

# Submission to Te Tari Taiwhenua | Department of Internal Affairs Safer Online Services and Media Platforms

We thank you for the opportunity to provide feedback to the Safer Online Services and Media Platforms consultation.

## About the New Zealand Family Violence Clearinghouse

The New Zealand Family Violence Clearinghouse ([NZFVC](#)) is the national centre for family violence and sexual violence research and information. The Clearinghouse was launched in 2005 in association with Te Rito: New Zealand Family Violence Prevention Strategy. Te Rito was developed in 2002 as a plan of action to reduce and eliminate family violence in Aotearoa New Zealand. The current NZFVC contract is delivered by UniServices at the University of Auckland with funding from Te Puna Aonui.

## Our feedback

Our feedback highlights our support and understanding of the need for these changes, the proposed changes we support, the gaps and risks we see, and our recommendations. Where our feedback relates to a specific question asked in the Discussion Document, we have noted this.

To inform our feedback we spoke widely with individuals and organisations. We also organised a webinar featuring Kate Hannah from The Disinformation Project, Anjum Rahman from Inclusive Aotearoa Collective Tāhono and Jo Robertson from The Light Project. We invited participants from the webinar to anonymously share feedback to inform our submission – we have included quotes from this feedback.

## Need for change

We welcome the work of Te Tari Taiwhenua | Department of Internal Affairs to address online safety. We believe this is a significant opportunity to improve Aotearoa New Zealand's response to both social online harm and individual online harm in response to the changing landscape of technology and gender-based violence (GBV).

Global prevalence rates of technology facilitated violence against women range from 16% to 58%<sup>1</sup>. The United Nations Secretary-General has reported that following the start of the COVID-19 pandemic “...reports emerged of a surge in violence against women and girls in digital contexts.”<sup>2</sup> This same report highlights that young women and girls are at an increased risk for being targeted with online violence. While men are also victims, the gender differences for online violence are similar to those of violence in the physical world, with women and girls more likely to experience gendered violence. Ethnic women, Indigenous women, lesbian, bisexual and transgender women, and women with disabilities are at greater risk for experiencing online violence. The UN Secretary-General’s report states that “Digital spaces reflect, reinforce and exacerbate systemic structural gender inequality, deep-seated cultural and social norms as well as patterns of harmful masculinities that drive all forms of violence against women.”

There is limited evidence about the prevalence and impacts of technology facilitated gender-based violence in Aotearoa New Zealand. However, researchers have documented rising issues with image-based abuse online<sup>3</sup> and Netsafe has continued to report increases in people seeking help under the Harmful Digital Communications Act<sup>4</sup> (HDCA).

While there has been an amendment to the HDCA in 2021 acknowledging image based abuse, there has been no review or further changes to the Act to keep up with changing technology or patterns of GBV online. Advocates have increasingly identified that the HDCA and Netsafe as the Approved Agency are not meeting the needs of victim-survivors<sup>5</sup>.

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<sup>1</sup> Understanding and measuring technology-facilitated violence against women for better prevention and response (2023), UN Women, accessed online 31 July 2023:

<https://data.unwomen.org/publications/understanding-and-measuring-technology-facilitated-vaw>

<sup>2</sup> Intensification of efforts to eliminate all forms of violence against women: Report of the Secretary-General (2022), UN Women, accessed online 31 July 2023:

<https://www.unwomen.org/en/digital-library/publications/2022/08/intensification-of-efforts-to-eliminate-all-forms-of-violence-against-women-report-of-the-secretary-general-2022>

<sup>3</sup> Image-based sexual abuse : an international study of victims and perpetrators. A summary report (2020), RMIT, by A Powell, AJ Scott, A Flynn and N Henry, <https://library.nzfvc.org.nz/cgi-bin/koha/opac-detail.pl?biblionumber=7060>; 'Devastating like it broke me' : responding to image-based sexual abuse in Aotearoa New Zealand (2022) in Criminology & Criminal Justice by N Henry, N Gavey, C McGlynn, and E Rackley, <https://library.nzfvc.org.nz/cgi-bin/koha/opac-detail.pl?biblionumber=7645>.

<sup>4</sup> Netsafe figures reveal continuing upward trend in online harm (2021), Netsafe media release, accessed online 31 July 2023: <https://netsafe.org.nz/wp-content/uploads/2021/02/Netsafe-figures-reveal-concerning-upward-trend-in-online-harm-.pdf>

<sup>5</sup> Harmful Digital Communications Act: recent cases, changes and calls for review (2022), New Zealand Family Violence Clearinghouse, accessed online 31 July 2023:

<https://nzfvc.org.nz/news/harmful-digital-communications-act-recent-cases-changes-and-calls-review>

## We support this work moving forward

**We agree**, if action is not taken, Aotearoa New Zealand will fall **further** behind best practice global responses to online harm. Aotearoa New Zealand must take action to stop intimidation, threats, abuse and violence from happening online, to create protections and safety especially for those who are most targeted, to regulate platforms, and to hold accountable those who cause harm.

**We agree**, action must be taken to regulate platforms as the extent of harmful content online rapidly surges and 1) platforms fail to take responsibility or effective action to prevent, stop or address harmful content and 2) platforms often play a role in enabling and contributing to harm.

**We welcome** the proposal for an independent regulator. Independence is essential to ensure the rights of individuals, their family, friends, whānau and communities; the accountability of government and government agencies for their role and actions in stopping and addressing harm; and that platforms are both held accountable, and forced to take effective, genuine and immediate action.

**We believe** the approach must be prescriptive [question 11] to ensure genuine action and give the independent regulator adequate powers to enforce meaningful regulation. We have already seen that a purely supportive approach (with the voluntary New Zealand Code of Practice for Online Safety and Harms) has been ineffective.

*“If there seems to be no consequences for online abuse this can lead to fear of reporting actual abuse.”*

*~ participant from our webinar on the consultation*

**We welcome the potential to expand content filtering and takedown powers**, but call for wider consideration in this area. Please see our recommendations below.

## Gaps and risks

**We believe there are significant gaps in the proposals** outlined in the Safer Online Services and Media Platforms that fail to address the safety and rights of those experiencing the greatest harm online, and risks facilitating further harm and causing systemic harm and marginalisation.

In particular, the proposed changes focus on regulating platforms from a lens of social harms, with little to no attention given to individual harms. For example, there is a lack of consideration for how the proposed changes intersect with critical legislation including the Harmful Digital Communications Act. Lived experiences are not so easily siloed into separate categories. The reforms must consider harms from the perspective of lived experience of violence, which often spans both social and individual impacts.

We believe the proposed changes:

- Do not adequately give effect to Te Tiriti o Waitangi.
- Do not adequately address the gaps and challenges in our current systems for addressing online harm.
- Do not address the needs of individual women and girls and gender diverse people who are victims of misogynistic violence and gender-based violence online including victim-survivors of family and sexual violence.
- Do not address the behaviour and accountability for individuals who cause harm by creating or sharing harmful content online.
- Are unlikely to address the extent of online harmful content that spans illegal and legal content.
- Are at risk of complicating the pathways to seek help for people experiencing online harm by creating a complaints mechanism separate to the Harmful Digital Communications Act.

We also note that the consultation process was not easy for communities, individuals and the general public to engage with. Many struggled to understand the full breadth of the reforms or the significance for their families, whānau or communities. The limited number of online information sessions did not recognise the need to go to communities and take time to talk with them about the reforms, the significance for them and what they know is needed to keep them safe online.

Below we outline our recommendations to address these gaps and risks.

## Our recommendations

### Address all aspects of Te Tiriti o Waitangi [addresses question 23]:

On page 39 of the discussion document, it states that the regulator will meet the government's obligations under Te Tiriti by "...appropriate processes would be built into the code development and approval process, including ensuring Māori participation and that codes reflect Māori social and cultural values." Further, on page 40 of the discussion document it states that the regulator would approve codes of practice including whether the codes reflected expectations in relation to Te Tiriti.

We agree with Internet NZ<sup>6</sup> that Māori participation "...is not the only obligation under Te Tiriti, and Internet NZ supports iwi Māori having both co-design and co-governance of the regulation of

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<sup>6</sup> Internet NZ (2023), accessed online 27 July 2023: <https://internetnz.nz/policy/safer-online-services-and-media-platforms/maori/>

media.” We call for a regulatory model that ensures Tangata Whenua have an enduring and mandated role to guide the design and oversight of the regulatory system.

*“There is an obligation to resource Kaupapa Māori Research and Māori participation as Partners in this important conversation and not simply as another subgroup of the population. A Kaupapa Māori analysis is needed to identify how the white stream approach will impact on Māori and what Māori need to do to safeguard our communities from the consequences of the 'well meaning' actions being taken to address these issues.”*

*~ participant from our webinar on the consultation*

There should be a dedicated stream of engagement with Tangata Whenua about what it means to give effect to Te Tiriti o Waitangi.

### **Mandate Community involvement in an ongoing way in the design and governance of the codes and regulatory framework [addresses questions 21-22]:**

Community involvement must be resourced, enduring and given adequate power to influence all aspects of the design, implementation and governance of the codes and regulatory system. This is in addition to giving effect to Te Tiriti of Waitangi.

We have already seen that when community involvement is not mandated and there are inadequate mechanisms to listen and uphold the input of community, platforms will simply design systems that enable the platforms to continue with the status quo. Tohatoha NZ, Internet NZ, Inclusive Aotearoa Collective Tāhono and Dr Karaitiana Taiuru have highlighted<sup>7</sup> these issues with the voluntary Aotearoa New Zealand Code of Practice for Online Safety and Harms, which remain unaddressed.

On page 58 of the Discussion Document, which outlines the potential roles of key players, we note that communities, people with lived experience and experts are not included. On page 61, it notes that the consumers and the public would hold platforms to account, but we question how this would be possible if consumers and the public are not involved in design, implementation and governance. If the only role of the public is to make complaints, this does not enable the public to effectively hold platforms and other key players to account.

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<sup>7</sup> Statement on the release of the Aotearoa Code of Practice for Online Safety and Harms (2022), Joint media release from Tohatoha, Inclusive Aotearoa Collective Tāhono and Internet NZ, accessed online 31 July 2023: <https://www.tohatoha.org.nz/2022/07/statement-on-the-release-of-the-aotearoa-code-of-practice-for-online-safety-and-harms/>. Law needed, not voluntary code of conduct, to stop online bullying – digital expert (2022), Te Ao Māori News, accessed online 31 July 2023: <https://www.teaonews.co.nz/2022/07/26/law-needed-not-voluntary-code-of-conduct-to-stop-online-bullying-digital-expert/>

In the list of key players, the role of NGOs is only considered to include the delivery of critical thinking and awareness raising (page 59). Further, on page 24, the only role of NGOs is education and awareness. This approach fails to acknowledge the significant role NGOs have in understanding lived real world experiences, holding agencies to account and advocating for the rights of the public.

It is essential that girls, women and gender diverse people are involved in the design and governance of the codes and regulatory framework. This must include girls, women and gender diverse people who have lived experience of gender-based violence online including misogyny, and family and sexual violence, and the organisations and advocates who work with them.

As children and young people, women, Māori, Pasifika, Muslim and other faith communities, LGBTTQIA+ people, Disabled people, and those with intersecting identities are often the most targeted and affected by harmful content, these communities must be actively involved in every aspect of this proposal's development, creation, implementation and maintenance.

#### **Expand takedown powers and content filtering [addresses question 19]**

We strongly support the expansion of takedown powers to material that is illegal under other New Zealand legal frameworks. We believe there are forms of violence that should be considered when looking at the expansion of takedown powers or content filtering. This should consider both the actual individual impact and potential social impact of the content rather than current content legality. Using content legality as the frame of references only creates a silo that does not reflect the reality of online harm.

For example, we welcome the suggestion in paragraph 107, page 55, that takedown powers be extended to offences under the Harmful Digital Communications Act. This suggestion recognises that while content may not be illegal under our current frameworks, the harm caused by that content is illegal and therefore there is a duty to consider removal of the content.

We recommend that this approach be considered for other legal frameworks that address gender-based violence including the Family Violence Act 2018, Harassment Act 1997 and legislation that addresses sexual violence. Particularly as the legal frameworks in New Zealand have not kept pace with advancements in technology and perpetrators' use of violence online. The Family Violence Act 2018 does not specifically address technology facilitated violence, and our legal frameworks for stalking and harassment do not address technology facilitated violence. The Harmful Digital Communications Act has had minimal amendments to reflect the evolving nature of technology facilitated and online violence since it was first enacted in 2015.

Considering content that is related to offences related to family violence, sexual violence, stalking and harassment, recognises the UN Secretary-General's<sup>8</sup> comments that digital violence "...often occurs as part of a continuum that is connected to offline violence" and that online violence often precedes offline. We therefore also support the suggestion in paragraph 106, page 55, that threats to kill be considered for take down powers. We recommend that other forms of serious gender-based threats be considered such as sexual assault or rape threats, and extremism including violent misogyny and religiously/ethnically/racially motivated violence.

This area will require further exploration and we restate our previous comments that work such as this must be informed with the involvement of experts, advocates and people with lived experience of violence.

We also note that Aotearoa New Zealand's framework to address hate crime is currently under review by the Law Commission and that the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain specifically identified gaps with our legal framework for addressing hate speech and hate crime<sup>9</sup>. Significant hate-based and discriminatory violence takes place online that would not qualify under our existing legal frameworks.

If takedown powers are limited to illegal content, they will also be limited by the lack of progress in reforming our outdated legal frameworks addressing technology facilitated family and sexual violence, stalking and harassment and hate crimes. The people and communities who are being harmed, cannot wait for these reforms.

### **Include the Harmful Digital Communications Act and the function of the Approved Agency (Netsafe)**

It has been eight years since the Harmful Digital Communications Act (HDCA) was enacted. In that time, there has been one amendment to include non-consensual intimate visual recordings, also known as image-based abuse. Meanwhile there have been significant changes in technology, and people who use technology facilitated violence have continued to rapidly incorporate new technological tools to intimidate, abuse, control, threaten and harm victim-survivors.<sup>10</sup>

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<sup>8</sup> Intensification of efforts to eliminate all forms of violence against women: Report of the Secretary-General (2022), UN Women, accessed online 31 July 2023:

<https://www.unwomen.org/en/digital-library/publications/2022/08/intensification-of-efforts-to-eliminate-all-forms-of-violence-against-women-report-of-the-secretary-general-2022>

<sup>9</sup> Hate speech and hate crime related legislation (2020), Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain, accessed online 31 July 2023:

<https://christchurchattack.royalcommission.nz/publications/comp/introduction/>

<sup>10</sup> Technology-facilitated gender-based violence: preliminary landscape analysis (2023), The Global Partnership for action on gender-based online harassment and abuse, accessed online 31

The HDCA is no longer meeting the needs of victim-survivors and Netsafe, as the Approved Agency under the HDCA, has struggled to meet the increasingly complex needs of victim-survivors<sup>11</sup>, particularly those of family and sexual violence. Netsafe is limited to operating within the framework of the HDCA. The HDCA must be reformed and updated to keep pace with the evolving environment of technology and technology facilitated gender-based violence with a focus on an adequate infrastructure and system to respond to the needs of victim-survivors.

### **Create a single point of entry for people to seek help**

The stated purpose of the reforms is to create “a single regulatory framework” (page 21). The Discussion Document also highlights that currently “New Zealanders must figure out which of five industry complaint bodies to go to if they feel content is unsafe or breaches the conditions of the platform it is on” (page 4). However, by not considering changes to the Harmful Digital Communications Act and the role of Netsafe as the Approved Agency in conjunction with this work, the proposed approach inherently creates a separate regulatory framework and maintains separate complaints processes.

The approach creates two pathways that a person would have to separately access to seek assistance – proposed reforms would only address content that is publicly distributed which could include for example content that was initially shared by an intimate partner, but then has been replicated, reproduced or on-shared by other individuals. While the reforms might provide an opportunity for this content to be removed, it will not address the illegal actions of the person who first distributed the content without permission, in which case the victim would also have to contact Netsafe under the HDCA.

This also creates artificial silos that do not reflect the lived experience of victim-survivors. Individuals use a range of techniques to threaten and control including technology-based violence (including both public and private digital communications) and offline violence. For example, if a person’s intimate image was shared without their consent, they would need to seek legal recourse under the Harmful Digital Communications Act through Netsafe. If an offence was found, the person would then need to seek a takedown order through the independent regulator.

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July 2023: <https://www.gov.uk/government/publications/technology-facilitated-gender-based-violence-preliminary-landscape-analysis>

<sup>11</sup> Harmful Digital Communications Act: recent cases, changes and calls for review (2022), New Zealand Family Violence Clearinghouse, accessed online 31 July 2023: <https://nzfvc.org.nz/news/harmful-digital-communications-act-recent-cases-changes-and-calls-review>



### **Address the people causing harm**

In the current proposal, people who cause harm are not addressed. As a result, it is not visible how these reforms will stop the flow of harmful content online. Reforms must consider accountability for people who have caused harm and pathways for change. Again, this area requires deeper consideration and must involve consultation with experts and people with lived experiences, and the organisations and advocates who work with and support people with lived experience.

### **Be courageous**

We recognise the way forward is challenging and complex, but international jurisdictions have shown that strong action can and should be taken. Work must move forward on regulating platforms. To truly achieve a Safer Online environment, the reforms must honour Te Tiriti o Waitangi, be fully inclusive of changes to the Harmful Digital Communications Act and involve people with lived experience of harm in design, implementation and governance.

To take meaningful action towards a Safer Online environment, any reform must be informed by the communities and individuals with lived experience of harm. This requires time and consideration of the best ways for those communities and individuals to share their experiences, needs and suggestions for change.

Once again, we thank you for the opportunity to provide feedback to the Safer Online Services and Media Platforms consultation.

Mauri ora,

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