting to discuss

Netsafe would very much appreciate a meeting with you to introduce ourselves and discuss online harm, the Justice portfolio and reversing the decision to have a multi party contract with Justice, DIA and Netsafe. Barb Wright, our Executive Assistant can be contacted at barbw@netsafe.org.nz and by phone on +64 21 925 910 and she can make meeting arrangements.

Congratulations again and I look forward to working with you and the incoming Government.

Ngā manaakitanga



Brent Carey
Chief Executive Officer
+6421925140
Encl

Appendix: Netsafe suggestions for issues to consider as part of a review of the HDCA

The following suggestions for issues to consider as part of a review of the HDCA have been discussed with the Ministry of Justice.

General improvements

- Most phone calls are technically digital communications as defined in the HDCA. Clarity is needed on whether these should be caught by the legislation.
- Potential loopholes:
 - Airdrop, encrypted data, live stream, and disappearing messages are considered digital communications even though they are fleeting and the digital evidence no longer exists or is not readily accessible
 - Data that is being shared or has been shared by a private account, that can only be accessed by the account holder or friends
- A threat to share (communicated digitally) is treated the same as content that has been shared.

Individuals and groups

There are a number of areas where the Act's focus on individuals is a problem:

- Harmful speech targeted towards groups is a potential gap in the legislation because it may not identify any one or particular individual. Consideration of whether the Act should include redress for members of a group who have suffered harm more generally but where an individual is not specifically targeted is needed.
- Small businesses where the content is damaging to a specific individual (e.g. sole trader) and they suffer harm.
- School leaders cannot consent to engage in the dispute resolution process on behalf of a student. But they can do so in their own right.

Other

- There is nothing explicitly requiring a connection/ nexus to New Zealand in the legislation which raises jurisdiction and demand for services issues. People in New Zealand as tourists or the wider Pasifika diaspora asking Netsafe for help from overseas. Dealing with people who are overseas is challenging from an evidentiary and service level position.
- There is no Privacy Act carve out for dealing with harmful digital communication matters (section 29).
- Make it clear that the existing prohibition on posting intimate visual recordings without consent clearly covers synthetic or deep fake images where a victim could be identified.
- There are repeat reporters (victims of online harm) who report issues to Netsafe but don't engage with the courts processes beyond Netsafe. We keep issuing case summaries, but they refuse to go to the District Court for remedies. Should there therefore be discretion to not have to produce a case summary unless it is necessary for a Court proceeding.

- Police taking civil cases. To our knowledge, the Police have never taken a civil case against an individual under the HDCA and therefore are not using all the enforcement provisions of the HDCA.
- Mis/dis/malformation is plentiful but is rarely a breach of the communication principles in the HDCA.
- False allegations are typically in the top three comms principles breached. For example, accusations of rape, paedophilia, drug use, infidelity, fraud. Netsafe has no powers to investigate. It is not typically a breach of platform community standards without evidence; so can't usually offer any redress except via the district court processes.
- Consider the use of restorative justice solutions and other more victim centric processes. Also consider making the Youth Court (not the District Court) an option for people under 18 years old wanting to resolve their HDCA matters.
- Consider prescribing (under section 7(b)) additional functions such as tackling harms related to body dysmorphia and eating disorders, adult content in video games and cyberflashing.