VICTORIA REA

CRIMINAL LIABILITY FOR PERPETRATORS OF HARMFUL DIGITAL COMMUNICATION WHOSE VICTIMS COMMIT SUICIDE

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Abstract

Set against the prevalence of suicide and harmful digital communication in New Zealand this paper argues that criminal liability is appropriate for perpetrators of harmful digital communication whose victims commit suicide. The circumstances that lead to person ending their life can be a complex range of factors relating to health, family and social pressures. This paper, in recognising that the end result of someone taking their life is by no mean ever caused by one act, asserts that in some contexts the contributory actions of a person are great enough to attract criminal liability. Concluding that liability is possible through the Harmful Digital Communication Act s22 offence provision, s179 of the Crimes Act as aiding and abetting suicide, or s160 of the Crimes Act unlawful act manslaughter.

Key Words

Harmful Digital Communications Act 2015, Crimes Act 1961, suicide, cyber bullying, aiding and abetting, Manslaughter.

Contents

I INTRODUCTION

The statistics speak for themselves, in the space of a year, 2016/17, 606 self-inflicted deaths. Something needs to change. The circumstances that lead to person ending their life can be a complex range of factors relating to health, family and social pressures. This paper, in recognising that the end result of someone taking their life is by no mean ever caused by one act, asserts that in some contexts the contributory actions of a person are great enough to attract criminal liability.

Chapter one will look at the societal settings in New Zealand in regards to two main areas; the prevalence of suicide and the prevalence of harmful digital communications. It is argued that it is the toxic combination of these two societal setting that gives rise to the analysis of the relationship between cyber-bullying and suicide. That due to the extent of the problem of both suicide and harmful digital communication in New Zealand there is a need for criminal liability to be imposed where the two issues intersect.

Chapter two looks at three different criminal offence provision that a person who distributes harmful digital communication could be charged and convicted under. The three offences are; s22 of the Harmful Digital Communications Act 2015, s179 or s160 of the Crimes Act 1961. It is argued that no one offence provision is completely apt for purpose in addressing the conduct, but that liability would be possible under each section.

Chapter Three briefly looks at the sentencing implications of criminal offences in trying to combat the prevalence of harmful digital communications resulting in suicide. The main

purpose of criminal liability for the perpetrator of harmful digital communication whose conduct results in a person committing suicide is deterrence and to promote a sense of accountability in the offender. Whether or not this can be achieved through a criminal sanction alone is arguable and further research into meaningful extra legal remedies will be necessary to make any change to conduct attracting this kind of criminal liability.

II CHAPTER ONE: NEW ZEALAND SOCIETAL SETTING

A Introduction

In order to direct the focus of the paper to the specific criminal liability for persons distributing harmful digital communications whose victims commit suicide, it is necessary to look at the broader societal setting which this problem is framed against. This analysis will be undertaken in predominantly two parts. The first is an analysis of the prevalence of suicide in New Zealand. This part of the paper captures the extent of the problem of self-inflicted death and potentially causative and contributing factors. On the back of comments specifically by the media and the New Zealand Coroners the section then discusses the concept of harmful digital communication and the effects they can have on a person. The analysis of the section concludes with recent examples both in New Zealand and internationally linking harmful digital communications, cyber bullying and suicide.

B Prevalence of Suicide in New Zealand

1 Suicide and Youth Suicide Statistics

The Chief Coroner Judge Deborah Marshall has released provisional suicide statistics for 2016/17, showing that for a third year in a row the number of suicides has increased. The provisional figure for 2016/17 is 606 self-inflicted deaths.[1] This year's figures show that the 20-24 year old cohort record the highest number of suicide deaths with 76 out of the 606 followed by the 25-29 year old cohort.[2]

The UNICEF Innocenti Report card paints a bleak picture for New Zealand's rate of suicide. In high income countries in 2012 suicide was found to be the leading cause for death for people aged 15-24.[3] New Zealand holds the highest rate of youth suicide 15-19 year olds and the second highest 20-24.[4] In recent times the Coroners of New Zealand and the media have highlighted harassment, abuse and bullying as being a substantial contributing stress on a person's decision to end their life.[5]

Suicide related behaviour includes the following; suicide (death caused by self-directed injurious behaviour with an intention to die), suicide attempt (a non-fatal self-directed

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[1] The Office of the Chief Coroner of New Zealand "Chief Coroner releases provisional annual suicide figures" (press release, 28 August 2017).

[2] Above n 1.

[3] *Building the Future: Children and the Sustainable Development Goals in Rich Countries* (UNICEF, 2017) at 21.

[4] Above n 3.

[5] NetSafe "Incitment to Suicide" (22 Sep 2015) <www.netsafe.org.nz/incitement-to-suicide>.

potentially injurious behaviour with an intent to die as a result of the behaviour, a suicide attempt may or may not result in injury), self-harm (the direct, deliberate act of hurting your body, can be a precursor to a suicide attempt) and suicidal ideation (thinking about, considering or planning a suicide.) Suicide related behaviour is complicated and rarely the result of one single cause or stress.[6]

Alarmingly the rates of hospital admission for self-harm, often a precursor to suicide, are 50-100 times greater than those of the suicide figures themselves.[7] Many more young people may have suicidal thoughts or ideation even though they may never self-harm or attempt suicide. Figures projecting the possible extent of the problem including the different variations of suicide are not easily gathered due to the private nature of the burden of suicidal ideation, attempt and suicide.[8]

There is no legislative definition of suicide in New Zealand, Sir James Stephen said that the plain definition was "where a man intentionally kills himself."[9] Following the Criminal Code 1893 the act of committing suicide was no longer criminalised,[10] and attempting to commit suicide ceased to be a crime with the introduction of the Crimes Act 1961. While the acts themselves are no longer criminal offences, Bingham counters this with the argument that it doesn't create a right to suicide.[11] This idea is supported by s41 of the

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[6] Centres for Diseases Control and Prevention "The Relationship between Bullying and Suicide: What We Know and What it means for Schools" 04/2014.

[7] K Hawton and others "Self-harm and suicide in adolescents" (2012) 379 The Lancet 2373 at 2372.

[8] Above n 7.

[9] *Seales v Attorney General* [2015] NZHC 1239 at [117].

[10] Criminal Code 1893.

[11] *Pretty v Director of Public Prosecutions* [2011] UKHL 61 at [35].

Crimes Act, which allows for the use of such force as may be reasonably necessary to prevent the commission of suicide.[12] Parliament has also retained and reinforced the consequences for those who assist or incite the commission of suicide.[13] This legislation reinforces the prominence of value and sanctity of human life in the eyes of the law.

2 Causes and Contributing Factors in Suicide

Suicide is more than simply a mental health issue. In particular youth suicide often has different drivers to suicide at a later age. The way that young people live their lives has changes greatly over recent decades and this change created a range of poorly understood, but critical pressures that affect their psyche and behaviour.[14] Compared to previous generations the role of the traditional community supports in sport, church and other youth groups is on the decline. The pace of their sociological and technological changes is unprecedented and it is not surprising that many are unequipped or unprepared to deal with the rate of change that encompasses their day to day life.[15]

There are a number of factors that may play into the likelihood of a suicide attempt including; socio-demographic factors and restricted educational achievement, family discord and poor family relationships, tendency to be impulsive, externalising behaviour (anti-social behaviours and alcohol and drug dependency problems), internalising

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[12] Crimes Act 1961, s 41.

[13] Crimes Act 1961, s 179.

[14] Peter Gluckman *Youth Suicide in New Zealand: A Discussion Paper* (Office of the Prime Ministers Chief Science Advisor, Paper 26 July 2017).

[15] Above n 14.

behaviours (depression, anxiety and fear), low self-esteem, hopelessness and loneliness, history of suicidal behaviour between friends and family and partner or family violence.[16] The key conclusion from studies is that suicide needs to be regarded as more complex than simply outward evidence of mental disorder.

3 Reporting on Suicide

In New Zealand suicide is often treated as a taboo subject. Unlike many countries New Zealand has criminal laws governing what can and can't be said when it comes to a suspected or actual suicide.[17] The law change that came into force July 21 2016 means that a death can be reported as suspected suicide before the coroner has ruled on the case.[18] If the coroner finds that the death has been self-inflicted then only the deceased person's name, address and occupation and the fact of a finding of suicide are to be reported.[19] An exemption can be made by the coroner if they believe the details are unlikely to be detrimental to public safety and there is sufficient public interest.[20]

This limitation on publication in New Zealand presents a barrier for research in this area. Coroner's reports are notoriously hard to access unless you are family or in some way connected to the victim. The details for New Zealand suicide examples are media reports based on often unfounded allegations or assertions on the beliefs of friends.

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[16] Above n 7.
[17] Coroners Act 2006, s 71.
[18] Coroners Amendment Act 2006, s 46.
[19] Coroners Act 2006, s 71.
[20] Coroners Act 2006, s 71A.

C Advent and Rise of Social Media and the Internet

Social Media is a relatively new phenomenon that has swept the world during the past decade. Social media fuses technology with social interaction via internet based applications that allows the user to generate content.[21] Social media platforms such as chat rooms, blogging website (Blogspot), video sites (YouTube), social networking (MySpace, Facebook and Twitter) and electronic bulletin boards or forums as well as the traditional e-mail, text messaging and video chat have transformed traditional method of communication.[22] The application allow instantaneous and interactive sharing of information, created and controlled predominantly by individuals but also groups, organisations and at time governments.[23] To highlight how rapid the expansion of social media has been, in 2004 Facebook had close to one million users worldwide over the course of ten years this number has risen to 1.55 billion, with five new profiles being created every second.[24] Snapchat has 200 million daily active users, Twitter 316 million, YouTube 1 billion, and Instagram 400 million.[25]

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[21] David Luxton and others "Social Media and Suicide: A public health Perspective" (2012) 102 AM J Public Health 195 at 195.

[22] Luxton, above n 21, at 195.

[23] Luxton, above n 21, at 195.

[24] Aki Libo-on "The Growth of Social Media 3.0" (August 2017) Search Engine Journal, <www.searchenginejournal.com/growth-social-media-v-3-0-infographic>.

[25] Above n 24.

The rise of the internet, Web 2.0 (term used over the last 15 years to describe the transition from static HTML websites to more interactive and participative platforms)[26] and social media has resulted in dramatic changes in the ways people communicate. For the first time anyone with access to basic technology and the internet can be a publisher, contributor and creator.[27] Content can be distributed quickly and anonymously to a potentially endless audience. Smartphones, tablets, laptops and PCs are now common place with many people owning multiple devices. The unique features of digital communication only serve to increase the risks of harm in ways we haven't experienced in traditional forms of communication.[28]

D Prevalence of Harmful Digital Communication

1 What are harmful digital communications?

Throughout this paper the term "harmful digital communication" is used to cover the spectrum of behaviours involving the use of digital technology to intentionally threaten, humiliate, denigrate, stigmatise or otherwise cause harm to another person.[29] The term cyber bullying is often referred to in relation to such abuse that occurs within the context of adolescent peer relationships, as a subset of the broader term of harmful digital.[30] This

[26] Luxton, above n 21, at 195.
[27] Luxton, above n 21, at 195.
[28] Luxton, above n 21, at 195.
[29] Law Commission *Harmful Digital Communications; the adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at 2.10.
[30] Law Commission, above n 29, at 1.24.

paper will focus broadly on harmful digital communication while recognising that most of the evidence relates to cyber bullying.

The definition of a harmful communication as espoused by the Act is that a message or other matter sent by means of a communications device has become a digital communication, any form of electronic communication, including text message, writing, photograph, picture, recording or other matter that is communicated electronically.[31] The act of communicating is covered by posting a digital communication meaning to transfer, send, publish, disseminate or otherwise communicate any information whether truthful or untruthful about the victim or an intimate visual recording.[32]

2 What is cyber bullying?

Cyberbullying can be seen as more a more directed harmful subset of harmful digital communication. Bullying is well defined; aggressive behaviours that are intentional and involve an imbalance of power or strength.[33] Historically this imbalance involved social status or physical strength. Bullying occurred not once or twice, but was repeated over a period of time in which the bullied had little hope of defending themselves. Cyber bullying has the same hallmarks as traditional bullying just that the playground as it were is

[31] Harmful Digital Communications Act 2015, s 4.

[32] Harmful Digital Communications Act 2015, s 4.

[33] Law Commission, above n 29, at 1.24.

unbounded and unsupervised.[34] In the broadest sense possible cyber bullying refers to bullying behaviour that occurs through electronic communication device. In essence cyber bullying is not a new problem, but traditional bullying that has adapted to new technologies.[35]

A unique feature of online communications is that it is possible that one single act of communication could create repeated harm.[36] Through tools such as sharing and liking, and the ability to screen grab and distribute on an entirely different platform the communication can be passed on to hundreds and thousands of people in an instant. The victim can be trapped in a cycle of repeated bullying and victimisation.[37]

In New Zealand just as in many other jurisdictions there is a growing concern that technology is being utilised to intentionally cause harm. Cyberspace, the internet has provided a vast unsupervised playground where bad actors can harass, intimidate and defame causing emotional and psychological distress with relative impunity.[38] Media representations of cyber bullying have tended to focus on the interactions being between young people using the phone and internet in relation to school groups and friendships,

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[34] The Nova Scotia Task Force on Bullying and Cyberbullying Respectful and Responsible Relationships There's No App for That. The Report of the Nova Scotia Task Force on Bullying and Cyberbullying (Feb 29 2012) at 12.

[35] Marilyn A Campbell "Cyberbullying: An Old Problem in a New Guise?" (2005) 15(1) Australian Journal of Guidance and Counselling.

[36] Sally Adams "Cyberbullying: an emerging form of student aggression for the 'always-on' generation (2007) 2 The Australian Educational Leader 16 at 17.

[37] Robert Slonje and others "The nature of cyberbulling, and strategies for prevention" (2013) 29 Computers in Human Behaviour 26 at 27.

[38] Nova Scotia Task Force, above n 34, at 12.

highlighting cases where cyberbullying has been a factor in suicide or self-harm.[39] This reporting has contributed to a popular perception that cyber bullying only occurs between young people. However when taken out of the school yard context young adult and adult examples emerge in areas such as workplace bullying and intimate recordings. These areas of cyber bullying are equally valid and prevalent.

Whilst we have touched on the similarities between cyber bullying and traditional bullying elements of cyber bullying make the risk of harm greater. Those elements are longevity, anonymity and global reach. Once a communication has been sent into cyberspace it is near impossible to retract it, even if you delete it yourself, many sites now have archive versions that automatically store information and people have the ability to screen shot posts and continue to share them without your permission. Anonymity has become a hallmark not only of the internet in general but in many of the social media sites that have facilitated and even encouraged the bullying of others; Ask.fm, Form spring and Qooh.me, all offer users complete anonymity when posting. Anonymity can facilitate an environment of fearlessness and a place where people might say things they otherwise wouldn't say to the person face to face.[40] The global reach of the internet is now staggering, there is no geographical limit on digital communications and people are contactable instantly. Technology is so enmeshed in our everyday lives and interactions that it is no longer possible to draw a distinction between the two areas of physical presence.

[39] Nova Scotia Task Force, above n 34, at 10.

[40] Law Commission, above n 29, at 2.68.

3 Trouble defining cyber bullying

There is no accepted definition of cyber bullying and this limits the ability to accurately compare any studies on the reach and impact of cyberbullying. Net Safe defined cyber bullying as "the use of the internet, a mobile phone or other digital technology to harm somebody, harass or embarrass them."[41] This definition leaves itself open to a large range of behaviours both intentional and non-intentional. Cyber bullying can take a variety of different forms; flaming (deliberate, hostile insults), online harassment, cyberstalking, denigration, masquerade, outing and exclusion. The context of a message can also include a range of communications; threats, abuse, name calling, death threats, ending a friendship or relationship, demands, humiliation and rumour.[42]

4 How common is harmful digital communication in the community?

Broadly research suggests that as many as one in ten New Zealanders have some personal experience of harmful communication on the internet. That rate more than doubles to 22 percent among 18-29 year olds who are the heaviest users of new media.[43]

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[41] NetSafe "Online Bullying Advice" (21 February 2017, NetSafe <www.netsafe,org,nz/online-bullying>.

[42] Slonje, above n 37, at 27.

[43] Under s 6(2)(b) of the Law Commission Act 1985 the Commission is mandated to "initiate, sponsor, and carry out such studies and research as it thinks expedient for the proper discharge of its functions." The Law Commission commissioned the independent research company Big Picture to undertake research for a number of areas under review.

In recent months the New Zealand Police, Coroners and Secondary School Teachers Associations have all expressed growing concerns about the prevalence of cyber bullying and the impact it has to inflict significant harm; ranging from truancy and poor academic performance to self-harm and suicide.[44] Fundamentally the issue with the reporting details discussed below is the inherent private nature of these communications. This leads to the conclusion that it seems reasonable to assume that there is a significant under-reporting of digital communication offences.[45]

The media have reported that on a daily basis police are dealing with complaints from the public relating to threatening and offensive text messages. Net Safe estimates that on average its staff were assisting 75 people each month who were dealing with various forms of electronic harassment or abuse, with half of those victims being adults and half being adolescents.[46] Vodafone have reported that in excess of 60,000 account holders have made use of the text blocking facility which was launched by the company to assist customers to combat mobile bullying and harassment, they additional issued warnings to 5,250 customers for using their phones in an abusive or illegal way.[47] NetSafe's own research estimates that 1 in 5 New Zealand high school students experience some form of cyber bullying or harassment per year.[48]

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[44] Simon Collins and Vaimoana Tapaleao "Suicide link in cyber-bullying" The New Zealand Herald (online ed, New Zealand, 7 May 2012).

[45] Law Commission, above n 29, at 2.9.5.

[46] Netsafe "Submission to Justice and Electoral Committee on the Harmful Digital Communication Bill" (24 February 2012) at 1.

[47] Law Commission, above n 29, at 2.19.

[48] John Joseph Fenaughty Challenging Risk: NZ High-school Students' Activity, Challenge, Distress and Resiliency, within Cyberspace (PhD Dissertation, University of Auckland, 2010).

5 What is the impact of harmful digital communication

The predominant response to receiving harmful digital communication is emotional distress.[49] There are many examples of the harms faced by people in response to harmful digital communication. In 2010 a 16 year old Christchurch girl was forced to relocate schools and cities after male acquaintances coerced her, while drunk into performing sex acts which they recorded on a cell phone.[50] In the girls victim impact statement she referred to being abused, humiliated, labelled and held up to public ridicule.[51] In sentencing a male who placed nude photographs of his girlfriend on Facebook the Sydney magistrate commented on the incalculable damages, embarrassment, humiliation and anxiety that can be done to a person's reputation by the irresponsible posting of such information.[52] This behaviour was repeated in a similar fact scenario in New Zealand in 2010 and in 2012 where a man was imprisoned for threatening to publish naked photos.[53] Net Safe are aware of local instances where the publication of sensitive images of targets of harassment have been associated with suicidal behaviour and ideation.

To date there has been limited New Zealand research specifically on the harms of harmful digital communication. Australian research on the matter noted that covert bullying, which

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[49] Law Commission, above n 29, at 18.

[50] *R v Broekman* DC Christchurch CRI-2011-061-000199, 3 April 2012.

[51] *R v Broekman*, above n 50.

[52] Heath Aston "Ex-lover punished for Facebook revenge" Sydney Morning Herald (reproduced on Stuff, New Zealand, 23 April 2012).

[53] David Clarkson "Man in court over naked pic threats" (31 May 2012) < www.stuff.co.nz >.

goes unnoticed or unaddressed by adults, including cyber bullying presents particular risks to its victims;[54]

> Emerging research indicates that covert bullying has the potential to result in more severe psychological, social and mental health problems than overt bullying, not only is it more difficult for parents and the school to detect, but also has the capacity to inflict social isolation on a much broader scale than overt bullying.

Evidence of the toll of social media abuse on teenagers was submitted to the select committee as they discussed the introduction of the Harmful Digital Communications Act. On one level the abuse of new communication technologies to cause intentional harm to another can be seen as an extension of offline behaviour. However this is too simplistic. The facility to generate, manipulate and disseminate digital information, which can be accessed instantaneously and continuously, is producing types of abuse which simply have no precedent or equivalent in the pre digital world.[55] Ordinary citizens can in effect cause irreparable harm to one another's reputations and inflict enduring psychological and emotional damage.[56] This potential to cause significant and potentially devastating harm demands an effective legal remedy.

E The link between Harmful Digital Communication and Suicide

[54] D Cross and others *Australian Covert Bullying Prevalence Study* (Child Health Promotion Research Centre, Edith Cowan University, Perth 2009) at 3.

[55] Law Commission, above n 29, at 31.

[56] Law Commission, above n 29, at 32.

Whilst to a broad extent this paper will be referring to the impact of harmful digital communication on the general population, it is recognised that much of the focused analysis comes from cases of cyber bullying in adolescence.

1 Academic Opinion

As a society we are understandably disturbed about the possibility that a misuse of technology might be playing a role in New Zealand's continually growing rates of suicide. It is also vital to consider this issue within the much broader context of wellbeing and mental health. New Zealand researchers have developed a clear understanding of risk factors associated with suicide and self-harm, while exposure to bullying and other forms of aggression certainly feature as a risk factor, it can be only one strand of a complex picture.[57]

While New Zealand's high youth suicide rate the possible relationship between cyber bullying and suicide ideation as important, Fenaughty emphasises that not all instances of harmful digital communication or cyberbullying lead to distress.[58] The headlines in the media can often distort the fact that the harmful communication is one of a number of possible causes and contributors for a person taking their life.[59]

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[57] AL Beautrais AL and others *Suicide Prevention: A review of evidence of risk and protective factors, and points of effective intervention.* (Ministry of Health, 2005).

[58] Fenaughty, above n 48, at 150-151.

[59]Beautrais, above n 57, and see Sameer Hinduja and Justin W. Patchin "Bullying, Cyberbullying and Suicide" (2010) 14(3) Archives of Suicide Research 206 at 209.

To date there has been less emphasis on measuring the economic and psych-social impacts of harms resulting from the misuse of digital communication technologies such as attacks on reputation, malicious impersonation, sexual and racial harassment and invasions of privacy.[60]

Sociological analysis of causes of suicidal behaviour reveals that in cases where it is possible to obtain relevant data about half the suicides were primarily anomic, caused by a social environment characterised by sudden or emphatic changes which impaired the individuals capacity to regulate aspirations and desires.[61] The other half were primarily egotistic caused by social environments in which impaired individuals bond to socially given ideas and purposes thus weakening bonds with commonly shared meanings, collective activity and social purposes.[62]

2 Portrayal in New Zealand Media

In May 2012 New Zealand Chief Coroner, Judge Neil MacLean, expressed his concern about the emergence of bullying an cyber bullying in particular, as a background factor to New Zealand's high youth suicide rate.[63] Bullying was also noted to be a feature in research on self-harm. This was followed by the finding of Coroner Wallace Bain in relation to the death of a 15 year old North Island girl, Hayley Ann Fenton, whose death was not ruled a

[60] Law Commission, above n 29 at 2.4.

[61]Rosalia Condorelli "Social Complexity, Modernity and Suicide: An Assessment of Durkheim's Suicide from the Perspective of a Non-Linear Analysis of Complex Social Systems." (2016) 379 PMC.

[62] Condorelli, above n 62.

[63] Collins, above n 44.

suicide based on doubt of intention to commit suicide given her messages for help.[64] In his findings Bain drew attention to the impact on the teen of a series of highly abusive and threatening text messages written by her lover's wife in the days and hours leading up to her death.[65]

12 year old Alex Teka was believed to be victim of an orchestrated campaign of email and text bullying resulting in him talking his own life.[66] Stephanie Garret was 15 years old when she dies in Palmerston North in 2013, having been bullied online in the days leading up to her death.[67] The case of Wilkinson in 2014 highlighted the bullying Jessica had suffered in the weeks leading up to her death by a group of girls at school. Jessica's mother and the coroner maid comments that;[68]

> "all though school life there are children who cannot filter messages they receive and those who cannot filter the messages they say to another person. Add to this the instant age of texting and such messages are rapidly spread amongst youngsters. Once a message is sent there is no retracting"

Over a period of five years there have only been a handful of cases in which the coroner has explicitly considered the role of technology in a young person's suicide. In many respects the cases illustrate the complexity of the underlying issues associated with youth

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[64] Michael Dickison "Text bullying victim tells lover 'see you in heaven'" New Zealand Herald (online ed, New Zealand, 16 Dec 2010).

[65] Dickison, above n 65.

[66] Simon O'Rourke "Teenage bullies hound 12-year-old to death" New Zealand Herald (online ed, Auckland, 11 March 2006).

[67] Alecia Bailey "Cyber-bullying blamed for death" New Zealand Herald (online ed, New Zealand, 24 Feb 2013).

[68] *Wilkinson* [2014] NZCorC 36 (1 April 2014).

suicide. Even when there was no evidence of malice or intention to harm the recipient it was suggested that texting itself could result in distorted communication which could in some circumstances have a far greater emotional impact than verbal or face to face communication.[69] One coroner referred to the impact of a texting frenzy, another referred to the impact of a highly emotionally charged late night texting exchange.[70] The family of 12 year old Kyana Vergara who died in a suspected suicide spoke out publically about the dangers of online bullying.[71] After Vergara died the family discovered evidence of troubling social media postings she had received; "it was typical bullying, the hurtful words that young kids say and they don't realise. You call them ugly, you call them fat and it does damage and they don't realise that."[72]

Even days before the submission of this paper media attention flurried around Coroner Peter Ryan's finding in relation to the death of Alatauai Sasa in 2013.[73] Sasa, was a 15 year old girl who took her own life and was the victim of relentless and vicious cyber-bullying in the lead up to her death. The bullying started when she was the victim of several anonymous posts on a public Facebook page called Wellington School Girl Confession.[74] She had also been subject to vicious comments addressed to her on websites Qooh.me and Ask.fm, some comments included taunts encouraging her to take her own life. Ryan said

[69] Law Commission, above n 29, at 2.78-2.80.

[70] Law Commission, above n 29, at 2.79.

[71] " 'She had so much to live for' – Family speaks out on dangers of online bullying" New Zealand Herald (online ed, New Zealand, 13 March 2016).

[72] Above n 72.

[73] Carla Penman and Melissa Nightingale " 'Kill yourself' comments made to teen Alatauai Sasa could be criminal says Netsafe" New Zealand Herald (online ed, New Zealand, 4 Oct 2017).

[74] Penman, above n 74.

that there were three factors that would have affected Sasa's mental state: the long history of domestic violence and stress in relation to charges against her father; the cyber-bullying on her Facebook and Wellington Schools Confession page and the cyberbullying on Ask.fm and Qooh.me pages.[75] Ryan found that it was reasonable to infer that the bullying had a serious deleterious effect on her already compromised mental health.[76]

3 Portrayal in International Media

It is not just New Zealand that has seen a wave of media reports linking cyber bullying with suicide. One of the most well-known international examples is that of Megan Meier a 13 year old who in 2006 committed suicide after being cyber bullied by Lori Drew, the mother of one of Megan's friends.[77] Drew used the anonymity of social media to pretend to be a teenage boy interested in Megan and used the information gained to humiliate her and encourage her to commit suicide.[78]

The death of Charlotte Dawson also gained a lot of media attention in New Zealand.[79] Charlotte had long suffered from depression and her death threw the increasing incidence of cyber bullying via social media websites back into the spotlight. The former model was often the subject of a torrent of online abuse primarily through Twitter.[80]

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[75] Penman, above n 74.

[76] Penman, above n 74.

[77] Leonard Doyle "Bloggers name MySpace suicide neighbours" New Zealand Herald (online ed, New Zealand, 27 Nov 2007).

[78] Doyle, above n 78.

[79] "Charlotte Dawson found dead" (22 February 2014) Stuff.

[80] Above n 80.

International media the world over came to a halt over the charge, conviction and sentence of Michelle Carter.[81] Carter was a teenager from Plainville, Massachusetts who was charged and convicted of involuntary manslaughter for encouraging her boyfriend to kill himself. The case was novel for the absence of an aiding and abetting provision in Massachusetts statute and testing the limits of a manslaughter conviction.[82] The court weighed the tests of whether the texts sent by Carter qualified as reckless action leading to the predictable loss of life, a legal requirement for an involuntary manslaughter conviction.[83] Not just whether words could be wanton or reckless conduct, but specifically repeated digital communication. Prosecutors had the task of proving that Carter consciously disregarded a substantial and unjustifiable risk of causing Roy's death when she encouraged him to kill himself.[84] At one point in the chronology of events leading up to Roy's suicide, he exited the car that was filling with noxious fumes. At that point he contacted Carter, who told him to get back in the car, it was that final comment that sealed Carters fate. When Roy exited the car he broke the chain of self-causation and her final encouragement established her liability in the death.[85] The case, although controversial was not unprecedented in the United States, Carter was found guilty of homicide, on her words alone.[86]

[81] "Michelle Carter given 15 months for convincing boyfriend to kill himself" New Zealand Herald (online ed, World, 4 Aug 2017).
[82] Above n 82.
[83] Above n 82.
[84] Above n 82.
[85] Above n 82.
[86] Above n 82.

Beyond these cases of harmful digital communication the use of the internet to spread intimate photos and videos of previous partners has garnered a lot of international attention. The suicide of Amanda Todd, Felicia Garcia, Rehtaeh Parsons and Hope Witsell are all example of cases where the only solution available to the girls in response to intimate photos and videos being shared was suicide.[87] What is even more staggering is that those are just four examples of a long list that received media attention connection the specific slut shaming type of cyber bullying with their decisions to kill themselves.[88]

F Conclusion

The picture that begins to be painted is bleak. A country with high suicide statistics, not just for youth, but young adolescents and as a general population. Media and the Coroners have recently begun to draw links between the experiences of a person in the lead up to them taking their own life and the decision to commit suicide. The primary focus of those experiences has been the victim's exposure to cyber bullying and harmful digital communication as a contributing cause or stressor in their decision to end their life. This paper will analyse what criminal sanctions are available against perpetrators of harmful digital communications whose victims commit suicide.

[87] Emily Poole "Hey Girls, Did You Know? Slut Shaming on the internet needs to stop" (2014) 48 University of San Francisco Law Review 221.

[88] Poole, above n 88.

III CHAPTER TWO: CRIMINAL OFFENCES AVAILABLE FOR CYBER BULLIES WHOSE VICTIMS COMMIT SUICIDE

A Introduction

Media and parliamentary attention surrounding the impact of harmful digital communications on a person lead to the creation of the Harmful Digital Communications Act. Whilst the act goes some of the way in addressing the emotional distress that can be caused, where the result is the death of a person from suicide it is arguable that tougher criminal sanctions are necessary. This chapter will discuss the three potential criminal sanctions where death is a result of harmful digital communications.

1 Criminalisation of Youth Offending

This paper examines the concept of cyber bullying within the wider concept of harmful digital communications. Adolescents and schools are not immune from the law and whilst it is important and an aim of the New Zealand legal system to refrain from criminalising young people, it is also important for them to understand what society expects and what kinds of behaviour it will punish. The law has a vital role to play in society. It embodies our common values and defined the behaviours that we regard as acceptable and unacceptable.

The Law Commission have considered this point previously, deciding that where the implications are for extreme types of behaviour that a criminal offence is warranted. Prosecutions would not doubt be reserved for the most serious cases and the deterrent effect of a criminal penalty would clearly signal the outer limits of internet freedoms. [89]

2 Anonymity

While at face value it might seem as though the anonymity of online bullies is a hurdle for the court to overcome on any of the three criminal offence, in practice this would be dealt with through a disclosure order.[90] In some situations victims might not know who is sending them messages or who is responsible for posts on websites or social networks. Complainants can ask an approved agency to investigate, and that agency can pass on a request or removal, modification or correction of the harmful communication to an internet service provider, or other appropriate internet entity.[91] If that does not address the situation the court could order the internet intermediary to provide identity details and once done the court has the discretion to determine whether or not to remove the anonymity of the person. In June 2012 in what has been hailed as a landmark case the High Court granted a woman a disclosure order compelling Facebook to reveal the IP addresses and account details of those responsible for posting the offensive content.[92]

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[89] Law Commission, above n 29, at 4.96.

[90] FAQs Harmful Digital Communications Bill <www.beehive.govt.nz/ FAQs_Harmful_Digital_Communications_Bill.pdf.

[91] Above n 91.

[92] Terri Judd "Landmark ruling forces Facebook to drag cyberbullies into the open" The Independent (online ed, 9 June 2012).

B Harmful Digital Communication Act

The analysis of the Harmful Digital Communication Act provision is twofold; initially as the first line of action for any individual who is being harassed by harmful digital communications to the extent that it is causing serious emotional distress. Its additional analysis is providing the background and offence details to be used as the predicate offence in the homicide analysis in this chapter. Section 11 of the Harmful Digital Communication Act also provides that such an action can be brought by a large range of persons, including the Coroner, which suggests that the action can still be brought in the event of harmful digital communications leading to death or suicide.

3 Background and Purpose

The purpose of the Harmful Digital Communication Act is twofold; to deter, prevent and mitigate harms caused to individual by digital communications,[93] and to provide victims of harmful digital communications with a quick and efficient means of redress.[94] The Act draws heavily on the expedited work of the Law Commission in response to growing concerns about the impact of technology.[95] In presenting the bill to Parliament Chester Borrows highlighted the rapid advances in technology over the last few decades changing

[93] Harmful Digital Communications Act, s 3(a).
[94] Harmful Digital Communications Act, s 3(b).
[95] Law Commission, above n 29, at 4.96.

the way that people communicate with each other.[96] Our lives are increasingly entwined by the digital world. Highlighting that while a raft of positives come with the creation and expansion of technology that they also present new challenges. It is now easier than ever to threaten others, spread destructive rumours, publish invasive and distressing photographs, and harass people. People are bullied more instantly, and anonymously.[97] A digital age has meant that tormentors can harass their target anywhere, at any time and their trails of abuse remain in cyberspace forever.

In its final reading in Parliament the Minister of Justice, Amy Adams spoke on prevalence of the problems that the Act tries to remedy.[98] Cyber bullying is a real and growing problem. It is not a minor issue confined to a small number of people. One in five New Zealanders aged 13-30 have experienced harmful communications on the internet, but victims can be found across all age groups.[99] We need to do something to stem these new and insidious threats. Some people use communication technologies such as email, text messaging and social media to intimidate others, spread damaging or degrading rumours and publish invasive and intimate photographs.[100] These are rapidly, cheaply and anonymously disseminated to huge audiences. This must stop. Whether it is in the schoolyard, the workplace or at home, bullying anywhere is intolerable.[101]

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[96] (14 November 2013) 694 NZPD 14747.
[97] (14 November 2013) 694 NZPD 14747.
[98] (25 June 2015) 706 NZPD 4830.
[99] (25 June 2015) 706 NZPD 4830.
[100] (25 June 2015) 706 NZPD 4830.
[101] (25 June 2015) 706 NZPD 4830.

4 Offence Provision (s22)

The criminal offence provision found in section 22 of the Harmful Digital Communication Act creates an offence of posting digital communication with intent to cause harm.[102] A person commits this offence if: the person posts a digital communication with the intention that it cause harm to the victim,[103] intention requirement, and posting the communication would cause harm to an ordinary person in the position of the victim,[104] the mixed objective subjective test, and posting the harm did cause harm to the victim,[105] subjective requirement.

The offence has been created to remedy three areas of the law. The first is to cover gaps in the existing law in relation to threats, intimidation and offensive messages which inflict emotional distress or mental harm, rather than physical harm. The current criminal law is focused on threats and intimidation where there is a risk, fear of physical safety or damage to property.[106] However the discourse has changed and it is starting to be recognised that emotional and mental harm can be just as distressing and have just as great an impact as physical harm.[107] The second is to ensure that malicious impersonations of another can be prosecuted, the current threshold is only where the impersonation has been done to benefit or causing a loss to another person.[108] The offence broadens the scope to include where

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[102] Harmful Digital Communication Act, s 22.
[103] Harmful Digital Communication Act, s 22 (1) (a).
[104] Harmful Digital Communication Act, s 22 (1) (b).
[105] Harmful Digital Communication Act, s 22 (1) (c).
[106] Crimes Act, s 306 and s 306A.
[107] *R v Ireland* [1998] AC 147 (HL) at 156. See also *R v Mwai* [1995] 3 NZLR 149 (CA) at 154-155.
[108] (24 March 2015) 704 NZPD 2537.

that impersonation has caused emotional distress to the victim. The third purpose is to cover instances where a person publishes an intimate recording that was initially made with consent, but was published without consent.[109] It is this third area which has produced a great extent of the cases that have already been prosecuted under the HDC Act.

(a) Mixed Objective and Subjective Test

The mixed objective subjective test that exists in the offence provision has been the content of a lot of criticism levied at the Act's provisions.[110] The tests sets out that it is necessary for the prosecution to prove that the communication would cause harm to an ordinary reasonable person (the objective limb) in the position of the complaint (the subjective limb.)[111] The statute goes on to set out a non-exhaustive list of factors which the court might consider; extremity of language used,[112] the age and characteristics of the victim,[113] anonymity,[114] repetition,[115] extent of circulation,[116] whether it is true or false,[117] the context in which the digital communication appeared.[118] Subjective elements that have been taken into account are; the relationship between the defendant and complainant and relevant characteristics of the complainant.[119] It was the opinion of the Justice and Electoral

[109] (24 March 2015) 704 NZPD 2537.
[110] Justice and Electoral Committee *Harmful Digital Communications Bill* (April 2014) at 253 and 254
[111] Harmful Digital Communication Act, s 22(1)(b).
[112] Harmful Digital Communication Act, s 22(2)(a).
[113] Harmful Digital Communication Act, s 22(2)(b).
[114] Harmful Digital Communication Act, s 22(2)(c).
[115] Harmful Digital Communication Act, s 22(2)(d).
[116] Harmful Digital Communication Act, s 22(2)(e).
[117] Harmful Digital Communication Act, s 22(2)(f).
[118] Harmful Digital Communication Act, s 22(2)(g).
[119] *R v Iyer* [2016] NZDC 23957.

Committee that the appropriate approach lies between the purely objective and purely subjective approach[120]. The mixed subjective objective standard is used in the Harassment Act and this test was seen to achieve consistency among the criminal and civil elements of liability.[121]

(b) Serious Emotional Distress

Harm is defined as being serious emotional distress. The Law Commission saw harm as a pivotal aspect of the Act. Notably that harm can extend to a full range of serious negative consequences which can result from offensive communication including fear, humiliation, mental and emotional distress;[122]

> Not all harms arising from communications are proscribed by law. The criminal law has typically been concerned with protecting citizens from communication harms which invoke fear of physical consequences, either personal or proprietary, or which are obscene or harmful to children. The civil law in the past also typically shied away from protecting emotional harm. In both spheres there has been a movement towards the recognition and protection of such mental and emotional harm. Within the community at large and within younger demographics particularly the threshold for when a communication causes the level of distress that can be described as harmful and when it is simply an annoyance or irritation is a hard margin to run. The view is

[120] Justice, above n 115, at 253 and 254.

[121] Harassment Act 1997, s 16(1)(b)(ii).

[122] Law Commission. above n 29, at 1.27.

> that the level of emotional distress must be described as significant for the law to have a role to play.

A purposive and plain meaning approach was adopted. Clearly emotional as opposed to physical harm is required and the nature of distinction between the two has developed over a considerable period. The addition of the adjective of seriousness meant that the harm had to be more than trivial.[123] Mere upset or annoyance as a result of the communication should not attract the attention of the criminal law.[124] On the other hand the harm need not be of such a nature that mental injury or recognised psychiatric disorder has been diagnosed.[125] It was concluded that the conduct must be harmful to an identifiable victim and that serious emotional distress may include a condition short of psychiatric illness or disorder, or distress that requires medical or other treatment or counselling.[126]

Additionally it was observed that the distinction between physical and emotional harm had broken down over the years. In *R v Ireland* it was observed that the civil law has for a long time taken account of the fact there is no rigid distinction between body and mind, the tort of intentional infliction of mental shock or distress was recognised as early as 1987.[127] Breaches of privacy also recognise that a form of damage may be in significant humiliation, loss of dignity or injury to feelings.[128] Distress is a basis for making a restraining order

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[123] Law Commission, above n 29, at 4.68.
[124] Law Commission, above n 29, at 19.
[125] *R v Iyer*, Above n 124.
[126] *R v Iyer*, above n 124.
[127] *R v Ireland*, above n 112 at 156.
[128] Privacy Act 1993, s 89.

under the Harassment Act.[129] To disturb, annoy or irritate a person by the use of a telephone is an offence against the Telephone Communications Act.[130]

Cases that have already come before the court have illustrated examples of conduct that meet the threshold of harmful communications; a communication sent to a shared email account involving 11 photos of the victim in various stages of undress,[131] photographs on Facebook with the victim naked and sensitive areas clearly visible,[132] demeaning and insulting messages were damaging in the form of significant humiliation,[133] loss of dignity or injury to feelings.[134] The use of a private Facebook chat including comments in the form of degrading and obscene sexual remarks;[135] there were some twenty threatening messages including telling the victim to slit her throat, that she was a bad mother and waste of space. The use of Instagram in the form of hashtags and phrases together which amounted to threats of personal injury and damage to property.[136] The final example of intimate photos of the victim in the shower followed with commentary.[137]

It is clear on the above examples that social media is being used for purposes of revenge or exacting some form of retribution. Many of the cases that have gone through the court have been in the context of failed relationships and the misuse of intimate images acquired

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[129] Harassment Act, s 16(1)(b).
[130] Telecommunications Act 2001, s 112.
[131] *Police v Lang* [2016] NZDC 11488.
[132] *Police v Williams* (District Court, Tauranga CRI 2015-070-004137).
[133] *Police v Williams*, above n 137.
[134] *Police v Williams*, above n 137.
[135] *Police v Black* (District Court, Greymouth CRI 2016-018-000021).
[136] *Police v Bisschop* [2015] NZDC 24183.
[137] *Police v Kelly* (District Court Invercargill CRI 2016-025-000506).

consensually over the course of the relationship.[138] Quite clearly the objective has been to hurt and embarrass within the context of public fora such as Facebook. It is also clear that the use of such images and the language employed is not just to provide an irritant but to seriously upset the victims in front of their friends, family or the public.[139]

(c) Intention of the defendant

The consideration of harm is also relevant in considering the intention of the defendant, did the defendant intend to cause serious emotional distress within the meaning that the act and judges have ascribed to the word.[140] In *R v Ivyer* there was sufficient evidence to prima facie support the prosecution contention that he wanted to dissuade the complainant from associating with other men or considering relationships that he thought were inappropriate.[141] There was available the suggestion that the defendant wished to inflict feelings of shame, fear and insecurity, forms of emotional distress that would have allowed him to achieve his goal.[142]

5 Sentencing

[138] *Police v Lang*, above n 136.
[139] *R v Iyer*, above n 124.
[140] *R v Iyer*, above n 124.
[141] *R v Iyer*, above n 124.
[142] *R v Iyer*, above n 124.

The maximum penalty upon conviction is three months imprisonment or a fine of up to $2000.[143] In the space of 12 months, 3 July 2015 to 17 June 2016 there had been 38 charges laid under the Act. The cases that have come before the court tend to suggest that the use of digital communication systems for the purpose of abuse, harassment and extreme embarrassment is far more widespread than the Commission anticipated.

Sentencing for offences have ranged from a discharge without conviction pursuant to s106 of the Sentencing Act to a sentence of 11 months.[144] Other imprisonment sentences have included three months and six months, in such cases involving imprisonment there were also other charges being tried.

The case of *Police v Tamihana* received a detailed consideration of sentencing issues arising in cases involving a breach of section 22.[145] There were other charges for breach of bail and two for intentional damage but the lead offence was that of s22 which the judge described as the most serious.[146] The offending arose in the context of a volatile relationship. The victim was not the partner of the defendant but rather her mother and had received communication from the defendant of intimate recordings of her daughter that left her feeling despair and distress.[147]

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[143] Harmful Digital Communication Act, s 22(3)(a).
[144] *Police v Tamihana* [2016] NZDC 6749.
[145] *Police v Tamihana*, above n 149.
[146] *Police v Tamihana*, above n 149.
[147] *Police v Tamihana*, above n 149.

The judge in sentencing made reference to the effect of online disinhibition. That we live in a world where it is very easy and certainly a very cowardly way and impersonal third person way to communicate with others without fronting up yourself. The other problem of course is that in this day and age broad dissemination of such material is just at the touch of a button.[148]

The judge stated that the actions of the defendant were designed to have maximum possible impact on the victim and that he acted out of retributive malice in delivering a cowardly and sinister attack.[149] Whilst acknowledging that the Act was new and there would be worse cases he struggled to think of one. The principle objective in sentencing was that of deterrence. The judge fixed the starting point of 9 months, uplifting it for three months in totality of the offending and a further three for previous convictions.[150] The defendant received a 25 percent discount for guilty plea. Deterrence was communicated through a rejection of home detention.[151]

6 Conclusion

The offence section in HDC Act has been in force for two years. It has attracted more prosecutions than the Commission or Parliament envisaged. There may have been an underestimate in the frequency and venom of online communications especially in the

[148] *Police v Tamihana*, above n 149.
[149] *Police v Tamihana*, above n 149.
[150] *Police v Tamihana*, above n 149.
[151] *Police v Tamihana*, above n 149.

context of a failed relationship. The decision in *Police v Tamihana* sets out some useful guidelines for factors for the court to take into account when dealing with offenders charged under s22. Deterrence is going to have to be a significant factor, especially given the ease with which the offence might be committed. The content and effect upon the victims of the various communications must be of concern and warrants the involvement of the criminal law.

C Crimes Act (s179)

The HDC Act offence provision is a useful tool for dealing with substantial emotional distress that may result from such a communication. However the seriousness of the conduct that results in someone taking their own life needs to be appropriately recognised by the criminal sanction that it attracts. It is the contention of this paper that where the result of a person's harmful digital communication is death of a person, this should attract a sanction such as s179 or s160 of the Crimes Act. These both appropriately recognise the role the person played in the suicide of the victim.

1 Background and Purpose

Five different acts are covered by s179 of the Crime Act; aiding, abetting, counselling, inciting and procuring.[152] The definition of each different elements of help illustrates that the provision creates two very different kinds of offence; on the one hand a defendant is

[152] Crimes Act, s 179.

aiding a victim in a decision that they have already come to, that person does not requires any additional motivation to end their life. On the other hand the elements of inciting and counselling suggest a more direct role in convincing the person on their decision to end their life. The essential elements of the offence; that the defendant knew that the victim was seriously contemplating suicide,[153] an intentionally formed and deliberate encouragement or urging that the suicide take place,[154] and a causal relationship between that encouragement and the suicide taking place.[155]

More broadly than those two different kinds of help, the Act aims to cover two different types of intention. Policy makers and the courts have recently been discussing the right to die or euthanasia, behaviour which would fall under s179 as a criminal offence for the person or people who assist a terminally ill person in taking their life. Much of the case law in New Zealand focuses on cases with those compassionate circumstances; a terminally ill person wishing to take their life before their pain and suffering get worse. The other side of the story is more malicious, a person intentionally encouraging someone to take their life where they display no characteristics of empathy or compassion but rather hurt and harm.

The prosecution must prove beyond reasonable doubt the essential legal elements that the secondary party aided, abetted, incited, counselled or procured the principal party in the commission of the offence, by words, conduct or both and the secondary party intended to

[153] Crimes Act, s 179.
[154] Crimes Act, s 179.
[155] Crimes Act , s 179.

aid and knew of the offence to be committed by the principal party.[156] Although the section required proof that a secondary party had in fact assisted or encouraged the principal party, the provisions do not stipulate a requirement that the assistance or encouragement remained operative at the time the offence was committed.[157] The actus reus is complete when the actual assistance have been provided, then the person goes on to commit the offence.[158]

2 Offence Provision

(a) Definition of aid, abet, counsel, incite and procure

There is no direction explanation of the terms in relation to a suicide context, the analogous explanation comes from the use of the terms in s66 when assessing part liability. The terms aid, abet, counsel, incite and procure are utilised to distinguish different independent meanings and should be treated as such.[159] The elements are not determined simply on statutory terminology but also common law principles that have been developed.

Abet, incite and counsel as terms overlap in their ordinary meaning. Abet and incite both convey a sense of urging or instigating and encouraging.[160] This compares with counsel in which the primary meaning is to advise or recommend, though in a narrower sense has

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[156] *Ashin v R* [2014] NZSC 153.
[157] *Ashin v R*, above n 161.
[158] *Ashin v R*, above n 161.
[159] *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773, 2 All ER 684 (CA).
[160] *R v Schriek* [1997] 2 NZLR 139; *R v Pene* CA63/80, 1 July 1980.

often been equated with instigating or inciting.[161] At common law the behaviours were separated through reference to the time of participation. An abettor was one who was actually or constructively present at the scene of the offence, where as a counsellor was involved earlier as an accessory before the fact.[162] This is elucidated through the words preceding the actions in statute, where "in the commission of" refers to abetting and "to commit the offence" contemplates inciting and counselling before the offence has been committed. This is purely a technical distinction and does not substantially reflect the nature of the relevant acts of participation.

Abetting has broadly been equated with encouragement. Encouragement may be given by words or conduct, though mere presence at the scene is not enough to establish liability, deliberate presence intended to signify approval will support an inference of encouragement.[163] This can also take the form of passive acquiescence if there is a duty to act or relatively minor acts of encouragement.[164]

Counsels has been described as more apt to represent the provision of advice or information. In Canada the distinction has been drawn with counselling meeting the threshold of a person actively inducing or advocating, rather than merely describing the commission of an offence.[165]

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[161] *Martyn v Police* [1967] NZLR 396 (SC).
[162] *R v McKewen* [1973] 2 NZLR 603 (CA).
[163] *R v Pene* CA63/80, 1 July 1980.
[164] *R v Pene*, above n 168.
[165] *R v Hamilton* (2005) 255 DLR (4th) 283 (SCC).

(b) Intention to aid……

Intention is not defined in statute in New Zealand. However it is generally accepted that "intention is D aim, purpose or objective and D is said to act intentionally when he acts to bring about a specific result."[166] This is what is known as direct intention. The famous statement from Lord Bridge is that "the golden rule should be that the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent."[167] Oblique intention is the second type of intention "it is outcome which in D's eyes are so closely bound to normally-intended outcomes that they are virtually certain to occur alongside them. They may also be regarded as indirectly intended. Conclusions on oblique intentions are hard to accept. Oblique intention is usually supplied in relation to objectives that the defendant has foreseen as virtually certain as a potential side effect of his purpose."[168]

The Court of Appeal considered that actual intention is essential for abetting and rejected the proposition that mere knowledge by an accused that their conduct would be likely to encourage or incite the commission of a crime means that he has intended to encourage the commission of that crime.[169] There is no requirement that a secondary party must desire the principal party to commit the offence.[170] It is the assistance that must be intended and not the ultimate crime. So long as the secondary party acts in order to help encourage the

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[166] Margaret Briggs "Criminal Law" (2013) NZ L Rev 137 at 137.
[167] *R v Moloney* [1985] 1 AC 905 (HL) at 926.
[168] WJ Brookbanks and AP Simester Principles of criminal law (4th ed, Brookers, Wellington, 2012) at 108.
[169] *R v Pene*, above n 168.
[170] *R v Wentworth* CA10/93, 26 May 1993.

principal party to do the act which constitutes the offence, it is immaterial that the secondary party does not want the offence to be committed or is indifferent as to whether it is committed or not.[171]

In *R v Tamatea* the element of intention was discussed in relation to the words and actions of the defendant. The judge concluded that there must be a formed intention to deliberately encourage.[172] The judge did not consider that in the circumstances there was enough evidence to support an inference that the accused formed an intention to deliberately encourage the suicide.[173] Rather the evidence suggests that the words were said in the heat of the moment, without any informed intention that they be acted on.[174] There is no evidence to suggest any desire or intention on the part of the accused that Rochelle should take her life, other than words offered in the heat of the argument.

The judge finally stipulated that it was his view in the appropriate circumstances such as those in *R v Tamatea* to set the bar high concerning intent.[175] This is because many people say things in the heat of the argument that they do not intend should happened. There would need to be further evidence to illustrate actual intention; earlier statements or actions by the deceased of a desire for Rochelle to take his or her life.[176]

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[171] *R v Singh* CA53/03, 10 December 2003.
[172] *R v Tamatea* (2003) 20 CRNZ 363 at [32].
[173] *R v Tamatea*, above n 177, at [33].
[174] *R v Tamatea*, above n 177, at [32].
[175] *R v Tamatea*, above n 177, at [33].
[176] *R v Tamatea*, above n 177, at [33] .

The intention to aid, incite or encourage suicide will be a hurdle for many convictions under s 179. Whilst defendants may engage in conduct that has the effect of encouraging suicide, many will be reckless that suicide could be a consequence of their bullying. The lack of intention in the instance of harmful digital communications inciting suicide is unlikely to be met in many fact scenarios. If the standard was dropped to include oblique intention or even lower to recklessness this would open the scope sufficiently broad to include this kind of conduct.

(c) Knowledge

In the language of party liability the secondary party to an offence must know the essential matters which constitute the offence.[177] A secondary party must at least know that the principal party intends or contemplates doing certain acts that constitute the offence in fact committed, although it is immaterial that the second party may not know those acts amount to an offence.[178] Where a second party knows the principal party intends to commit an offence the secondary party need not have particularised knowledge of the details of the offence, for example time and place of the commission or the mode of execution.[179]

Knowledge will prove to be an issue in any conviction of aiding or abetting suicide on the basis of harmful digital communication. Whilst a defendant can engage in harmful digital

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[177] *Cooper v Ministry of Transport* [1991] 2 NZLR 693 (HC) .

[178] *R v Gill* (1999) 19 NZTC 15,526 (CA); *Cardin Laurant Ltd v Commerce Commission* [1990] 3 NZLR 563; *van Niewkoop v Registrar of Companies* [2005] 1 NZLR 796 (HC).

[179] *R v Baker* (1909) 28 NZLR 536 (CA); *R v Witika* [1993] 2 NZLR 424.

communication that might have the effect of inciting someone to commit suicide does not impute knowledge on the part of the defendant that they knew that the victim intended to commit suicide.

(d) Amendment by HDC Act

The Harmful Digital Communication Act also created a new offence in a subsection to s179 of the Crimes Act.[180] Incitement to suicide was not an offence unless the person themselves actually does or attempts to commit suicide. Given the distress such incitements may cause in themselves, let alone the devastating outcomes of a successful attempt the Law Commission believed it appropriate that incitement to suicide be a criminal offence.[181] Clause 24 creates a new offence of inciting, counselling or procuring a person to commit suicide where no suicide or attempted suicide occurs. The offence is punishable of up to three years imprisonment. The Law Commission acknowledge that the harm covered by this offence may be covered by the civil regime, but highlighted the difference in purpose between the two acts; civil regime is a quick and proportionate response to prevent harm whereas the criminal regime is to hold an offender accountable for their actions.[182] The Law Commission didn't foresee this section being used very often and only in serious cases, there are yet to be any cases before the court on such a charge.

3 Sentencing

[180] Crimes Act, s 179(2).

[181] Law Commission, above n 29, at 4.80-86.

[182] Law Commission, above n 29, at 4.80-86.

The section stipulates that offence is punishable for a sentence of up to fourteen years imprisonment where suicide was attempted or completed.[183] There are not many cases which fall directly within the bounds of s179. Many fall under charged and convicted of murder, charged with murder and convicted of manslaughter or charged and convicted with aiding and abetting suicide.[184] Each difference offence outcome imports a different sentencing band.

R v Ruscoe, which is an example of an aiding and abetting suicide case, was charged with aiding the suicide of his tetraplegic friend.[185] Ruscoe was originally sentenced to 9 months imprisonment but this was substituted on appeal to the Court of Appeal for one year of supervision.[186]

Determining a sentencing pattern for cases of this type is difficult due to the variation in sentence between cases. At the lowest end of the sentencing range, a discharge without conviction was granted in *R v Mott*, due to the limited involvement of the defendant.[187] To the other end of the spectrum of 18 months supervision and 200 hours community work in *R v KJK*.[188]

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[183] Crimes Act, s 179 (1).
[184] Crimes Act, s 171, 173 and 179.
[185] *R v Ruscoe* (1992) 8 CRNZ 68.
[186] R *v Ruscoe*, above n 185.
[187] *R v Mott* [2012] NZHC 2366.
[188] *R v KJK* HC Christchurch CRI 2009-009-14397, 18 Feb 2010.

There are a number of common threads in the way the courts in New Zealand have approached these cases. The Courts have uniformly emphasised that the sanctity of human life must be the starting principle in cases of these kind.[189] Whenever life has ended, even for the most merciful motive the Court has held that the principle of sanctity of human life must dictate its response.[190] The suggestion that there should be some relaxation of criminal liability in the case of mercy killing or euthanasia has not been accepted by the Courts.[191] To do so have been seen at risk of undermining the rights of the weak, vulnerable or handicapped who need protection at law.

The courts have expressed the need to impose sentences affirming the principle of sanctity of life. Achieved through imposing sentences which reflect the following purposes of sentencing; to hold the offender accountable for the harm done to victim and community,[192] denounce the offence conduct,[193] to deter the offender but more importantly others in the community from committing the same or similar offence.[194]

In *Ruscoe* where the offence was for aiding and abetting suicide, the Court held that imprisonment must be imposed unless there is a strong reason to the contrary, that makes the case exceptional.[195] For a lesser sentence to be imposed the circumstances would have

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[189] See *R v Bell* HC Wanganui, S011886, 8 March 2002 at [22], *R v Stead* (1991) 7 CRNZ 29 at 295 and *R v Faithfull* (HC Auckland CRI 2007-044-007451, 14 March 2008). at [8].
[190] *R v Albury-Thomson* (1988) 16 CRNZ 79 and *R v Bell*, above n 195, at [38].
[191] *R v Bell*, above n 189, at [22] and *R v Faithfull*, above n 189, at [8].
[192] Sentencing Act 2002, s 7(1)(a).
[193] Sentencing Act, s 7(1)(e).
[194] Sentencing Act, s 7(1)(f).
[195] *R v Ruscoe*, above n 185, at 70.

to be truly exceptional. However those principles do not seem to have been applied in subsequent cases with imprisonment yet to be imposed in an aiding and abetting suicide case.

The courts have also emphasised that each case must be considered on its own facts.[196] The circumstances of each case differ so greatly that there can be no invariable sentence and cases are also responsive to idiosyncratic indications for judicial mercy.

D Crimes Act (s160)

1 Background and Purpose

To be an offence, homicide must be "culpable" that is blameworthy according to the law. In New Zealand homicide is section 160 of the Crimes Act; homicide is culpable when it consists of killing any person, by an unlawful act or by omission without lawful excuse to perform or observe any legal duty, by causing that person by threats of fear or violence, or by wilfully frightening a child under 16 or a sick person.[197]

Lord Atkin in *DPP* observed that manslaughter was perhaps the most difficult crime to define because it encompasses homicide in so many different forms.[198] While the law views murder as being based primarily on intention to kill, manslaughter mainly, though not

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[196] See *R v Mott*, above n 187, at [26] and *R v Stead*, above n 189, at [295].

[197] Crimes Act, s 160.

[198] *Woolmington v DPP* [1935 UKHL 1.

exclusively, is the absence of intention to kill but with the presence of an element of unlawfulness or negligence.[199] It is this lack of intention to kill that speaks to why the analysis for this paper is more appropriate under a manslaughter analysis.

Both types of manslaughter are founded on the principle of constructive liability.[200] The law fashions responsibility for a high crime from the existence of the unlawful act or negligent omission and the causation of death without any requirement that the defendant intended to harm the victim or even foresaw the risk of doing so. From an early stage the courts have expressed distaste of the constructive nature of both forms of manslaughter and have tried to confine liability within tolerable bounds.[201] Despite these efforts manslaughter law has been notoriously uncertain and contains a lack of conceptual clarity.

2 Offence Provisions

(a) Negligent Manslaughter

Under s160 (2)(b) the defendant will be guilty of manslaughter where death results from his or her failure to adequately perform a legal duty.[202] The problem with trying to fulfil the requirements of negligent manslaughter for those who engage in harmful digital communications causing suicide is that there is no general common law duty to save a life or prevent harm form occurring to another person. A duty to take reasonable steps to protect

[199] *Woolmington v DPP*, above n 204.
[200] Kevin Dawkins and Margaret Briggs "Criminal Law" (2003) NZ Law Review 569 at 570.
[201] Dawkins, above n 206.
[202] Crimes Act, s 160(2)(b).

or save another person from physical harm only arises where there is a particular relationship, status, or situation as those contemplated in the Act. The Crimes Act defines duties to; provide the necessaries and protect from injury,[203] provide necessaries and protect form injury to your charges when you are a parent or guardian,[204] provide necessaries as an employer,[205] use reasonable knowledge and skill when performing dangerous acts,[206] take precaution when in charge of dangerous things,[207] avoid omissions that will endanger life.[208] It would be hard to bring about the class of defendants discussed in this paper under the requirements of negligent manslaughter.

(b) Unlawful Act Manslaughter

While killing by unlawful act has long been manslaughter at common law, in recent years the courts have qualified and refined it application.[209] Over the years there has been much debate as to whether moral importance should be placed on bad consequences a person accidentally brings about by committing an unlawful act. Subjectivists believe that the accused should not be held legally responsible for consequences beyond his control, unless he intended or adverted to the possibility of causing such consequences.[210] The principle of fair labelling demands that as close a match as possible between the name and the nature

[203] Crimes Act, s 151.
[204] Crimes Act, s 152.
[205] Crimes Act, s 153.
[206] Crimes Act, s 155.
[207] Crimes Act, s 156.
[208] Crimes Act, s 157.
[209] Dawkins, above n 206.
[210] Horder "A Critique of the Correspondence Principle in Criminal Law " [1995] Crim LR 759 at 761.

or gravity of the defendant's conduct.[211] It is arguably unfair to impose such a stigmatic label as manslaughter on an attacker who did not foresee the fatal consequence of his or her unlawful act as potentially overly punitive.

Those who focus on the moral importance of consequences argue that a person falls following a punch and fatally hits their head on the ground, then it is appropriate that the person be found guilty of manslaughter regardless of the lack of intention or foresight regarding death or serious injury.[212] They argue that the termination of life by an unlawful act should be marked while identifying the communicative aspect of the criminal law as one of the main purposes of punishment.[213] A system which fails to differentiate between completed offences and mere attempts would give the impression that actually causing harm to people doesn't matter. As this would be a morally irresponsible message to transmit it follows that the presence or absence of harmful consequences should be directly taken into account.[214]

The Commission in Ireland believed the most problematic aspect of unlawful and dangerous act manslaughter is that it punishes very severely those who deliberately engaged in low levels of violence.[215] An accused who punches a person with a thin skull once with fatal results can be found guilty of manslaughter even though neither the accused nor the reasonable person would have foreseen death or serious injury as a likely outcome

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[211] Horder, above n 216.

[212] Ireland Law Reform Commission *Homicide: Murder and Manslaughter* (IRC 87, 2008).

[213] Law Reform Commission, above n 218.

[214] Law Reform Commission, above n 218.

[215] Law Reform Commission, above n 218.

of the assault. A manslaughter conviction is possible because the act of deliberately harming someone renders the wrongdoer responsible for whatever consequences ensue regardless of foreseeability.[216]

(i) Unlawful Act

The first stage of analysis is to prove the predicate offence or the unlawful act. All elements of the offence have to be established and once established there is no further mental element. The unlawful act must have three qualities; that it is dangerous, creates some form of harm and is a substantial and operating cause of death. For the purpose of analysis of unlawful act manslaughter the predicate offence will be s22 of the Harmful Digital Communication Act, liability for which has been discussed above.

The phrase unlawful act is defined in section 2 of the Crimes Act as, a breach of any act, regulation, rule or bylaw.[217] Defined in a such a way as to include act punishable as crimes, acts constituting actionable wrongs and acts contrary to public policy, morality or injurious to the public.[218] In *R v Lamb* it was held that at common law a civil wrong was not sufficient for unlawful act manslaughter and the act must be unlawful in the criminal sense of the word.[219] *R v Myatt* supported this conclusion in stating that some acts that breach the law

[216] Ireland Law Reform Commission *Consultation Paper on Involuntary Manslaughter* at paragraphs (LRC CP 44, 2007) at 1.34-46.
[217] Crimes Act, s 2.
[218] Crimes Act, s 2.
[219] *R v Lamb* [1967] 2 QB 281.

are by their very nature not harmful to the lives and safety of others, something more than a mere technical breach of the law is needed for a manslaughter charge to be justified.[220]

For the purposes of analysis it is submitted that section 22 of the Harmful Digital Communication act as a criminal offence would meet the definition of being an unlawful act.

(ii) Objective Danger

It is now well established in New Zealand that in order to establish a manslaughter conviction through unlawful act the Crown must prove the act objectively dangerous.[221] The requirement has been expressed in a number of different ways in different cases and at the very least more than trivial harm. In New Zealand the origins of dangerousness requirement stretch back 40 years to *R v Grant* where the court expressed the view that the unlawful act had to be likely to do harm to the deceased.[222] This followed precedent of an English case, *Church*, which espoused the test that an unlawful act had to be such that all sober and reasonable people would inevitably recognise must subject the other person to at least the risk of some harm resulting from the act albeit not serious harm.[223] *R v Myatt* 20 year later resurrected the proposition in New Zealand case law for the proposition that the act must be likely to do harm.[224] But again failed to provide a clear statement for trial

[220] *R v Myatt* [1991] 1 NZLR 674 (CA).
[221] *R v Lee* (HC Auckland, T10974, 3 December 2001).
[222] *R v Grant* [1966] NZLR 968.
[223] *R v Church* [1966] 1 QB 59.
[224] *R v Myatt*, above n 226.

direction on the unlawful act dangerousness doctrine. Therefore an overview of the current law in New Zealand shows these elements being relevant; the unlawful act must have been likely to do harm to V or some class of person of whom V is one,[225] the act will likely to do harm if it carries with it the risk of at least some, though not serious harm,[226] some harm means more than trivial,[227] or transitory harm,[228] though it may be minor and subject to the overall test from church; the act must be such that all sober and reasonable people would inevitably recognise that is subject V to the risk of harm.[229]

As discussed earlier in the paper the associated harms and dangers that accompany harmful digital communication have begun to be widely recognised. Beyond proving the communications are a cause of a person taking their life the communications themselves are inherently dangerous and likely to cause harm to the victim.

(iii) Causation

Causation has two elements, one of factual causation and one of legal causation. Factual causation is based on the idea that the act of D must be more than a de minimis cause which is more than a trifling or trivial connection with the result. The fundamental question to be asked is but for the conduct of the defendant would the result have occurred.[230] Although

[225] *R v Grant*, above n 228, *R v Myatt*, above n 226 and *R v Lee*, above n 227.
[226] *R v Myatt*, above n 226, and *R v Lee*, above n 227.
[227] *R v Lee,* Above n 227.
[228] *R v Rapira* [2003] 3 NZLR 794 (CA).
[229] *R v Church*, above n 229.
[230] *R v White* [1910] 2 KB 124.

that test is not very sophisticated and may not predict the result where there is more than one cause.

Causation is essentially a legal judgement that an act is sufficiently connected with a consequence so as to impute responsibility for the consequence to the actor. But causation in the legal sense presupposes causation in fact and factual causation can only be established by application of the but for test; an act is not a cause of the consequence unless that consequence would not have happened but for the act. If the conclusion is that the consequence would have occurred anyway, the act is not in fact a cause of the consequence and the causal inquiry ends.

Legal causation on the other hand is determined through the use of the substantial and operative cause test.[231] *R v Smith* provides the law for this test that on principle if at the time of death the original wound was still an operating and substantial cause of death can death be said to be a result of the wound, albeit that some other cause was also operating.[232] Only if it can be said that the wound was merely the setting in which another cause operates can it be said that the death does not result from the wound.[233] Finally putting that statement another way, that only if the second cause was so overwhelming to make the original wound part of history can it be said that death does not flow from the original cause.[234]

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[231] *R v Smith* [1959] 2 QB 35.
[232] *R v Smith*, above n 237.
[233] *R v Smith*, above n 237.
[234] *R v Smith*, above n 237.

The defendants actions do not have to be the sole or even the main cause of death, provided that it a substantial and operating cause or death or a significant contribution to death.[235] Substantial means that it is not trifling or trivial. It does not require proof that D's act was largely to blame. The most recent authority supporting this in New Zealand is *R v McKinnon* which supports the contention that there may be more than one cause of death in homicide cases.[236] Where more than one injury had been inflicted on the deceased, death can properly be said to be a result of the original injury, if at the time of death the original injury is still an operating and substantial cause of death, provided the act that was the immediate cause of death is not so overwhelming to make the original injury merely part of history.[237]

Causation will always be the biggest hurdle in establishing that a person's harmful digital communication caused a person to end their life. The threshold however is lower than straight causation, allowing for intervening acts and other causes to play on the eventual result of death. It is the contention of this paper that given the comments of New Zealand Coroners recently for example in the case of Sasa that there is little doubt that the online bullying she suffered in the lead up to her committing suicide was a significant or substantial and operating cause of her death.

(iv) Intervening Acts

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[235] *R v Smith*, above n 237.

[236] *R v McKinnon* [1980] 2 NZLR 31.

[237] *R v McKinnon*, above n 242.

It is possible to have two or more independent operative causes of death, and any person whose conduct constitutes a cause may be convicted of an offence in respect to the death. Other causes which contribute to the death may be the actions of others,[238] (police in *Pagget*) or the victim themselves (*Williams* and *Roberts*).[239] These other causes do not relieve D of liability where the act of D was a substantial and operating cause.

The civil law notion of novus actus arises here, that the chain of causation may be broken if the intervention amounts to a free and deliberate informed decision or action. In *Roberts* it was concluded that the action of the victim doesn't break the chain of causation if it was reasonably foreseeable and not so daft or unexpected that no reasonable man could foresee it.[240] The same proposition was supported in *Williams* which held that the nature of the threat was an important factor in deciding both the foreseeability of harm and the proportionality of response.[241] If the response from the victim is outside the range of responses which might be expected from a victim in his situation, allowing for their particular characteristics, then the chain of causation is broken.

Difficulties in proving causation also arise where the victims own actions were the cause of the result, for example they injure themselves while they attempt to flee. In such circumstances the accused conduct will still be a legal cause if the victims act were a natural consequence of that conduct. Where victims are killed or injured in response to a threat by

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[238] *R v Pagget* (1938) 76 Cr App R 279.

[239] *Roberts v R* [1971] EWCA Crim 4 ; *Williams and Davis v R* [1992] Crim LR 198.

[240] *Roberts v R*, above n 245.

[241] *Williams and Davis v R*, above n 245.

the accused their actions will only be a natural consequence of the accused conduct if the fear was well founded and the response to the threat was reasonable.[242]

A review of reasonableness of response has become an ever increasing scope of inquiry. Relying on *R v Oakes* and the courts acceptance that battered woman's syndrome was relevant to her perception in a claim for self-defence, this has opened the door to claims that other forms of syndrome and mental illness can be brought into the scope of assessing the reasonableness of a response.[243] This idea is yet to come before the courts but it can only be a matter of time before the issue of whether mental illness affecting subjective perception of danger comes before the courts for determination.

Despite the fact that there is often more than one cause in a person's decision to end their life, being a victim's act potentially disrupting the chain of causation. An analysis of the response of the victim to the continual threats, bullying or harmful digital communication they were receiving could be deemed reasonable given the research on the links between bullying conduct and suicide and in addition to the circumstances of the victim.

(v) Characteristics of the Victim

An important aspect of discussion on manslaughter is that it has long been the policy of the law that those people who engage dangerous behaviour must take their victims as they find

[242] Dawkins, above n 206.
[243] *R v Oakes* [1995] 2 NZLR 673.

them.[244] This clearly applies to mental as well as physical characteristics of the victim and the courts will rarely look as to whether the victim's response was reasonable.[245]

Many victims that commit suicide caused by harmful digital communications will have other stress factors and triggers occurring in their lives. In terms of a strict liability view these elements including any mental illness the victim might be suffering are part of the characteristics of the victim. That those characteristics also played a role in the effect of the defendants conduct on the victim is an unfortunate reality of the "egg shell skull" rule.

3 Crimes Act s163: committing homicide through influence of the mind

No one is criminally responsible for killing another person by influence on the mind alone, except by frightening a child under the age of 16, a sick person, or the killing of another person of any disorder arising from such influence, except wilfully frightening such child as aforesaid or sickness.[246]

In essence this section appears to represent the common law, which for homicide usually requires some physical or corporal injury.[247] In relying on an identical provision to s163, it was held that there was no liability for manslaughter where the victim died from a heart attack precipitated from stress arising from a scuffle with the defendant during an attempted

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[244] *Blaue v R* (1975) 61 Cr App R 271.
[245] *Blaue v R*, above n 250.
[246] Crimes Act, s163.
[247] *R v Murton* (1862) 3 F and F , 1 Hale PC 529 at 500.

burglary. The court held that as there was no physical injury inflicted on the defendant there was only a killing of the mind and no liability.[248]

This perception is starting to shift, the courts are increasingly prepared to embrace the whole person and not just the physical shell. The increasing definitions of harms to include both physical and mental injury, in addition to growing academia on the effects of harmful digital communication on a person all aid to the discourse that could see this section repealed to allow for homicide convictions for harmful digital communications leading to suicide.

4 Sentencing

The current sentencing framework for manslaughter bears little resemblance to that of murder. While both attract a maximum penalty of life imprisonment it is important to highlight the amount of judicial discretion in this area. The task for a judge in a manslaughter case is difficult, it involved a balancing of the competing demands of sentencing in particular upholding the sanctity of life, but also recognising the culpability at hand.

The maximum penalty of life for manslaughter is rarely imposed.[249] In contrast to many other offences the consequences of the offending are unintended and may result from a relatively minor unlawful act, or rather unusual circumstances.[250] Manslaughter

[248] *R v Powder* (1981) 29 CR (3d) 183.

[249] Crimes Act, s 177. The maximum penalty was imposed in *R v Wickliffe* [1987] 1 NZLR 55.

[250] *R v Leuta* [2002] 1 NZLR 215 at [62]; *R v Jamieson* [2009] NZCA 555 at [33].

encompasses a wide range of offending with corresponding culpability, from full inadvertence to situations that are little short of murder. Death may result from carelessness,[251] an impulsive push to the ground or wounding from a weapon or prolonged attack.[252] Consequently due to the variety of circumstances that can lead to manslaughter there is no guideline judgement. Most importantly the sentence must reflect the sanctity of life, but also proportional to the circumstances of the cases. The loss of life, whether intentional or not is always a heinous offence that society demands is met with appropriate condemnation.[253]

If the circumstances of the offence show low culpability then the sentence usually reflect his. Sheer carelessness or stupidity alongside powerful mitigating facts may warrant a lesser sentence.[254] Sentences in manslaughter cases are largely dependent upon the level of culpability as opposed to the consequence of the offending. Protection of the community among other sentencing principles requires a lengthier sentence for those who deliberately intend harm than those who do not.

E Conclusion

When analysing the three different criminal sanctions attracted by harmful digital communications leading to suicide it is important to recognise that no individual section perfectly addresses the fact scenario. The offence provision under the HDC Act

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[251] *R v Bannan* HC Christchurch CRI-2010- 009-014017, 15 December 2010; *R v Tuirirangi* HC Wanganui CRI-2010-083-2891, 21 June 2011.

[252] See *R v Larson* HC Dunedin CRI-2011-012- 001013, 6 July 2011.

[253] *Solicitor-General v Kane* CA154/98, 23 September 1998 at 9.

[254] *R v Mears* HC Rotorua CRI-2010-069-2211, 2 February 2011.

contemplates liability that attracts very nominal sentences. Aiding and abetting suicide in the Crimes Act logically seems to be the most fitting criminal offence and yet lack of intention to encourage suicide, or knowledge that suicide was in contemplation in the first place would be a hurdle to overcome in any prosecution. Finally an unlawful act manslaughter analysis looks promising in terms of a strict legal analysis, albeit with arguable analysis on elements such as causation and the intervening acts of the victim. However, the sentences attracted by a conviction for unlawful act manslaughter can be lengthy and incarceration may not be the appropriate response.

IV SENTENCING IMPLICATIONS

A Introduction

Imposing a sentence (the punishment given to an offender) can be one of the most exacting tasks undertaken by a judge. By law sentences must reflect a number of considerations, some of which may be in conflict. Some of the more important considerations are: the seriousness of the offending, the interests of the victim, consistency with sentences imposed for similar offending, the personal circumstances of the offender.

A former Chief Justice of New South Wales put it this way;[255]

> The core of the sentencing task is a balancing, overlapping, contradictory and incommensurable objective. The requirements of deterrence, rehabilitation,

[255] *Sentencing Guideline Judgments*, the Hon JJ Spigelman, Address to the National Conference of District and County Court Judges, Sydney, 24 June 1999.

denunciation, punishment and restorative justice, do not generally point in the same direction. Specifically the requirement of justice, in the sense of just deserts and of mercy often conflict. Yet we live in a society that values both justice and mercy.

B Principles and Purposes of Sentencing

The Sentencing Act defines the purpose of sentencing, but does not require that any particular purpose must be given any greater weight than others. The purposes include: holding the offender accountable;[256] promoting in the offender a sense of responsibility,[257] providing for the interests of the victim,[258] denunciation of the offenders conduct,[259] deterrence of both the offender and other persons,[260] protection of the community,[261] and assisting in the offenders rehabilitation and reintegration back into the community.[262]

1 Hold the offender Accountable for Harm Done

The court may impose punishment in order to hold the offender accountable for the harm done to the victim and the community. This is a codification of the traditional concept of retributive punishment.[263] Based on the desert principle; the view that punishment is

[256] Sentencing Act, s 7(a).
[257] Sentencing Act, s 7(b).
[258] Sentencing Act, s 7(c).
[259] Sentencing Act, s 7(e).
[260] Sentencing Act, s 7(f).
[261] Sentencing Act, s 7(g).
[262] Sentencing Act, s 7(h).
[263] Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at SA7.01.

justified simply because offenders have done something to deserve it. It is rooted in the Kantian notion that a legal system generates reciprocal political obligations upon citizens to obey its norms; that an offender gains an unfair advantage through the commission of an offence which upsets the moral equilibrium arising from those reciprocal political obligations and that the purpose and justification of punishment is to remove that unfair advantage and restore to moral equilibrium or relationships of justice which existed prior to the offence.[264]

Whatever the language used, the fundamental requirement of retributive punishment is proportionality. The quantum of punishment is dictated by reference to the seriousness of the offence and the culpability of the offender, and not by forward looking factors such as the offenders risk, his or her rehabilitative potential or the need for deterrence.[265] The youth of the offender will not excuse serious offending and will not prevent courts from holding offenders accountable for the harm caused to their victims.[266]

2 Promote a sense of responsibility and providing for the interests of the victim

A sanction may be imposed in order to promote in the offender a sense of responsibility for the harm and to provide for the interests of the victim. These two purposes, which should be read together, do not generally appear in the traditional literature on the philosophy of punishment.[267] The fact that an offender has acknowledged the harm done

[264] *Adams,* above n 275 at SA7.01.
[265] *Adams,* above n 275 at SA7.01.
[266] *R v TT* (CA257/02) 29/10/2012. cA257/02.
[267] *Adams,* above n 275, at SA7.02.

and faced up to his or her responsibilities arising from the commission of the offence (expression of remorse or guilty plea) has of course always been regarded as a mitigating factor which may result in a reduction of sentence.[268] It has been less common for a sentence to be imposed explicitly in order to promote a sense of responsibility in the offender or to provide for the interest of victims. It is important to note that a sentence should not be dictated by what will satisfy the victim; to interpret s1(c) as an indication that heavy sentences should be imposed so the victims may personally feel vindicated cannot have been legislature's intent.[269]

3 Denounce conduct

The court may impose a sanction in order to denounce the offender's conduct and thereby make a symbolic statement about the offence and the way it is regarded in the community.[270] In effect the penalty declares that society condemns and thereby disavows the criminal act. It is therefore a symbolic expression of the attitude which society should have to the behaviour in question, and the demonstration of the fact that it will not be condoned or allowed.[271]

Underlying denunciation is the belief that public condemnation of offending can have a long term cohesive and educative impact; the establishment and maintenance of boundaries

[268] *Adams,* above n 275, at SA7.02.
[269] *R v Tuiletufuga* 25/9/03, CA 205/03.
[270] *Adams,* above n 275, at SA7.04.
[271] *Adams,* above n 275, at SA7.04.

of acceptable and unacceptable behaviour.[272] Without the constant reaffirmation of the values underpinning the criminal law through the process of punishment, it would lose its character as law and the social and moral fabric which it assists in holding together would be weakened; society through the courts, must show its abhorrence of particular types of crime, and the only way in which courts can show this is by the sentences they pass.[273]

4 Deter the offender or other persons from committing the same or similar offence

Penalties may be imposed for the purpose of deterrence. Deterrence is of two types. The first is general deterrence – the imposition of penalties so that other individuals who may be tempted to commit offences will be discouraged from doing so through fear of consequences.[274] The second is individual (or special) deterrence; the imposition of penalties in order to discourage further offending by the individual on whom such penalties are imposed.[275]

Deterrence is a well-entrenched principle which has been widely recognised and relied on in sentencing practice;[276]

> One of the main purposes of punishment is to protect the public from the commission of crimes by making it clear to the offender and to other persons with similar impulses

[272] *Adams,* above n 275 SA7.04.
[273] *R v Sargeant* (1974) 60 Cr App R 74 at 77.
[274] *Adams,* above n 275, at SA7.05.
[275] *Adams,* above n 275, at SA7.05.
[276] *R v Radich* [1954] NZLR 86.

> that if they yield to them, they will meet with severe punishment. In all ages and civilised countries that has been the main purpose of punishment and continues to be so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does and will prevent the commission of many that would be committed if the offender thought they could escape without punishment or with only a light punishment. If a court is weakly merciful and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that sentences are such as to operate as a powerful factor to prevent the commission of such offences.

The extent to which the purpose is given prominence will depend on the nature of the offence and the circumstances of the offender. However two general observations are warranted;

First deterrence is the dominant aim for a small group of offences involving a significant amount of premeditation.[277] This does not mean that no weight is to be attached to personal circumstances. Even where they are subordinated to the importance of deterrence, the personal circumstances of an offender in a particular case may be such as to warrant some reduction to the sentence.

Second there are some classes of offence in which the purpose of deterrence either general or specific should be given little emphasis because it is unlikely to be efficacious.[278] This

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[277] *Adams,* above n 275, at SA7.05.

[278] *Adams,* above n 275, at SA7.05.

particularly applies to offences which involve little or no premeditation and are undertaken impulsively or compulsively. While such offences frequently warrant severe sentences, such as sexual offending, these are likely to be justified through different purposes, than by reference to deterrence. Where deterrence is a consideration it must be directed towards those aspects of the offender's conduct that were intentional and created risk of harm. In manslaughter cases, the deterrent effect should be measured against that aspect and not the unintended consequence of death.

5 Protect the community from the offender

The protection of the public has sometimes being seen by the courts as an overrising purpose that encompasses other more specific purposes such as deterrence or rehabilitation; courts should bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him, or deterring him and others.[279]

The term is presumably not used in such a broad sense in regard to section 7, since the specific purpose of denunciation, deterrence and rehabilitation are provided for elsewhere in the section. Rather it captures the purpose often referred to as incapacitation; taking offenders out of circulation or otherwise putting constraints upon their freedom so that their opportunities to offend are limited or removed.[280]

[279] *R v Howells* [1999] 1 Cr App R 98 at 104.
[280] *Adams,* above n 275, at SA7.06.

6 Hierarchy of Purposes

Various attempts have been made in overseas jurisdictions to specify an overrising purpose or purposes, or to provide a hierarchy of purposes, either explicitly or implicitly. Subsection (2) explicitly eschews such an approach.[281] Subject to the general principles in section 8 Judges are left with a discretion to determine which purpose or purposes should be given precedence according to the overall circumstances of the individual case. Presumably this is based on the belief that specification of a dominant purpose or purposes would produce undue inflexibility and therefore injustice.

7 Sentencing of Youth Offenders

It was acknowledge by the judge in *R v TT* that he found the task of sentencing the appellant difficult.[282] On the one hand the appellant was a very naïve 15 year old youth who might lack psychological insight, empathy or others and an understanding of his behaviour on them. The Crown contended that sentencing decision of the court for youth offending fell into two categories. First there are the cases where the offenders mental or psychological difficulties have justified an exceptional sentence, and secondly cases without that special facts.[283] Offending of such gravity is not excused by the offender's youth and naivety even if accentuated by the appellant's different upbringing and cultural background. The reports available make it clear that he knew what he was doing was wrong. It is not suggested that

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[281] Sentencing Act, s 7(2).

[282] *R v TT*, above n 278.

[283] *R v TT*, above n 278.

he suffers from developmental, underlying personality or psychological difficulties. Where youth is associate with such particular circumstances the court must take into account that a sentence, otherwise appropriate may be disproportionality severe.

C Conclusion

An analysis of the principles and purposes of sentencing highlights some positive and negative associations for the conduct this paper has examined. Deterrence is seen to be the strongest purpose of the act in regards to the goal of sanctioning this kind of behaviour. In regard to an unlawful act manslaughter conviction, the relative low level of intention or thought that death could result from the actions of the perpetrator will mean that deterrence would be achieved through a punitive sanction, which might seem overly severe in both a specific and general deterrent approach. Whilst the imposition of a criminal sanction against a youth offender is often met negatively, the courts have begun to recognise where the conduct is serious, sanctions are warranted and that youth can be taken account of at sentencing. The analysis of the purposes of sentencing speaks to broader underlying theme of the whole paper that while criminal sanctions are warranted to reflect certain conduct that in order to address and solve issues such as suicide and harmful digital communications that extra-legal solutions would be required in addition to the power of a criminal sanction.

V CONCLUSION

This paper is founded on the assertion that the sanctity of life is paramount. Loss of life in any circumstance has devastating effects on the family and the community. New Zealand faces the two societal setting of a prevalence of suicide and harmful digital

communications. Whilst individually the settings are distinct the toxic combination of both societal settings creates situations that should attract criminal liability.

Media attention on the correlation between harmful digital communication and suicide has provided a basis for an analysis on what an appropriate criminal sanction is for the kinds of behaviour. The three viable options discussed in the paper were: s22 of the Harmful Digital Communications Act, s179 or s160 of the Crimes Act. No one section provides a perfect fit for the conduct discussed. The Harmful Digital Communications Act only contemplates situations in which serious emotional distress has resulted and the corresponding criminal sentence is fitting to that level of harm. Had the act contemplated the conduct resulting in death the sentence act to liability would need to be raised to recognise the sanctity of life. Aiding and abetting suicide seems like the most natural fit when discussing the conduct of a perpetrator leading to someone committing, however the high threshold placed on intention, in addition to the knowledge requirements excludes potential perpetrators. It is more than likely that persons distributing harmful digital communications have a reckless mind-set rather than that of direct intention. The final sanction of unlawful act manslaughter provides a unique analysis of the extent of liability that could be attributed to a perpetrator of harmful digital communications. At its core the principles that underpins unlawful act is simple that in completing the unlawful act, the law constructs your liability for the death that ensued. Elements of this analysis are still arguable however on balance the right fact scenario could persuade the court that the conduct attracts such a conviction.

This paper has focused directly on criminal liability and the sanctions imposed against perpetrators of harmful digital communications whose victims commit suicide, however in doing so ignites a discussion on what is the appropriate way to deal with people who engage in these activities. Whilst some of the aims of the Sentencing Act 2002 will be met through the imposition of incarceration terms on those perpetrators a broader base of solutions including extra legal options would need to be explored to make any inroads in ameliorating the problem in the long term.

Word Count

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