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Women's rights, gender and ICTs



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NEW ZEALAND

Proposed new laws and their impact on women



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Introduction

The New Zealand government is taking steps to extend its powers in an effort to manage “harmful digital communications” through new laws proposed in two bills: the Communications (New Media) Bill (developed by the Law Commission and due to be tabled in parliament in 2013) and the Objectionable Publications and Indecency Legislation Bill (still before the New Zealand parliament in 2013). Both attempt to place greater controls on the use of the internet and online digital environment.

The bills have been criticised by internet rights groups for enabling new, invasive censorship by the government and for limiting free speech. Despite high rates of violence against women in New Zealand and high rates of internet access and use, a significant concern is that little attention has been given to the impact of the proposed new laws on women.¹ The bills have not been subject to thorough feminist or gender analysis by women’s organisations. The Ministry of Women’s Affairs provided a gender impact statement in the Cabinet Paper for the draft New Media Bill but it focused on women as victims of violence and incitement to commit suicide.² Little attention was paid to the enabling aspect of internet access and the role of women as agents with the power to occupy and utilise the digital sphere as a site of engagement, collaboration and empowerment.

As feminists, we know that the digital sphere can be a site of oppression and liberation, pleasure and harm, but this reflects the realities of the offline world; the power dynamics and processes are being acted out on a more dynamic and fast-changing stage. The challenge for feminist activists is to find ways of remaining present in the digital sphere in order to transform online relations and advance

ethical digital citizenship. We must use the digital sphere to progress rights, enhance liberation, minimise harms, model ethical digital relations and challenge processes which exclude us and destroy our ability to act as agents of online transformation.

In New Zealand the questions at this moment are: (a) How might the proposed bills shape women’s freedoms and protections in the digital environment? (b) Are the bills a balanced and appropriate response to the perceived harms? and (c) Will the bills increase censorship and, if so, what are the implications for women’s rights?

Proposed laws

The primary purpose of the Communications (New Media) Bill is the mitigation of harm caused to individuals by electronic communications. The bill has been developed by the New Zealand Law Commission as a result of their 2013 report on Harmful Digital Communications and New Media.³ The general objective is to shift the process and responsibility of online harm mitigation to an offline environment by establishing an approved agency that will assist and advise people suffering from harmful digital communications. A new criminal offence will be created, targeting digital communications which are “grossly offensive or of an indecent, obscene or menacing character and which cause harm”. Harm includes physical fear, humiliation, and mental and emotional distress. The bill will set out communication principles providing that digital communication should not:

- Disclose sensitive personal facts about an individual
- Be threatening, intimidating or menacing
- Be grossly offensive to a *reasonable person* in the complainant’s position (emphasis added)
- Be indecent or obscene
- Be part of a pattern of conduct that constitutes harassment
- Make a false allegation

¹ Only one women’s rights group, the National Council of Women, made a submission to the policy review of the Law Commission.

² Minister of Justice of New Zealand (2013) “Harmful Digital Communications” Cabinet Social Policy Committee Paper, paras 114-117, p. 16.

³ New Zealand Law Commission (2013) *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age*. www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media/report

- Contain a matter that is published in breach of confidence
- Incite or encourage anyone to send a message to a person with the intention of causing that person harm
- Incite or encourage another person to commit suicide
- Denigrate a person by reason of his or her colour, race, ethnic or national origins, religion, ethical belief, gender, sexual orientation or disability.

Remedies will include an order that internet content be taken down (the order may be against a perpetrator or an internet service provider “or any other internet intermediary”); that the perpetrator stop certain conduct; that a correction be published; that a right of reply be given; that an apology be published; or that the identity of an anonymous communication be released. A new criminal communication offence is to be created that entails “using a communication device to cause harm”.⁴ The new offence will be punishable by up to three months imprisonment or a fine of USD 2,000.

The stated purpose of the *Objectionable Publications and Indecency Legislation Bill* is to increase penalties for producing, trading or possessing child pornography. The bill purports to achieve this by increasing the penalties for distributing, importing or possessing “objectionable publications”. A presumption of imprisonment will be imposed for repeat offenders and a new offence created of exposing a person under 16 to indecent material.

“Objectionable publication” is comprehensively defined in the *Films, Videos, and Publications Classification Act 1993*. It includes a number of criteria and a general consideration of material which “describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.” The new bill has raised concerns because while it purports to relate only to child pornography, by establishing a scope that incorporates objectionable publications *per se*, in fact it will capture more than this, including, for example, lawful adult material.

Taken together, these bills have the potential to curtail, or hinder, the exchange of information online and raise at least three significant issues for feminists and for women’s rights and freedoms

in the digital environment. The first is the transfer of responsibility for determination of whether or not a communication is objectionable, offensive, indecent or obscene, or causes harm, from the online space to a new offline state agency. The new agency’s mandate will allow for state censorship of online communications. Increasing state censorship is always a concern, especially for women and sexual rights advocates.

For example, women, young people and lesbian, gay, bisexual, transgender/transsexual and intersex (LGBTI) identities and their bodies have been, and continue to be, the site of moral and political battles about decency and indecency, objection and repulsion – bodies are policed, sexual morality is subjective and highly contested. There is a risk that increased censorship will decrease our online presence through the chilling effect of the possibility of complaints (particularly if malicious or mischievous). In addition, the state may further “police” our gender and sexualities by censoring other ways of being that are normatively considered objectionable.

In addition, missing from the discussion on the bills is any analysis or concern about how the bills’ contents or processes acknowledge or comply with international standards and norms relating to human rights and internet freedoms. For example, the United Nations Human Rights Council has confirmed, through a resolution signed by 85 countries, that the same human rights standards and norms apply online and offline.⁵ But the New Zealand government did not sign the Human Rights Council resolution and has not referred to it in the development of the new bills. In addition, while the New Zealand government has been active in reporting to the United Nations Committee for the Elimination of All Forms of Discrimination against Women (CEDAW) and to the Commission on the Status of Women on progress in implementing the Beijing Platform for Action, there has been no direct focus on women’s rights and the internet. The absence of any such analysis is deeply concerning when one of the rationales given by the government for the bill is that it will better protect women.

Advancing women’s rights requires a transformation of social relations in the online and offline

⁵ Human Rights Council (2012) *The promotion, protection and enjoyment of human rights on the Internet*, A/HRC/20/L.13, 20th Session. The Resolution provides that the Council, inter alia: “Affirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”

⁴ *Ibid.*, para 76, p. 11.

world. The gender inequalities played out in an online environment mirror the inequalities in the street – online violence plays on the same sex and gender-based power relations. But new complexities also arise, so that it is not a simple transfer of power relations and forms of rights violations.

A further risk is that the new agency will have little oversight and knowledge of the emancipatory potential of the digital environment and the empowerment of women. The associated risk is that, through a narrative of “protection” of women from harm, online discussion which is deemed harmful but which would otherwise have led to valuable outcomes for women will be removed from the digital space. One example is the use of the digital environment for coalescing discussion around abortion rights and sexual and reproductive health and rights. Some state actors would define discussion of abortion as objectionable or obscene or may even consider it appropriate to intervene to protect the foetus. This would be a particular concern given the age limits in the bill and could affect young women’s access to sexual health information. Another example is whether politically and socially contentious reproductive issues will be reframed as obscene and complainants seek to have these removed from the digital sphere. This would also have significant impact on activism and could affect access to vital information about health services for women.

A second issue relates to the legal test in the new bills for material deemed grossly offensive to a “reasonable person”. The legal standard of a “reasonable person” has been highly contested in feminist legal critique, which analysed this as a gendered male standard, which has defined reasonableness through the looking glass of masculinity. Associated with masculinity are “protection” narratives that extend to the protection of women from harm by attempting to reduce their exposure to objectionable or obscene material. Applied in the online context, the subjective and politicised tests for objectionable, obscene or offensive material could exclude women from viewing sexually explicit material which may actually be focused on increasing their power, pleasure and agency in sexual relations. Women have the right to claim and maintain the online space as a place where they can actively engage in challenging and changing normative assumptions about gender, sex and sexuality. The bills’ application is unclear and therefore poses risks for advocates.

A third and related issue is how women making complaints of online harassment will be treated by offline agencies, including the District Court, in

these cases. There is little reason to believe that the approach of the courts (still largely informed by normative gender ideals of appropriate masculine and feminine offline behaviour) would provide an appropriate process or response for complaints from women about online conduct.

The new agency will need to be careful that its processes are not similar to court processes which are often harrowing and traumatic for victims. A quick review of comments online, for example on blogs, suggests that women are not engaged in discussion on the bills. If women are excluded from the public conversations about the content of the bills, it is very unlikely that their online interests will be represented in ways which give them agency and which are empowering and enabling of their rights.

Despite these issues, a number of the proposals may be useful for women who are victims of violence online. For example, the proposal to allow complaints about disclosure of personal facts or information may enable action to be taken against online violence which is not currently adequately provided for (such as sharing of intimate photos without consent or disclosure of information designed to humiliate). Many of those in support of the proposal point to its use to prevent or resist cyber bullying (a major concern for many New Zealanders), to help protect children and young people, to ensure that abusive recording and distributing of intimate filming (such as on mobile phones) can be properly addressed, and to protect the vulnerable from incitement to suicide.

Conclusion and action steps

The digital sphere provides a critical site for transforming relations, but there is a danger that, in the name of protecting women from harm, “keeping them safe” from objectionable or obscene material will simultaneously reduce the transformative capacity of the digital sphere and reduce women to digital victimhood. Rather than a space for democratic dialogue, for challenging inappropriate behaviour and developing *in situ* solutions and responses to online violence, the bills empower a state agency to do this on an individual’s behalf. This approach takes away the opportunity of using the digital sphere as a site of social transformation. Exclusion from the digital sphere, exclusion from a transformative space, can occur through a variety of mechanisms, including a lack of considered, robust feminist and gender analysis of policy and legislative initiatives associated with increased state censorship. We cannot let this happen.

So, what can we do? Here are just a few ideas:

- Use a human rights approach to advancing and maintaining women's interests and presence in the digital sphere.
- Keep a very close watching brief on policy and laws related to the digital sphere and fully engage in policy discussions.
- Engage with the new agency to ensure it takes an enabling approach to the internet as a space of transformation and power for women, rather than a protectionist approach.
- Ensure women's rights defenders are appointed to the new agency and recommend gender audits and analysis of complaints.
- Consider the use of social media, including the use of hashtags, for reporting perpetrators of violence online – deal with violence *in situ*.
- Advocate for a model of ethical digital citizenship, including ethical relationships.
- Advocate for the promulgation of digital literacy skills, including the ability to understand how the digital world influences individuals themselves and others.
- Become a digital bystander: intervene in online conversation to prevent the perpetuation of gendered ideas and comments.
- Form a digital bystander group, develop shared peer norms, and express online support for ethical use of digital communications. ■