

REPUBLIC OF VANUATU

BILL FOR THE
HARMFUL DIGITAL COMMUNICATIONS
ACT NO. OF 2024

Explanatory Note

The Bill for the Harmful Digital Communications Act No. of 2023 (“the Bill”) sets out a comprehensive legislative scheme that complements and strengthens the efforts outlined in the National Cyber Security Strategy of 2030. It is a step towards securing and protecting the internet, cyberspace, and online media realm in Vanuatu. It is crucial for online communication in Vanuatu to be expressed and founded upon the basis set out in the Constitution of Vanuatu (Article 5 of Chapter 2) which recognizes that all persons are entitled to certain “Fundamental Rights and Freedoms”. It follows that “Respect and Responsibility” must predominate online communication, including via emails, texts, pictures, website content, blog posts, online comments, online forums, social media, and phone-based apps.

The Bill will give effect to the following Policy Objectives and Strategies:

- a) Policy Objectives 6.3, 6.4, 6.7, and 6.9 under Goal 6 of the Society Pillar and Policy Objective 2.9 under Goal 2 of the Economic Pillar of the National Sustainable Development Plan 2016 - 2030;
- b) Policy Objectives under the National Cyber Security Priority 6 (CSP-6) of the Vanuatu National Cyber Security Strategy of 2030;
- c) Policy Objectives under the Harmful Digital Communications Policy of Vanuatu.

The Bill confirms that the Government recognizes the need to maintain respect for and the protection of fundamental rights and freedoms of individuals using the Internet, and to provide safeguards for breaches of the 10 Communication Principles.

Key features of the Bill include:

- A clear statement of the 10 Communication Principles;
- A Commissioner of Harmful Digital Communications tasked with investigating complaints about possible breaches of the Communication Principles;
- Allows people to take serious complaints to the Magistrates Courts;
- Creates new criminal offences which upon conviction can result in a fine or imprisonment, or both;
- Certain protections for a person hosting the content of others online.

Prime Minister



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An Act to regulate the use of harmful digital communications and for related matters.

Be it enacted by the President and Parliament as follows-

PART 1 PRELIMINARY MATTERS

1 Interpretation

(1) In this Act, unless the contrary intention appears:

applicant means a person who makes an application under section 4;

application means an application to the Magistrates Court under section 8;

Authority means the Digital Safety Authority established under the Digital Safety Authority Act No. of 2024;

Commission means the Digital Safety Commission established under the Digital Safety Authority Act No. of 2024;

Commissioner means the Commissioner of Harmful Digital Communications appointed under the Digital Safety Authority Act No. of 2024;

Communication Principles means the Communication Principles under subsection 2(2);

complaint means a complaint made under section 3;

court means the Magistrates Court or the Supreme Court;

digital communication means:

- (a) any email, phone call, social media messaging, sms or text message, web chat, blog, podcast or video; or
- (b) any writing, photograph, picture, recording or other matter that is communicated electronically; or
- (c) any other form of electronic communication;

harm means serious emotional distress;

internet protocol address provider means a person that operates a business that, other than as an incidental feature of its main business activities:

- (a) offers the transmission, routing, and providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; and
- (b) allocates Internet Protocol addresses to its account holders; and
- (c) charges its account holders for its services; and
- (d) is not primarily operated to cater for transient users;

intimate visual recording has the meaning given by subsections (2) and (3);

Minister means the Minister responsible for harmful digital communications;

online content host, in relation to a digital communication, means the person who has control over the part of the electronic retrieval system, such as a website or an online application, on which the communication is posted and accessible by the user;

post, in relation to a digital communication, means:

- (a) to transfer, send, publish, disseminate, or otherwise communicate by means of a digital communication:
 - (i) any information, whether truthful or untruthful, about a victim; or
 - (ii) an intimate visual recording of an individual; and

- (b) to include an attempt to do anything referred to in paragraph (a);

victim means:

- (a) in relation to section 15, an individual who is the target of a posted digital communication; and
- (b) in relation to section 16, an individual who is the subject of an intimate visual recording.
- (2) An intimate visual recording is a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of an individual who is the subject of the recording, and that is of:
- (a) the individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is:
- (i) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or wearing only undergarments; or
- (ii) engaged in an intimate sexual activity; or
- (iii) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
- (b) the individual's naked or partly covered genitals, pubic area, buttocks, or female breasts which is made:
- (i) from beneath or under an individual's clothing; or
- (ii) through an individual's outer clothing in circumstances where it is unreasonable to do so.
- (3) An intimate visual recording includes a recording that is made and transmitted in real time without retention or storage in:
- (a) a physical form; or
- (b) an electronic form,

from which the recording is capable of being reproduced with or without the aid of any device or thing.

2 Communication Principles

- (1) A person who performs any functions or exercises any powers under this Act must:
- (a) consider the Communication Principles: and
 - (b) act consistently with the rights and freedoms under the Constitution of the Republic of Vanuatu.
- (2) A digital communication must not do all or any of the following:
- (a) disclose sensitive personal facts about an individual;
 - (b) be abusive, threatening, intimidating, or menacing;
 - (c) be offensive to a reasonable person in the position of the affected individual;
 - (d) be indecent or obscene;
 - (e) be used to harass an individual;
 - (f) make a false or misleading allegation;
 - (g) publish a matter that is in breach of confidence;
 - (h) incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual;
 - (i) incite or encourage an individual to commit suicide;
 - (j) denigrate an individual by reason of his or her colour, race, ethnic, island or national origins, political affiliation, religion, gender, sexual orientation, or disability.

PART 2 HOW TO MAKE A COMPLAINT TO THE COMMISSIONER

3 Making a complaint to the Commissioner

- (1) An individual may make a complaint in writing to the Commissioner about a digital communication that might contravene any of the Communication Principles.
- (2) The Commissioner is to assess the complaint and decide what action he or she is to take.
- (3) After assessing the complaint, the Commissioner must, in writing, advise the complainant on the steps that the Commissioner may take to resolve the complaint and whether the complainant has grounds to make a complaint.
- (4) The Commissioner may refuse to investigate, or cease investigating, any complaint if the Commissioner considers that:
 - (a) the complaint is trivial, frivolous, or vexatious; or
 - (b) the subject matter or nature of the complaint is unlikely to cause harm to any individual; or
 - (c) the subject matter or nature of the complaint does not contravene the Communication Principles.
- (5) The Commissioner may decide not to take any further action on a complaint if, in the course of assessing or investigating the complaint, it appears to the Commissioner that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.
- (6) If the Commissioner decides not to take any further action on a complaint, the Commissioner must notify the complainant in writing of the right to apply to the Magistrates Court for an order under this Act.

PART 3 PROCEEDINGS FOR HARMFUL DIGITAL COMMUNICATIONS IN THE MAGISTRATES COURT

Division 1 Proceedings for harmful digital communications in the Magistrates Court

4 Proceedings

- (1) A person may apply to the Magistrates Court for an order under section 11 or 12.
- (2) An application may be made by:
 - (a) an individual (the affected individual) who alleges that he or she has suffered or will suffer harm as a result of a digital communication; or
 - (b) a parent or guardian on behalf of the affected individual; or
 - (c) the principal of a school if the affected individual is a student of that school and consents to the principal bringing the proceedings; or
 - (d) a police officer if the digital communication constitutes a threat to the safety of an individual; or
 - (e) any other person prescribed by the Regulations.

5 Requirements for the proceedings

- (1) A person must not apply for an order under section 11 or 12 in respect of a digital communication, unless the Commissioner has first received a complaint about the communication and has had a reasonable opportunity to assess the complaint and decide what action if any to take.
- (2) The Magistrates Court must not grant an application unless it is satisfied that:
 - (a) there has been a breach of the Communication Principles; and
 - (b) the breach has caused or is likely to cause harm to the individual.

- (3) The Magistrates Court may dismiss an application under subsection 4(1):
- (a) if it considers for a person under paragraph 4(2)(a), (b), (c) or (e) that the application is frivolous or vexatious, or for any other reason does not meet the requirements under this section; and
 - (b) if it is satisfied for a person under paragraph 4(2)(d), after having regard to all the circumstances of the case, that the application must be dismissed.
- (4) The Magistrates Court may make an order that any proceeding under this Act is to be heard, in whole or in part, in closed court if the Court considers that it is in the interests of justice.

6 Magistrates Court may refer matter back to the Commissioner

The Magistrates Court, in considering an application under section 4:

- (a) must consider whether an attempt has been made to resolve the complaint, whether through mediation or otherwise; and
- (b) may adjourn the proceedings and refer the matter back to the Commissioner unless satisfied that attempts at resolution, or further attempts at resolution, of the matter by the parties and the Commissioner are likely:
 - (i) not to contribute constructively to resolving the matter; or
 - (ii) not in the circumstances to be in the public interest; or
 - (iii) to undermine the proceedings before the Court.

7 Magistrates Court may require Commissioner to provide information

- (1) The Magistrates Court may require the Commissioner to provide information for the purposes of satisfying the Court of any matters referred to in sections 5 and 6.
- (2) The Commissioner must provide the information in the form prescribed (if any) by the rules of court.

Division 2 Applications

8 Applications

- (1) An application to the Magistrates Court for an order under section 11 or 12 must be filed in the Court and be in the prescribed form.
- (2) The Magistrates Court may give directions as to service and, if the Court considers it appropriate to do so in the circumstances, consider an application made on a without notice basis.
- (3) A filing fee is not payable for an application.

9 Mode of hearing and evidence

- (1) The Magistrates Court may, having regard to the circumstances of a particular case, direct that an application be determined:
 - (a) on the basis only of written material provided to it; or
 - (b) by way of a hearing involving oral submissions; or
 - (c) in such other way as the Court determines.
- (2) The Magistrates Court may deal with an application in any manner that it thinks will preserve the anonymity of a party so that the party's identity is not released to any other party during the proceedings.
- (3) The Magistrates Court may receive any evidence or information that may in its opinion assist it to deal effectively with any proceedings under this Act, whether or not the evidence or information would be otherwise admissible in a court of law.

Division 3 Technical Advisers

10 Technical advisers

- (1) The Magistrates Court may appoint a technical adviser to assist in considering and determining an application for an order under section 11, 12 or 17 and the Supreme Court may appoint a technical adviser for the purposes of an appeal.

- (2) The duties of a technical adviser are:
- (a) to sit with the Magistrates Court or the Supreme Court; and
 - (b) subject to subsection (4), to act in all respects as an extra member of the Court.
- (3) The Magistrates Court must appoint a technical adviser if the Court is considering an application for an order under paragraph 12(2)(a) or (b), subsection 12(3) or paragraph 12(4)(a).
- (4) The Magistrates Court or the Supreme Court may give any weight to the technical adviser's advice that the Court thinks fit, and the Court alone must determine the application or appeal.
- (5) The Commission must maintain a panel of persons who may be appointed as technical advisers, and only persons named on the panel may be appointed as technical advisers.
- (6) A technical adviser may be appointed to the panel for up to 5 years, and the appointment continues until:
- (a) the person is reappointed; or
 - (b) a successor to the person is appointed; or
 - (c) the person is informed in writing by the Commission that he or she is not to be reappointed and that a successor to that person is not to be appointed; or
 - (d) the person resigns by notice in writing to the Commission; or
 - (e) the person is removed from the panel by the Commission for incapacity that affects the person's performance of duty, for neglect of duty, or for misconduct, proved to the satisfaction of the Commission; or
 - (f) the person dies.
- (7) The Commission is to determine the remuneration and allowances of the technical advisers.

Division 4 Orders

11 Interim Order

- (1) The Magistrates Court may grant any interim orders pending the determination of the application for orders under section 12.
- (2) An interim order under this section may do anything that may be done by order under section 12 and expires when the application under that section is determined.

12 Orders that may be made by the Magistrates Court

- (1) The Magistrates Court may, on an application, make all or any of the following orders against a defendant:
 - (a) an order to take down or disable material;
 - (b) an order that the defendant cease or refrain from the conduct concerned;
 - (c) an order that the defendant must not encourage any other person to engage in similar communications towards the affected individual;
 - (d) an order that a correction be published;
 - (e) an order that a right of reply be given to the affected individual;
 - (f) an order that an apology be published;
 - (g) any other order that the Court considers appropriate.
- (2) The Magistrates Court may, on an application, make all or any of the following orders against an online content host:
 - (a) an order to take down or disable public access to material that has been posted or sent;
 - (b) an order that the identity of the author of an anonymous or pseudonymous communication be released to the Court;

- (c) an order that a correction be published in any manner that the Court specifies in the order;
 - (d) an order that a right of reply be given to the affected individual in any manner that the Court specifies in the order.
- (3) The Magistrates Court may, on an application, make an order against an internet protocol address provider that the identity of an anonymous communicator be released to the Court.
- (4) The Magistrates Court may do all or any of the following:
- (a) make a direction applying an order provided for in subsection (1) or (2) to other persons specified in the direction, if there is evidence that those other person have been encouraged to engage in harmful digital communications towards the affected individual;
 - (b) make a declaration that a communication breaches a Communication Principle;
 - (c) make an order that the names of any specified parties be suppressed.
- (5) In deciding whether or not to make an order under this section, the Magistrates Court must take into account:
- (a) the content of the communication and the level of harm caused or likely to be caused by it; and
 - (b) the purpose of the communication, in particular whether the communication was intended to cause harm; and
 - (c) the occasion, context, and subject matter of the communication; and
 - (d) the extent to which the communication has spread beyond the original parties to the communication; and
 - (e) the age and vulnerability of the affected individual; and
 - (f) the truth or falsity of the statement; and

- (g) whether the communication is in the public interest; and
- (h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused; and
- (i) the conduct of the affected individual or complainant; and
- (j) the technical and operational practicalities, and the costs, of an order; and
- (k) the appropriate individual or other person who should be subject to the order.

13 Magistrates Court may vary or discharge order

- (1) Any applicant who obtains an order under section 11, 12 or 17 or any other party to that order may apply for an order in subsection (2).
- (2) The Magistrates Court may, by order, do any of the following things to an order made under section 11, 12 or 17:
 - (a) vary the duration of the order;
 - (b) vary any conditions of the order;
 - (c) discharge the order.

PART 4 OFFENCES

14 Offence of non-compliance with order

If a person, without reasonable excuse, fails to comply with an order made under section 11, 12 or 17, the person commits an offence punishable on conviction:

- (a) in the case of an individual – to a fine not exceeding VT500,000 or by imprisonment to a term not exceeding 6 months, or both; or
- (b) in the case of a body corporate – to a fine not exceeding VT1,000,000.

15 Causing harm by posting digital communication

(1) If:

- (a) a person posts a digital communication with the intention that it cause harm to a victim; and
- (b) posting the communication causes harm to the victim,

the person commits an offence punishable on conviction by the penalty set out in subsection (2).

(2) The penalty is:

- (a) in the case of an individual – to a fine not exceeding VT500,000 or by imprisonment to a term not exceeding 2 years, or both; or
 - (b) in the case of a body corporate – to a fine not exceeding VT1,000,000.
- (3) In determining whether a post causes harm, the court may take into account any factors it considers relevant, including:
- (a) the extremity of the language used;
 - (b) the age and characteristics of the victim;
 - (c) whether the digital communication was anonymous;
 - (d) whether the digital communication was repeated;

- (e) the extent of circulation of the digital communication;
 - (f) whether the digital communication is true or false;
 - (g) the context in which the digital communication appeared.
- (4) This section does not apply if the posted digital communication is an intimate visual recording to which the offence in section 16 applies.

16 Posting intimate visual recording without consent

(1) If a person, without reasonable excuse, posts a digital communication that is an intimate visual recording of a victim:

- (a) knowing that the victim has not consented to the posting; or
- (b) being reckless as to whether the victim has consented to the posting,

the person commits an offence punishable on conviction by the penalty set out in subsection (2).

(2) The penalty is:

- (a) in the case of an individual – to a fine not exceeding VT500,000 or by imprisonment to a term not exceeding 2 years, or both; or
- (b) in the case of a body corporate – to a fine not exceeding VT1,000,000.

(3) An individual under the age of 16 years cannot consent to the posting of an intimate visual recording of which he or she is the subject.

17 Court may make civil order during proceedings for offence under section 16

(1) On application made under this section and if the court considers it desirable to do so, the court conducting the proceedings for an offence under section 16 may make:

- (a) during the proceedings, all or any of the interim orders set out in subsection (2) against the defendant for the duration of the proceedings; and
 - (b) if the defendant is proven to have committed the offence, all or any of the orders set out in subsection (3) against the defendant.
- (2) Without limiting paragraph (1)(a), the court may make the following interim orders:
- (a) an order to take down or disable material;
 - (b) an order that the defendant cease or refrain from the conduct concerned;
 - (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual.
- (3) Without limiting paragraph (1)(b), the court may make the following interim orders:
- (a) an order to take down or disable material;
 - (b) an order that the defendant cease or refrain from the conduct concerned;
 - (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual;
 - (d) an order that a correction be published;
 - (e) an order that a right of reply be given to the affected individual;
 - (f) an order that an apology be published.

PART 5 LIABILITY OF ONLINE CONTENT HOST

18 Process for obtaining protection against liability for specific content

- (1) Civil or criminal proceedings may not be brought against an online content host if the online content host:
 - (a) receives a notice of complaint about a specific content; and
 - (b) complies with the requirements in subsection (2).
- (2) The requirements are that the online content host must, as soon as practicable but no later than 48 hours after receiving a notice of complaint:
 - (a) provide the author of the specific content with a copy of the notice of complaint, altered to conceal personal information that identifies the complainant if the host has received confirmation that the complainant does not consent to the host providing that information to the author; and
 - (b) notify the author that the author may submit a counter-notice to the host within 48 hours after receiving that notification.
- (3) If the host is unable to contact the author after taking reasonable steps to do so, the host must take down or disable the specific content as soon as practicable after taking those steps but not later than 48 hours after receiving a notice of complaint.
- (4) If the author submits a valid counter-notice in which the author consents to the removal of the specific content, the host must take down or disable the specific content as soon as practicable after receiving that counter-notice.
- (5) If the author submits a valid counter-notice in which the author refuses to consent to the removal of the specific content, the host must:
 - (a) leave the specific content in place; and
 - (b) as soon as practicable after receiving that counter-notice, notify the complainant of the author's decision; and
 - (c) if the author consents, provide the complainant with personal information that identifies the author.

- (6) If the author does not submit a valid counter-notice , the host must take down or disable the specific content as soon as practicable but no later than 48 hours after notifying the author under subsection (2).
- (7) A notice of complaint must:
- (a) state the complainant’s name and a telephone number, a physical address, and an email address for the complainant; and
 - (b) state the specific content, and explain why the complainant considers that the specific content is unlawful or breaches 1 or more Communication Principles and has caused harm; and
 - (c) provide sufficient details to enable the specific content to be readily located; and
 - (d) state whether the complainant consents to personal information that identifies the complainant being released to the author; and
 - (e) contain any other information that the complainant considers relevant.
- (8) A counter-notice must state:
- (a) the author’s name and a telephone number, a physical address, and an email address for the author; and
 - (b) whether the author consents to personal information that identifies the author being released to the complainant; and
 - (c) whether the author consents to the removal of the specific content.
- (9) An online content host must not disclose any personal information about the complainant or author except by order of a Magistrate or Judge made on an application under this subsection.

19 Further provisions related to section 18

- (1) The Commissioner may lodge a notice of complaint under section 18 on behalf of a complainant and provide advice and assistance to the complainant in relation to the complaint.

- (2) The protection conferred on an online content host by section 18 does not apply if:
- (a) the host does not provide an easily accessible mechanism that enables a user to contact the host about specific content in the manner provided in that section; or
 - (b) the person who provides the specific content does so on behalf, or at the direction, of the online content host.
- (3) Nothing in this section limits the right of an individual to injunctive relief in relation to the content of a digital communication posted by another person and hosted by the online content host.

PART 6 MISCELLANEOUS PROVISIONS

20 Immunity

- (1) A civil or criminal proceedings must not be brought against the Commissioner or any staff of the Authority for anything done or omitted to be done in good faith by him or her in carrying out his or her functions and in exercising his or her powers under this Act.
- (2) Subsection (1) does not apply if the Commissioner or any staff of the Authority acted in bad faith by him or her in carrying out his or her functions and in exercising his or her powers under this Act.

21 Conflict of interest

- (1) If the Commissioner has a conflict of interest in an investigation relating to a complaint received by him or her, the Commissioner must, in a written notice, disclose his or her interest to the Commission.
- (2) If the Commissioner discloses his or her interest, the Commission must appoint another person to preside over the investigation in that specific matter.

22 Report to the Authority

- (1) The Commissioner must, within 3 months after the end of each year for that year, provide a report to the Authority on:
 - (a) the general administration of this Act; and
 - (b) the activities of the Commissioner for that year.
- (2) The annual report must also include:
 - (a) the number of complaints made to the Commissioner and the nature of those complaints; and
 - (b) the number of complaints resolved, deferred, or refused.

23 Regulations

The Minister may, on the recommendation of the Commission after receiving advice from the Commissioner, make Regulations prescribing all matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) that are necessary or convenient to be prescribed for the carrying out or giving effect to the provisions of this Act.

24 Commencement

This Act commences on the day on which it is published in the Gazette.