

<http://researchcommons.waikato.ac.nz/>

Research Commons at the University of Waikato

Copyright Statement:

The digital copy of this thesis is protected by the Copyright Act 1994 (New Zealand).

The thesis may be consulted by you, provided you comply with the provisions of the Act and the following conditions of use:

- Any use you make of these documents or images must be for research or private study purposes only, and you may not make them available to any other person.
- Authors control the copyright of their thesis. You will recognise the author's right to be identified as the author of the thesis, and due acknowledgement will be made to the author where appropriate.
- You will obtain the author's permission before publishing any material from the thesis.

**Investigating New Zealand's Legal and Institutional Responses to
Child Pornography on the Internet and Evaluating our
Legislative Framework, to Determine its Effectiveness as a
Response to Internet Child Pornography**

New Zealand's Regulation of Internet Child Pornography

A thesis

submitted in fulfilment

of the requirements for the degree

of

Doctor of Philosophy in Law

at

The University of Waikato

by

Tawhana Ball



THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

2017

Abstract

The Internet has revolutionised the exchange of all forms of information, including that of an issue of great concern: child pornography. The consumption of child pornography is not a legislative or punitive problem. It is a law enforcement issue exacerbated by the main medium of supply, the Internet. The problem of the regulation of child pornography on the Internet has no universal answer. The solution to this concern will require a modulated response which will enable law enforcement agencies to adequately counter every aspect of the issue. This thesis examines New Zealand's classification system and the primary statutory authority which prohibits the proliferation of child pornography, the Films, Videos, and Publications Classification Act 1993.

Drawing on institutional, private and law enforcement narratives, this thesis investigates New Zealand's current legal responses to the consumption of child pornography by way of the Internet. The intention of this investigation is to ascertain whether institutional responses could be improved and to make recommendations to assist law enforcement agencies to respond more effectively to this concern. Empirical data has been gathered from law enforcement personnel through qualitative research and has provided a privileged insight into the complexities of child pornography investigations. This qualitative empirical research confirmed that New Zealand's child pornography legislation must be continually critiqued to ensure that it is keeping pace with technology. New Zealand's institutional responses also need to be constantly evaluated to guarantee that the capacity of law enforcement agencies to respond to the problem of child pornography keeps pace with the main medium of supply, the Internet. Moreover, this thesis contends that all forms of child pornography should be outlawed because of its potential to cause harm to children and society. Although, the recommendations of this thesis do not constitute the definitive answer to the issue of child pornography on the Internet, each individual aspect of the recommendations constitutes a critical component of an overall response to this concern.

Acknowledgements

I would like to thank all my friends and family who have assisted with my journey through the wilderness of academia. I will not name names but you all know who you are; many thanks and so much love to you all.

I would also like to thank my supervisors for their guidance and all the assistance they have given me over the last few years.

Finally, I must also thank all my research participants for their time and the invaluable information that they have so graciously imparted during the research phase of this thesis.

Table of Contents

Abstract	iii
Acknowledgements.....	iv
Table of Contents	v
Tables of Cases and Legislation	xii
Table of Figures.....	xx
List of Abbreviations	xxi
Overall Introduction.....	xxv
Chapter 1.....	1
Child Pornography and Harm.....	1
1.1 Overall Introduction	1
1.2 Child Pornography	2
1.2.1 Introduction	2
1.2.2 Defining Child Pornography and Distinguishing Paedophilia.....	2
1.2.3 Moral Panics and Child Pornography	4
1.2.4 The Evolution of Child Pornography	15
1.2.5 The Role of the Internet in Sexual Abuse	17
1.2.6 The Expansion of Child Pornography	20
1.2.7 The Internet and New Opportunities for Offenders	25
1.2.8 Child Pornography and Organised Crime.....	27
1.2.9 Child Pornography and Digital Imaging Technology.....	29
1.2.10 Child Pornography and Peer-to-Peer Technology.....	31
1.2.11 The Role of the Internet in Sexual Abuse	34
1.3 The Theory of Harm	36
1.3.1 Introduction	36
1.3.2 The Harm of Child Pornography and Punishment	36
1.3.3 Joel Feinberg's Theory of Harm and Child Pornography.....	41
1.3.4 Liberalism and Freedom of Expression	47
1.3.5 The Harm of Child Pornography to the Community and Society	51
1.3.6 Conclusion	61
1.4 Methodology.....	62
1.4.1 The Qualitative Production of Information.....	62
1.5 Overall Conclusion for Chapter 1	64
Chapter 2.....	66
The International Legal Framework.....	66

1.6	Overall Introduction	66
1.7	Children as Rights Holders and the United Nations Convention on the Rights of the Child 1989	67
1.7.1	Children as Rights Holders.....	67
1.7.2	The Source of New Zealand's International Obligations	76
1.7.3	The United Nations Convention on the Rights of the Child 1989 and Child Pornography	78
1.7.4	The Introduction of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000.....	81
1.7.5	The Establishment of Universal Standards	92
1.7.6	Recommendations	94
1.8	Overall Conclusion for Chapter 2	96
	Chapter 3.....	98
	The Classification System in New Zealand	98
1.9	Overall Introduction	98
1.10	The Optional Protocol and the Outlawing of Child Pornography	98
1.11	The Development of Censorship in New Zealand	99
1.11.1	What is Censorship in New Zealand?	99
1.11.2	The History of New Zealand's Censorship Law	100
1.12	The Films, Videos, and Publications Classification Act 1993 and Freedom of Expression.....	102
1.12.1	The Films, Videos, and Publications Classification Act 1993	102
1.12.2	New Zealand's Approach to Publications in the Digital Environment	105
1.13	Freedom of Expression	124
1.13.1	The International Protections	124
1.13.2	Freedom of Expression and Censorship in New Zealand.....	125
1.14	The Amendment Act 2005.....	136
1.15	The Classification of an Objectionable Publication in New Zealand	138
1.15.1	Introduction.....	138
1.15.2	The Office of Film and Literature Classification	138
1.15.3	The Purpose of the Classification System in New Zealand	144
1.15.4	The Classification Process	153
1.15.5	The Review of a Classification Decision	162
1.15.6	The Right of Appeal to the Courts	168
1.16	Overall Conclusion for Chapter 3	169
	Chapter 4.....	171
	Filtering the Internet.....	171

1.17	Overall Introduction	171
1.18	The Optional Protocol and Filtering of the Internet	171
1.19	Filtering of the Internet	172
1.19.1	Filtering Software and Technological Solutions to Child Pornography	172
1.19.2	Safeguarding the Protection of Legal Internet Content	174
1.20	New Zealand's Filtering System	175
1.20.1	The Introduction of Filtering in New Zealand	175
1.20.2	The Rationale for Filtering in New Zealand	176
1.20.3	The Purpose of the Filtering System	178
1.20.4	The Operation and Reality of the Filtering System	180
1.20.5	The Office of Film and Literature Classification and Filtering	181
1.20.6	The Legal Basis of the Filtering System	182
1.20.7	The Voluntary Nature of Filtering in New Zealand	185
1.20.8	Scope Creep	186
1.21	The Limitations of New Zealand's Filtering System	188
1.21.1	Filtering in Foreign Jurisdictions	190
1.22	The Department of Internal Affairs' Control Procedures	196
1.22.1	The Code of Practice	196
1.22.2	Oversight: The Independent Reference Group	200
1.22.3	The Appeal Procedure	202
1.22.4	Transnational Filtering of the Internet	203
1.23	Recommendations	206
1.23.1	The Encouragement of Filtering in other Jurisdictions	206
1.24	Overall Conclusion for Chapter 4	207
	Chapter 5	209
	Crimes and Law Enforcement	209
1.25	Overall Introduction	209
1.26	The Optional Protocol and Prosecuting Child Pornography Offences	209
1.27	The Prosecution of an Offender by New Zealand's Law Enforcement Agencies 210	
1.27.1	Introduction	210
1.27.2	New Zealand's Prosecution Provisions	211
1.27.3	Section 123	212
1.27.4	Section 124	224
1.27.5	Section 131	228
1.27.6	Section 131A	233

1.27.7	Section 145A	235
1.27.8	New Zealand's Law Enforcement Agencies.....	240
1.27.9	The Taskforce and Specialised Cross-agency Co-operation.....	247
1.27.10	The Seizure of an Objectionable Publication	248
1.27.11	The Investigation and Apprehension of an Offender	248
1.27.12	Conclusion.....	257
1.28	The Objectionable Publications and Indecency Legislation Bill and the Substantive Changes to Child Pornography Offences.....	257
1.28.1	Introduction.....	257
1.28.2	The Objectionable Publications and Indecency Legislation Bill	258
1.28.3	Substantive Changes to Child Pornography Offences.....	259
1.28.4	Recommendations	263
1.28.5	Conclusion.....	264
1.29	Overall Conclusion for Chapter 5	265
	Chapter 6.....	266
	Law Enforcement Concerns.....	266
1.30	Overall Introduction	266
1.31	The Legislative Challenges confronting Law Enforcement in New Zealand	267
1.31.1	The Privacy Act 1993 and the Right to Privacy.....	267
1.31.2	The New Zealand Bill of Rights Act 1990 and the Right to Privacy	269
1.31.3	The New Zealand Bill of Rights Act 1990 and Regulatory Offences.....	271
1.32	Mandatory Data Retention Periods for Internet Service Providers in New Zealand 274	
1.32.1	Introduction.....	274
1.32.2	The Optional Protocol and Mandatory Data Retention	274
1.32.3	The Right to Privacy and Mandatory Data Retention.....	274
1.32.4	Data Retention in New Zealand	276
1.32.5	Mandatory Data Retention in New Zealand	278
1.32.6	Mandatory Data Retention in the European Union	281
1.32.7	Mandatory Data Retention in the Republic of Ireland	282
1.32.8	Recommendations	284
1.32.9	Conclusion.....	285
1.33	Law Enforcement and Data Encryption.....	286
1.33.1	Introduction.....	286
1.33.2	The Optional Protocol and a Compulsory Order for an Encryption or Password Code 287	
1.33.3	The Right to Privacy and Compulsory Decryption	287

1.33.4	The Apple iPhone 6 and Google's Android Platform	288
1.33.5	Criticism of Apple and Google by Law Enforcement Agencies.....	291
1.33.6	PhotoDNA Technology.....	293
1.33.7	Law Enforcement and Support from the Private Sector	295
1.33.8	Recommendations	296
1.33.9	Conclusion	297
1.34	The Implementation of a Compulsory Order for an Encryption or Password Code 298	
1.34.1	Introduction	298
1.34.2	The Decryption of Encrypted Data and New Zealand's Legislation	298
1.34.3	The Implementation of a Compulsory Order to Decrypt Data.....	300
1.34.4	Recommendations	302
1.34.5	Conclusion	303
1.35	Additional Resources to enable International Law Enforcement Co-operation	304
1.35.1	Introduction	304
1.35.2	The Optional Protocol and Co-operation between Jurisdictions.....	304
1.35.3	The Challenges of Policing the Internet.....	307
1.35.4	Recommendations	314
1.35.5	Conclusion	316
1.36	The Placement of Liaison Officers	317
1.36.1	Introduction	317
1.36.2	Liaison Officers	318
1.36.3	Recommendations	323
1.36.4	Conclusion	323
1.37	The Signing of Additional Memoranda of Understanding	324
1.37.1	Introduction	324
1.37.2	Memoranda of Understanding	324
1.37.3	Recommendations	328
1.37.4	Conclusion	329
1.38	Streamlined Mutual Production Orders.....	329
1.38.1	Introduction	329
1.38.2	The Challenges in Controlling Internet Child Pornography.....	330
1.38.3	Making Requests for Mutual Assistance.....	333
1.38.4	The Assistance Offered by New Zealand to other Countries in Internet-based Child Pornography Investigations.....	335
1.38.5	Police-to-Police Assistance.....	337

1.38.6 The Implications of Substandard Laws and Agreements for New Zealand's Law Enforcement Agencies	338
1.38.7 Recommendations	341
1.38.8 Conclusion.....	342
1.39 Overall Conclusion for Chapter 6	343
Chapter 7.....	345
Sentencing for Child Pornography Offending	345
1.40 Overall Introduction	345
1.41 The Optional Protocol and Sentencing of an Offender	345
1.42 The Maximum Sentence for Child Pornography Offending in New Zealand	346
1.43 The Purpose of the Sentencing Act 2002	347
1.44 The Objectionable Publications and Indecency Legislation Bill and Sentencing	349
1.44.1 Introduction.....	349
1.44.2 The Purpose of the Objectionable Publications and Indecency Legislation Bill and Sentencing.....	349
1.44.3 Increasing Penalties for Child Pornography Offences	350
1.44.4 Other Proposed Amendments.....	354
1.44.5 Recommendations	356
1.44.6 Conclusion.....	357
1.45 Sentencing Guidelines for Child Pornography Offending	357
1.45.1 Introduction.....	357
1.45.2 Sentencing Guidelines in the United Kingdom.....	358
1.45.3 The Sentencing of Child Pornography Offenders in New Zealand	365
1.45.4 Recommendations	375
1.45.5 Conclusion.....	376
1.46 The Following up of Psychological Orders by the Courts	377
1.46.1 Introduction.....	377
1.46.2 The Sentencing Act 2002	377
1.46.3 The Reality of Psychological Programmes for Convicted Child Sexual Offenders	378
1.46.4 Recommendations	381
1.46.5 Conclusion.....	381
1.47 Overall Conclusion for Chapter 7	382
Conclusions	383
1.48 Introduction.....	383
1.49 Conclusions	386

1.49.1	The Harm of Child Pornography	386
1.49.2	The International Legal Framework	386
1.49.3	New Zealand's Censorship Legislation.....	387
1.49.4	New Zealand's Filtering System	388
1.49.5	Crimes and Law Enforcement.....	388
1.49.6	Mandatory Data Retention Periods for Internet Service Providers in New Zealand 389	
1.49.7	The Challenges for Law Enforcement Agencies from Advancements in Technology 390	
1.49.8	Co-operation with other Jurisdictions	390
1.49.9	Sentencing for Child Pornography Offending	391
1.50	Overall Conclusion	392
	Bibliography.....	395
1.51	Secondary Materials	395
1.51.1	Books and Chapters in Books.....	395
1.51.2	Documents, Conference Papers and Academic Works.....	402
1.51.3	Interview Participants and Emails	404
1.51.4	Journal Articles.....	406
1.51.5	Magazine Articles.....	418
1.51.6	Reports.....	418
1.52	Internet Resources.....	425
1.52.1	Media Reports	425
1.52.2	Websites and Blog Post.....	430

Tables of Cases and Legislation

Table of Cases

New Zealand:

Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

Care of Children Act 2004 (NZ).

Crimes Act 1961 (NZ).

Criminal Procedure Act 2011.

Criminal Proceeds (Recovery) Act 2009.

Crown Entities Act 2004 (NZ).

Customs Act 1913.

Customs Excise Act 1996 (NZ).

Education Act 1989.

Evidence Act 2006.

Extradition Act 1999.

Films, Videos, and Publications Classification (Prohibition of Child Pornography)
Amendment Bill 2000.

Films, Videos, and Publications Classification (Prohibition of Child Pornography)
Amendment Bill 2001.

Films, Videos, and Publications Classification Act 1993.

Films, Videos, and Publications Classification Amendment Act 2005.

Indecent Publications Act 1910.

Indecent Publications Act 1958.

Indecent Publications Act 1963.

Indecent Publications Amendment Act 1954.

Interpretation Act 1999.

Mutual Assistance in Criminal Matters Act 1992.

Mutual Assistance in Criminal Matters Amendment Act 1998.

Mutual Assistance in Criminal Matters Amendment Act 2002.

Mutual Assistance in Criminal Matters Amendment Act 2009.

New Zealand Bill of Rights Act 1990 (NZ).

Objectionable Publications and Indecency Legislation Bill 2013 (124-1).

Official Information Act 1982 (NZ).

Privacy Act 1993.

Search and Surveillance Act 2012.

Sentencing Act 2002.

Summary Proceedings Act 1954.

Telecommunications Information Privacy Code 2003.

Video Recording Act 1987.

Australia:

Broadcasting Services Act 1992 (Cth) (au).

Telecommunications Act 1997 (au).

Canada:

Criminal Code 1985 (ca).

International and Supranational Legislation:

Convention on the Rights of the Child 1989 (UN).

Directive 2006/24/EU of the European Parliament 2006.

European Convention on Human Rights 1953 (europa.eu).

European Union Charter of Fundamental Rights 2009.

International Covenant on Civil and Political Rights 1966 (un.org).

International Covenant on Economic, Social and Cultural Rights 1976 (un.org).

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN).

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure 2014 (un.org).

Universal Declaration of Human Rights 1948 (un.org).

Vienna Convention on the Law of Treaties 1969 (un.org).

Ireland:

Communications (Retention of Data) Act 2011 (ie).

United Kingdom:

Communications Data Bill 2008 (gb).

Criminal Justice Act 1988 (gb).

Criminal Justice Act 2003 (gb).

Obscene Publications Act 1959 (gb).

Obscene Publications Act 1964 (gb).

Online Safety Bill 2014 (gb).

Protection of Children Act 1978 (gb).

Terrorism Act 2000 (gb).

United States of America:

Adam Walsh Child Protection and Safety Act 2006 (us).

Child Pornography Prevention Act 1996 (us).

Tables of Cases

New Zealand:

Batty v Choven HC, Auckland CRI-2005–404–313, 11 December 2005.

Batty v Choven HC, Auckland CRI-2005–404–313, 2 May 2006.

Civil Aviation Department v MacKenzie [1983] NZLR 78 (NZ Court of Appeal).

Clark v Police NZHC, 2013.

Clarkson v McCarthy [1917] NZLR 624 (nz SC).

Collector of Customs v Lawrence Publishing Co Ltd (1986) 1 NZLR 404 (NZ Court of Appeal).

Cropp v Judicial Committee (2008) 3 NZLR 774 (nz SC).

Department of Internal Affairs v Merry (2000) 2000 DCR 733 (NZ District Court).

Department of Internal Affairs v Wigzell High Court Wellington CRI-2007–485–110, 20 November 2007.

Department of Internal Affairs v Young [2004] DCR 231 (NZ DC).

Dotcom v Attorney-General [2014] NZSC 199 (nz SC).

Espinosa v Department of Internal Affairs High Court Auckland CRI 2008–404–233, 7 October 2008.

Goodin v Department of Internal Affairs High Court Gisborne AP 11/01, 24 July 2002.

Hamed v R (2012) 2 NZLR 305 (nz SC).

Hartley v New Zealand Film and Literature Board of Review (2011) 3 NZFLBR (NZ New Zealand Film and Literature Board of Review).

Holland v R Court of Appeal, Wellington CA217/2012, 28 November 2012.

Howden v Ministry of Transport (1987) 2 NZLR 747 (nz CA).

Kellet v Police (2005) 21 CRNZ 743 (NZ HC).

Kerr-Hislop v Walton [1952] NZLR 267 (NZ SC).

Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington) (2000) 3 NZLR 570 (NZ Court of Appeal).

LM v R Court of Appeal, Wellington CA217/2012, 15 April 2013.

Meyrick v Police HC Hamilton CRI-2005–419–58, 31 July 2007.

Millar v Ministry of Transport (1986) 1 NZLR 660 (NZ CA).

Moonen v Film and Literature Board of Review (2000) 2 NZLR 9 (NZ Court of Appeal Wellington).

Moonen v Film and Literature Board of Review (2002) 2 NZLR 754 (NZ Court of Appeal).

Moonen v Film and Literature Board of Review [2002] NZCA 69 (NZ Court of Appeal Wellington).

MOT v Noort (1992) 3 NZLR 260 (nz CA).

New Zealand Customs Service v Yang District Court, Auckland CRI-2006–092–7202, 28 August 2007.

News Media Ltd v Film and Literature Board of Review (1997) 4 HRNZ 410 (nz HC).

Pickering v Police (1999) 5 HRNZ 154 (nz HC).

Police v McDonald [2010] [2010] NZAR 59 (nz HC).

Police v News Media Ownership Ltd (1975) 1 NZLR 610 (NZ NZCA).

R v Barlow (1996) 14 CRNZ 9 (nz CA).

R v D Court of Appeal, Wellington CA287/2010, 20 September 2010.

R v Hibberd (2001) 2 NZLR 211 (nz CA).

R v Kempen District Court, Christchurch CRI-2011–009–2703, 13 July 2012.

R v Millward (2000) DCR 2000 633 (NZ).

R v Spark (2009) 3 NZLR 625 (NZ CA).

R v Williams (2007) 3 NZLR 207 (nz CA).

R v Zhu [2007] NZCA 470 (NZ Court of Appeal).

Re “People” [1993] NZAR 543 (NZ Indecent Publications Tribunal).

Robson v Hicks Smith and Sons Limited NZLR 1113 (nz SC).

S v Auckland District Court and New Zealand Police High Court, Auckland M310/SW99, 11 March 1999.

S v S (1994) 1 NZLR 540 (nz).

Secretary for Justice and Others v Taylor (1978) 1 NZLR 252 (nz CA).

Shaw v DIA HC Wellington CRI-2005–485–121, 23 September 2005.

Silvester v Department of Internal Affairs HC Hamilton AP74/00, 7 November 2000.

Society for the Promotion of Community Standards Inc v Film and Literature Board of Review (2005) 3 NZLR 403 (NZ Court of Appeal).

Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd (1993) 2 NZLR 709 (NZ High Court).

Solicitor-General v Radio New Zealand Ltd (1994) 1 NZLR 48 (nz HC).

Sumpter v Stevenson [1939] NZLR 446 (nz SC).

Tararo v R (2012) 1 NZLR 145 (nz).

Tararo v R [2010] NZSC 157 (nz SC).

Canada:

R v Sharpe (2001) (ca SCC).

European Union:

C-293/12, C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014].

United Kingdom:

Atkins v Director of Public Prosecutions (2000) 2 All ER 425 (gb).

R v Curl (1772) 2 Stra 788; 93 ER 849 (gb).

R v Hicklin (1886) LR 3 QB 360 (gb).

R v Oliver & Ors (2003) 1 CrAppR 28 (gb;england.and.wales).

R v Sidley (1663) 1 Sid 168; 82 ER 1036 (gb).

R v Toomer (2001) 2 CrAppR(S) 8 (gb).

R v Wild (2002) 1 Cr App R (S) 37 (gb).

Robson v Hallett (1967) 2 QB 939 (gb).

United States of America:

Bantam Books, Inc v Sullivan, 372 58 (us 1963).

New York v Ferber, 458 747 (us 1982).

Osborne v Ohio, 495 103 (us 190AD).

US v Pugh, 515 F3d 1179 (us CA11 (Ala) 2008).

US v Sherman, 268 F3d 539 (us CA7 (Ill) 2001).

Table of Figures

Examination Process 1	160
Investigations Process 1	252

List of Abbreviations

ACMA – Australian Communications and Media Authority.

Administration Committee – Government Administration Committee.

Amendment Act – Films, Videos, and Publications Classification Amendment Act 2005.

Bill – Objectionable Publications and Indecency Legislation Bill 2013.

Bill of Rights Act 1990 – New Zealand Bill of Rights Act 1990.

Board of Review – Film and Literature Board of Review.

CCU or Unit – Censorship Compliance Unit.

Classification Act 1993 or Act – Films, Videos, and Publications Classification. Act 1993.

Classification Office or Office – Office of Film and Literature Classification.

COCA – Care of the Children Act 2004.

Commission – United Nations Commission on Human Rights.

Convention – Convention on the Rights of the Child 1989.

COPINE – Combating Paedophile Information Networks in Europe.

Corrections – Department of Corrections.

CPO – Australian Federal Police Child Protection Operations Team.

Customs Act 1996 – Customs Excise Act 1996.

Customs Service or Customs – New Zealand Customs Service.

Data Retention Directive – Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC.

Department – Department of Internal Affairs.

Disclosure Scheme – Child Sex Offenders Disclosure Scheme.

EU – European Union.

FBI – Federal Bureau of Investigation.

Filtering System – Digital Child Exploitation Filtering System.

First World Congress – First World Congress against the Sexual Exploitation of Children.

GCSB – Government Communications Security Bureau.

HSI – Homeland Security Investigations.

ICE Unit – Internet Child Exploitation Unit of the Peel Regional Police, Canada.

Internal Affairs – Department of Internal Affairs.

IP address or IP – Internet Protocol Address.

IRC – Internet Relay Chat.

ISP – Internet Service Providers.

Jacob Wetterling Act 1994 – Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act 1994.

Kit – Internet Safety Kit/Netsafe Safety Unit.

Law Society – The New Zealand Law Society.

Ministerial Committee of Inquiry – Ministerial Committee of Inquiry into Pornography 1987.

MLAT – Mutual Legal Assistance Treaty.

MOU – Memorandum of Understanding.

MP – Member of Parliament.

Mutual Assistance 1992 – Mutual Assistance in Criminal Matters Act 1992.

NGO – Non-Governmental Organisation.

OCEANZ – Online Child Exploitation Across New Zealand Unit.

Optional Protocol – Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000.

Panel or Sentencing Advisory Panel – The Sentencing Advisory Panel.

Privacy Principle – Information Privacy Principle.

Prohibition of Child Pornography Amendment Bill – Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill.

Retention of Data Act 2011 – Communications (Retention of Data) Act 2011.

Telecommunications Code 2003 – The Telecommunications Information Privacy Code 2003.

UK – United Kingdom.

UN – United Nations.

US – United States of America.

Vienna Convention – Vienna Convention on the Law of Treaties 1969.

Overall Introduction

The Research Question

This thesis contends that while New Zealand does have a system to outlaw child pornography, it is not adequate to fully realise the specialised forms of protection required for children. The main objective of this thesis is to investigate and document the legal and the institutional responses to protecting children as rights holders from child pornography on the Internet, within New Zealand. The main question this thesis attempts to answer is: Do New Zealand's current legislative and institutional responses to child pornography on the Internet provide adequate protection for children?

The thesis assesses the nature and quality of the New Zealand system in order to determine how it is utilised to restrict the consumption of child pornography via the Internet and exposes possible gaps in the system's responses. In doing so, this thesis acknowledges that although the State is currently fulfilling its obligations towards children as rights holders, additional measures must be employed to uphold their rights to protection. In particular, fulfilling children's rights must accommodate their specific requirements as children.

There is no universal answer to the issue of child pornography on the Internet and the changes necessary to strengthen these legislative and institutional responses will require a comprehensive analysis at many levels. The problem requires a modulated response which: recognises the particular needs of children as rights holders; improves the regulation of Internet content; enhances the ability of law enforcement agencies to respond to this issue, and provides more effective and appropriate punishment. It is these improved tactics which will provide children in New Zealand and around the world with an enhanced defence against the harms associated with child pornography.

The Foundations and Research Focus of this Thesis

This thesis utilises the term ‘child pornography’, which may be a matter of concern for some. For example, law enforcement agencies in New Zealand currently refer to such content as ‘child sexual abuse images’ because the term is considered to reflect more appropriately the abuse that has been perpetrated upon the children in the images. The application of the ‘term pornography’ to the content has been criticised by the Chief Censor of the Classification Office, Dr Andrew Jack, as the viewing of pornography by adults is a legitimate and legal form of entertainment.¹ Therefore, the argument is that using the term ‘pornography’ normalises the content of the images and might imply that the children have consented to the sexual abuse portrayed in the images. Although this concern is acknowledged, it has been decided nonetheless to employ the term ‘child pornography’ in this thesis. This decision is not intended to in any way justify the content but rather to recognise that the term is currently the most widely utilised terminology associated with objectionable publications depicting children.

This thesis also considers the therapeutic aspect of New Zealand’s punitive response to child pornography offending. The therapeutic dimension is a critical component of the sentencing of an offender by the Courts. From data collected as part of the research process for this thesis, it has become clear that the therapeutic approaches to child pornography offending are often manipulated by offenders, for example they will reveal information concerning uninvestigated crimes. However, the general thrust of this thesis is not to examine the theory or practice of therapeutic programmes but only to highlight their inclusion within the punitive response.

The consumption of child pornography via the Internet is a matter of serious concern in New Zealand. The Minister of Internal Affairs Peter Dunne, states that “this concern is taken very seriously by the Government which is totally horrified by and opposed to all forms of child pornography, including its consumption and

¹ Interview with Dr Andrew R Jack, Chief Censor, Office of Film and Literature Classification, New Zealand (9 June 2014) at 1.

distribution by means of the Internet.”² Despite a determined effort by the Government and its law enforcement agencies to respond to the situation, the problem has become increasingly complex and has escalated over recent years. This thesis focuses on the legal and institutional responses to this complex issue. An examination of the scope of the thesis below illustrates that the system that New Zealand has adopted is itself highly complex. The consequence of this complexity is that the system’s measures are not cohesive or comprehensive overall. A wide-ranging approach must address all features of the problem and all possible responses. Indeed, one of the aims of the thesis is to show where improvements could be made to the existing system in order to fill in gaps in the institutional and legal response to the consumption of child pornography by way of the Internet. Furthermore, researching this topic has revealed a lack of academic literature relating to the classification system and more specifically to New Zealand attempts to suppress the consumption and dissemination of child pornography via the Internet. This thesis aims to contribute to the academic literature by building knowledge of the classification process and recommending ways in which to strengthen its legal and institutional responses. It will also enable this knowledge to be shared with other jurisdictions.

In New Zealand, the Films, Videos, and Publications Classification Act 1993³ (‘Classification Act 1993’ or ‘Act’) and the Films, Videos, and Publications Classification Amendment Act 2005⁴ (‘Amendment Act’) contain the main statutory measures that enable the suppression of child pornography which has been sourced from the Internet within this jurisdiction. This thesis explores New Zealand’s legislative and institutional responses to the outlawing of child pornography. In particular it scrutinises how the law operates to prohibit child pornography. It also evaluates whether the law could be improved to ensure the

² Interview with Peter Dunne, Minister of The Department of Internal Affairs of New Zealand (3 July 2014) at 1.

³ Films, Videos, and Publications Classification Act 1993.

⁴ Films, Videos, and Publications Classification Amendment Act 2005.

greater protection of children and to guarantee that it is responding sufficiently to the main medium of supply, the Internet.

One of the most pressing reasons to justify the outlawing of child pornography is that studies of convicted paedophiles⁵ indicate that the majority of such individuals will continue to consume and seek out this material.⁶ Furthermore, the compulsion to view child pornography on the Internet can escalate to contact offences against children.⁷ Detective Senior Sergeant John Michael, of the Online Child Exploitation Across New Zealand specialist Police unit, confirms that the New Zealand Police have undertaken online investigations which have revealed contact offending against New Zealand's children by users of online child pornography.⁸ Michael is also insistent that there is a clear link between viewing child pornography and contact offending against children.⁹ There is evidence to show that paedophiles are actively stalking children on the Internet, seeking to lure them into supplying them with new content or into real world meetings where they can be sexually abused.¹⁰ New Zealand is no exception to this trend and its children are also being targeted by paedophiles whose aim is to produce and disseminate new content across the Internet.¹¹

Although the production of child pornography is a major concern, it must be distinguished for the purpose of this thesis from the supply and consumption of this

⁵ For an overview of these studies refer to L Webb, J Craissati and S Keen "Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters" (2007) 19 Sex Abuse 449 at 449–452.

⁶ See Drew A Kingston and others "Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography use on Recidivism Among Sexual Offenders" (2008) 34 Aggressive Behavior 341 at 345–350.

⁷ Kerry Sheldon and Dennis Howitt *Sex Offenders and the Internet* (John Wiley and Sons, Chichester, 2007) at 249.

⁸ Interview with John Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand) (10 June 2014) at 3.

⁹ At 2.

¹⁰ John Carr *Child Pornography* (2008) at 20.

¹¹ Aaron Leaman "Te Awamutu Man Sentenced for Role in Global Child Pornography Ring" *Stuff.co.nz* (26 April 2013) <<http://www.stuff.co.nz/waikato-times/news/8600745/Te-Awamutu-man-sentenced-for-role-in-global-child-pornography-ring>>; Waikato Times "Couple Facing Child Pornography Charges" (7 June 2012) *Stuff.co.nz* <<http://www.stuff.co.nz/waikato-times/7234227/Couple-facing-child-exploitation-charges>>.

content. It is contended that the Internet itself is primarily a mechanism or vehicle for the supply of child pornography. Consequently, the *primary* focus of this thesis is on the consumption of this content, as it is the ease of consumption via the Internet which significantly contributes to this category of offending both domestically and internationally.¹² It is the Internet and its particular affordances that now facilitate the mass consumption of thousands of images at the click of a button.¹³ Furthermore, this thesis also aims to help improve New Zealand's response to combating the consumption of child pornography and its resultant harms through a comprehensive analysis of the current legal response to child pornography offending.¹⁴ It provides case studies and examples of problems that the law has sought to address in order to prevent actual and potential harm to children.¹⁵

The Structure of this Thesis

This thesis comprises eight chapters. Chapter 1 discusses the consumption and dissemination of child pornography. This chapter examines the role of the Internet in facilitating the sexual abuse of children around the world, including New Zealand. Chapter 1 confirms that Feinberg's theory of harm justifies the outlawing of this content. The chapter also considers the different types of harm that such content causes children and society, using Feinberg's theory as the rationale for outlawing these harms. Finally, the chapter argues that the gathering of empirical data is necessary to expand the pool of information on this topic.

Chapter 2 explores the status of children as rights holders under international law and New Zealand's domestic legislation. This chapter also covers the theoretical concept of children's autonomy which draws attention to some of the challenges

¹² Ian O'Donnell and Claire Milner *Child Pornography Crime, Computers and Society* (Willan Publishing, Devon, 2007) at ch 2.

¹³ At ch 2.

¹⁴ Suzanne Ost *Child Pornography and Sexual Grooming - Legal and Societal Responses* (Cambridge University Press, New York, 2009) at 1.

¹⁵ At 1.

posed by bestowing legal rights upon children. Chapter 2 then examines New Zealand's international obligations to address concerns about child pornography as required by the Convention on the Rights of the Child 1989 (Convention).¹⁶ The examination reviews some of the concerns about this international instrument which have resulted in calls for greater transnational co-operation¹⁷ and the enactment of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 ('Optional Protocol').¹⁸ Chapter 2 then explains how the Optional Protocol extends New Zealand's obligation to protect children from child pornography.¹⁹ As a result, Chapter 2 also argues for the adoption of universal standards to assist with the investigation and criminal prosecution of child pornographers.

Chapter 3 provides an overview of New Zealand's censorship legislation and its subsequent classification system, with particular reference to child pornography. It also scrutinises the need to balance children's rights with competing interests such as the right to freedom of expression. It investigates the classification process and its appeal provisions. The chapter also critically examines whether New Zealand's classification system is adequately addressing the State's obligation to suppress all child pornography by utilising the Optional Protocol's guidelines as a functional framework.

The thesis then discusses a particularly complex and controversial preventative aspect of this framework, filtering the Internet. The controversy surrounding this topic is examined in order to demonstrate the difficulties associated with protecting freedom of expression from scope creep. Chapter 4 scrutinises the introduction of filtering software in Australia and the United Kingdom, as these countries are both

¹⁶ Convention on the Rights of the Child 1989 (UN).

¹⁷ World Conference on Human Rights *Vienna Declaration and Plan of Action* (A/CONF.157/23 1993) at [45, 53].

¹⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN).

¹⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 1.

signatories to the Optional Protocol.²⁰ It also examines New Zealand's Digital Child Exploitation Filtering System ('Filtering System') and whether its rationale is an acknowledgement that children are rights holders because they require this particular form of protection. The Filtering System is scrutinised to determine whether it will assist New Zealand to fulfil its increased obligations to its children. The chapter also investigates the efficacy of New Zealand's Filtering System compared to other jurisdictions and assesses whether it should be utilised as a model for the introduction of filtering software overseas.

Chapter 5 introduces another aspect of the Optional Protocol's framework and examines the prosecution provisions of New Zealand's classification legislation. The chapter then illustrates the processes associated with the investigation and prosecution of an offender. It also provides an overview of the law enforcement agencies tasked with investigating child pornography offending. This overview highlights the mandates and operational functionality of these specialist agencies and explores to what extent their responses are informed by children's rights. The substantive changes to child pornography offences within the Objectionable Publications and Indecency Legislation Bill 2013 ('Bill') are also discussed in order to investigate whether the Bill raises awareness of children as rights holders. This discussion involves assessing the amendments to determine whether they assist child pornography investigations and New Zealand to meet its obligations in accordance with the Optional Protocol.

The purpose of Chapter 6 is to investigate various concerns of law enforcement agencies. These concerns include the retention of subscriber data by New Zealand's Internet Service Providers. The chapter discusses why a mandatory data retention could provide New Zealand's children with enhanced protection and alleviate concerns about the State's ability to achieve its obligations in accordance with the Optional Protocol. Chapter 6 also considers law enforcement agencies' concerns

²⁰ United Nations "United Nations Treaty Collection" (19 May 2015) United Nations <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en>.

about not receiving sufficient assistance from the private sector to counter the encryption of software. The chapter will contemplate whether an amendment to the Classification Act 1993 to compel a suspected child pornographer to provide access to encrypted software would be justified. Chapter 6 then focuses on concerns about operational co-operation between distinct jurisdictions and considers whether additional resources should be afforded to New Zealand's law enforcement agencies to assist with co-operation between jurisdictions. The chapter also investigates the usefulness of Memoranda of Understanding and streamlined mutual production orders as avenues to increase assistance between jurisdictions. Finally, the placement of additional Liaison Officers is also discussed in order to determine whether New Zealand's institutional responses could be advanced by the placement of additional personnel in strategic locations.

Chapter 7 explores the proposed amendments to sentencing within the Objectionable Publications and Indecency Legislation Bill 2013 to evaluate whether these provisions sufficiently address concerns about sentencing. Sentencing Guidelines in the United Kingdom are scrutinised to ascertain whether the introduction of New Zealand guidelines might be beneficial to the sentencing of child pornography offenders. Chapter 7 also investigates whether the Department of Corrections is adequately implementing Court-mandated treatment programmes for convicted child pornographers before they are released from prison. The chapter explores the question of whether more adequate sentencing of offenders reduces the potential risks to children and also assists New Zealand to fulfil its obligations under the Optional Protocol. This obligation requires the State to provide appropriate penalties that take into account the nature of child pornography offending.²¹

Chapter 8, the final chapter, contains conclusions which summarise the various areas that this thesis has discussed and the recommendations that have been made.

²¹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(3).

The chapter discusses how these recommendations meet the aim of the thesis, and then sets out the general conclusions.

Methodology

The methodology adopted for use in this thesis was primarily that used in conventional legal analysis of the positive law, but with some emphasis on the context in which the laws were made and operate. The author collected and examined information from primary legal sources such as conventions, protocols, statutes and case law, as well as secondary sources such as publications and websites. A positive analysis of the law was conducted to critically examine and interpret the law. Positivism suits this research project because it assists with the complex analysis of legal documents such as case law and with understanding its accuracy and whether its application meets the objectives of the legislation.²²

Basic case law analysis and comparison were also utilised within this thesis. Case law analysis enables the thesis to illustrate how the Courts interpret and apply the law.²³ The analysis was initially focused on New Zealand's domestic case law but was subsequently expanded to include case law from other jurisdictions. The examination of case law from other jurisdictions is intended to illustrate their application of the law and also to provide a contrast to New Zealand's case law. The cases were accessed through databases such as Westlaw NZ, Brookers, HeinOnline and Westlaw International.

The analysis of the legal documentation was both critical and comparative. A critical analysis of the law including statutes, case law and associated policy documentation was the dominant method applied in this thesis. A critical analysis was required to contextualise the law by recognising its importance and establishing

²² Tamara Hervey and others *Research Methodologies in EU and International Law* (Bloomsbury Publishing, Oxford, 2011) at 38.

²³ William Putman *Legal Research* (Cengage Learning, New York, 2009) at 158.

that the law is part of a broader mode of research.²⁴ A comparative study is an examination of the law between jurisdictions and is undertaken to aid legislative reforms.²⁵ In this thesis the comparison involved comparing foreign and domestic legislation that emphasised solutions offered in other jurisdictions to online child pornography offending. There are also ongoing developments in New Zealand's legislation to outlaw child pornography from the Internet. This thesis examines such developments up to the 28 of February 2015.

An analysis of the New Zealand Government's background documents which included Bills, Select Committee Reports and Hansard provided important information. Both statutory and non-statutory documentation were used, sourced electronically through official websites. The analysis contextualised the law so that its intended purpose could be ascertained to determine whether the current operation of the Classification Act 1993 meets its legal objectives. Moreover, to provide further background and insight into the analysis of the interview material, additional resources including journal articles from other disciplines were utilised. These resources were accessed through academic websites including SAGE, JSTOR and ScienceDirect. The significance of the interdisciplinary aspect to this thesis is that it provided valuable background information on child pornography offending. It has also enabled this thesis to discuss the therapeutic aspect of New Zealand's punitive response to child pornography offending. The therapeutic dimension is a critical component of the sentencing of an offender by the Courts.

The analysis is supplemented by qualitative empirical research. Qualitative research utilises empirical methods to interpret the workings of legal processes.²⁶ Significantly, empirical data allows the author to provide this thesis with the ability to access the insights and experience of experts who respond to online child pornography offending. This is pioneering research, without which this thesis

²⁴ Markus Dubber "Critical Analysis of Law Interdisciplinarity, Contextuality, and the Future of Legal Studies" (2014) 1 Critical Analysis of Law: An International & Interdisciplinary Law Review 1 at 1.

²⁵ Peter De Cruz *Comparative Law in a Changing World* (3 edition ed, Routledge-Cavendish, London, 2006) at 6.

²⁶ Susan Bibler Coutin *Qualitative Research in Law and Social Sciences* (2012) at 1.

would not have been as rich. The experts were interviewed and responded to using open-ended questions. The purpose of the questions was to facilitate a discussion of their experiences and to help them to identify any deficiencies in New Zealand's response to the distribution of child pornography through the Internet. The interviews were then transcribed and analysed to identify deficiencies in the law and in institutional responses to it. Numerous experts have graciously given their time and imparted highly valuable information which has enabled this thesis to evaluate New Zealand's responses to child pornography offending via the Internet, and for that I am very grateful. However, the views expressed during these interviews do not necessarily represent the views of any given organisation. Ethical approval to conduct these interviews has also been sought by this research project and granted by Te Piringa, Faculty of Law Ethics Committee.

It must also be acknowledged by this thesis that the majority of interviewees are members or associates of various executive branches of government. Therefore, the views of these participants will contain an enforcement bias as they have a vested interest in ensuring that the law is enforced. It must also be further acknowledged that this bias has the potential to impact upon the recommendations of the thesis. The significance of this bias is that the thesis may become inclined towards achieving more efficient law enforcement with less focus on the rights of offenders. However, the focus of this thesis has been on improving legal and institutional responses to the consumption of child pornography across the Internet. An element of this bias was there before this qualitative empirical research was conducted. This thesis contends that although this bias may well be present, the views of the interviewees are still valid and important to this field of academic research.

Chapter 1

Child Pornography and Harm

1.1 Overall Introduction

Chapter 1 of this thesis discusses the evolution of child pornography and then demonstrates how the issue has been compounded by the arrival of the Internet.²⁷ It establishes that the public's concern about the availability of child pornography on the Internet is genuine and although there is a moral panic concerning the sexual abuse of children, this thesis has in no way been influenced by a moral panic. The chapter will investigate how the Internet²⁸ and digital technology²⁹ have been utilised to facilitate a substantial increase in the consumption³⁰ of child pornography around the world.³¹ This development has also generated other significant issues which will also be examined within the chapter. Chapter 1 will confirm how the Internet is utilised to facilitate the sexual abuse of children around the world, including New Zealand.³² Feinberg's theory of harm is examined to justify the outlawing of this content and also to illustrate the different types of harm that child pornography causes to children and society. Chapter 1 also advocates for the qualitative production of empirical data which is required to expand the pool of academic information about this concern.

²⁷ Monique Mattei Ferraro, Eoghan Casey and Michael McGrath *Investigating child exploitation and pornography* (Elsevier/Academic, Amsterdam [etc], 2008) at 11.

²⁸ The Internet is a large system of connected computers that allows people around the world to share information and communicate with each other. For more information see: Committee on the Internet in the Evolving Information Infrastructure and others *The Internet's Coming of Age* (1st edition ed, National Academies Press, Washington, DC, 2001) at ch 1.

²⁹ Digital technologies are electronic devices and resources that generate, store or process data. For more information see: Chris Woodford *Digital Technology* (Evans Brothers, London, 2006) at 6–12.

³⁰ Consumption in this context refers to the intentional searching and then viewing or downloading of child pornography.

³¹ Hansard (5 March 2003) 606 New Zealand Parliamentary Debates 3978 at 3978; Hansard (8 February 2005) 623 New Zealand Parliamentary Debates 18428 at 18428.

³² United States General Accounting Office *Child Pornography is Readily Accessible Over Peer-to-Peer Networks* (GAO-03–537T) at 2.

1.2 Child Pornography

1.2.1 Introduction

This subchapter discusses the definition of child pornography and then draws attention to the distinction between a paedophile and a child molester. This subchapter then defends the thesis against any suggestion that it has been influenced by a moral panic surrounding the issue of child sexual abuse.³³ It will establish that the thesis takes a scholarly approach to an issue of serious concern and not based on an emotional reaction such as a moral panic. The section also investigates the evolution of child pornography and illustrates how the Internet has helped create a considerable upsurge in the consumption of child pornography within New Zealand. It also confirms that the dissemination of child pornography on the Internet is a serious concern affecting children all around the world.

1.2.2 Defining Child Pornography and Distinguishing Paedophilia

The definition of what constitutes child pornography is difficult to establish because of the differences in terminology and legislation between jurisdictions. The content that can be labelled as child pornography is also extremely broad in scope which increases the complexity of this definition.³⁴ Michael Seto defines child pornography as the:³⁵

Visual depictions of children that are sexually provocative or that show children engaged in sexual activity whether with other children or adults.

³³ Child sexual abuse in this context refers to the coercion of a child to engage in sexually explicit conduct or for the purpose of producing a visual depiction of such conduct. For more on this definition see: Lisa Hinkelman and Michelle Bruno "Identification and Reporting of Child Sexual Abuse: The Role of Elementary School Professionals" (2008) 108 *The Elementary School Journal* 376; *S v S* (1994) 1 NZLR 540 (nz).

³⁴ Suzanne Ost *Child Pornography and Sexual Grooming - Legal and Societal Responses* (Cambridge University Press, New York, 2009) at 29.

³⁵ Michael C Seto, American Psychological Association *Pedophilia and Sexual Offending Against Children Theory, Assessment, and Intervention* (American Psychological Association, Washington, 2008) at 54.

However, in New Zealand the legal definition of child pornography³⁶ is simply any content “involving a child³⁷ under 18 years of age that is considered to be injurious to the public good” in accordance with Sections 3 and 3(2)(a) of the Films, Videos, and Publications Classification Act 1993.³⁸ This definition also extends to fictional content consisting of literature and pseudo-images. A pseudo-image in this context can be defined as a computer-generated image that does not necessarily involve the sexual abuse of an actual child.³⁹ This content encourages the sexual objectification of children and also increases their vulnerability.⁴⁰ Accordingly, the consumption of this fictional content involves attitudinal harm to society which is considered to have the potential to injure the public good.

Another important consideration for this thesis is to distinguish a paedophile from a child molester. A paedophile can be defined as an individual with a sexual preference for prepubescent children,⁴¹ and a child molester can be defined as an individual who has engaged in sexual contact with a child.⁴² The significance of this distinction is that although child pornography offending is often indicative of paedophilia⁴³ it does not necessarily mean that this category of offender is a child molester.⁴⁴ The terms are often used interchangeably by the public and also the press which can result in a moral panic in which all paedophiles are mislabelled as child molesters or sexual offenders.⁴⁵

³⁶ For an in-depth analysis of this definition please refer to Chapter 3. Further legal definitions of child pornography can be found in Chapter 2.

³⁷ A child in this context is any person under 18 years of age. For an in-depth discussion on the complexity of defining a child please refer to Chapter 2.

³⁸ Films, Videos, and Publications Classification Act 1993 ss 3, 3(2)(a).

³⁹ Ost, above n 8, at 124–127.

⁴⁰ At 125.

⁴¹ Seto, American Psychological Association, above n 9, at 3.

⁴² At vii.

⁴³ At 56.

⁴⁴ At 56–61.

⁴⁵ At vii.

1.2.3 Moral Panics and Child Pornography

This thesis is aware of the possibility that New Zealand is currently experiencing a moral panic about the threat that the Internet and child pornography poses to society.⁴⁶ A moral panic can be described as:⁴⁷

A feeling held by a substantial number of the members of a given society, that evil doers pose a threat to the society and to the moral order as a consequence of their behaviour and therefore, something should be done about them and their behaviour.

It must be stated that the media's sensationalist coverage undoubtedly plays a significant role in influencing the level of concern.⁴⁸ Additionally, the frequency with which child sexual abuse investigations have been reported⁴⁹ illustrates how the media can over-report a single, high-profile criminal issue such as child pornography offending.⁵⁰ This type of over-reporting increases the acceptance of myths which run contrary to empirical evidence concerning sex crimes and sexual offenders.⁵¹ Excessive representations by the media of persons who are found to be in possession of child pornography and to be grooming young people through social networking sites ensure that the public believe that this form of behaviour is out of control.⁵²

⁴⁶ Suzanne Ost "Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society" (2002) 29 Journal of Law and Society 436 at 459.

⁴⁷ Erich Goode *Moral panics* (Blackwell, Oxford, UK ; Cambridge, USA, 1994) at 11.

⁴⁸ Ost, above n 8, at 155.

⁴⁹ See 3News "Search 3News Child Pornography" (6 December 2013) 3News <<http://www.3news.co.nz/3SearchResults.aspx?q=child%20pornography&ie=UTF-8&cof=FORID%3A10&cx=partner-pub-0784612283000026:7425741258>>; The New Zealand Herald "Search Results for 'Child Pornography New Zealand'" (6 December 2013) The New Zealand Herald <<http://www.nzherald.co.nz/child20pornography20new20zealand/search/results.cfm?kw1=child%20pornography%20new%20zealand&kw2=&st=gsa>>.

⁵⁰ Marcus A Galeste, Henry F Fradella and Brenda Vogel "Sex Offender Myths in Print Media: Separating Fact from Fiction in US Newspapers" (2012) 13 Western Criminology Review at 14.

⁵¹ Jill S Levenson and others "Public Perceptions About Sex Offenders and Community Protection Policies" (2007) 7 Analyses of Social Issues and Public Policy 137 at 142.

⁵² Ost, above n 20, at 459.

In recent years there have been frequent media reports concerning the dangers that await children when they access the Internet or social networking sites such as Facebook.⁵³ Sensationalist reporting allows the media to adopt a crusading attitude, in which incarcerating offenders is praised, while a lack of vigour by law enforcement agencies is condemned as negligence toward the victims.⁵⁴ What is more, the press is able to build on the community's existing concerns about child sexual abuse.⁵⁵ These concerns are aggravated by the characteristics of the Internet⁵⁶ and the popularity of social networking among young people.⁵⁷ Via social networking sites including Instagram and Facebook, the Internet is simply another avenue which enables paedophiles to interact with children.⁵⁸ When the press draws the public's attention to an investigation such as one including collections of child pornography with titles such as 'pre-teen' and 'two-year-old toddler',⁵⁹ moral panic can be fuelled.⁶⁰ Such moral panic is heightened by the linking of sexual abuse discourses such as 'stranger danger'⁶¹ with the Internet.⁶²

In a moral panic such as this, child pornographers are seen as engaging in unacceptable and immoral behaviour that is a threat to society,⁶³ and a danger to the values and interests of the community.⁶⁴ Although the author agrees with this aspect

⁵³ Ethel Quayle and Kirt M Ribisl *Understanding and Preventing Online Sexual Exploitation of Children* (Routledge, Abingdon, Oxon ; New York, 2012) at 116.

⁵⁴ Philip Jenkins *Moral panic* (Yale University Press, New Haven, CT, 1998) at 219.

⁵⁵ Quayle and Ribisl, above n 27, at 116.

⁵⁶ At 116.

⁵⁷ For an analysis of why social networking is so popular see Danah Boyd *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life* (2007–16 2007).

⁵⁸ Quayle and Ribisl, above n 27, at 116.

⁵⁹ 3News "Judge Horrified by Child Pornography" *3news.co.nz* (26 March 2010) <<http://www.3news.co.nz/Judge-horrified-by-child-pornography/tabid/423/articleID/148303/Default.aspx>>.

⁶⁰ Quayle and Ribisl, above n 27, at 116.

⁶¹ The public often believe that strangers pose the greatest danger to young children. However, studies clearly indicate that children are considerably more likely to be abused by a family member or an acquaintance of the family. For more information on this issue see Carol Vanzile-Tamsen, Maria Testa and Jennifer A Livingston "The Impact of Sexual Assault History and Relationship Context on Appraisal of and Responses to Acquaintance Sexual Assault Risk" (2005) 20 *J Interpers Violence* 813; Jonathan Simon "Megan's Law: Crime and Democracy in Late Modern America" (2000) 25 *Law & Social Inquiry* 1111.

⁶² Quayle and Ribisl, above n 27, at 116.

⁶³ Goode, above n 21, at 31.

⁶⁴ Stanley Cohen *Folk Devils and Moral Panics* (2nd ed, St Martin's Press, New York, 1972) at 9.

of a moral panic, the point of difference between this thesis and a moral panic is that this thesis is primarily concerned with the protection of children as rights holders and not the outcasting of child pornographers. Furthermore, this type of moral panic is demonstrated by how child pornography offenders are regarded as the enemy of society.⁶⁵ They are deviants or outsiders who are considered to be legitimate targets of self-righteous hostility and anger.⁶⁶ Sometimes the object of a moral panic can be relatively novel.⁶⁷ At other times the object is something that has been in existence for some time, such as child pornography, which can suddenly reappear as an intense focus of the public's concern.⁶⁸ Another characteristic of a moral panic is that the sudden focus on a particular problem is either unfounded or based on an exaggerated threat.⁶⁹ However, it is submitted that even though there is clearly a moral panic concerning child molesters being able to use the Internet as a means to contact and sexually abuse children,⁷⁰ this thesis is not part of that panic. This thesis will clarify that there is a problem although not precisely of the sort typically exemplified by the media. The recommendations and conclusions of this thesis will also be supported by robust evidence, unlike the moral panic that is currently being witnessed.

The general moral panic about sexual offending and the Internet is really a panic about many different factors,⁷¹ including the loss of childhood innocence and the forfeiture of both parental and State control of children.⁷² The basis of the author's proposition is that although the Internet is being utilised to disseminate child pornography, the Internet itself is not directly responsible for the grooming or sexual abuse of children.⁷³ This proposition is partly based on the assumption that

⁶⁵ Goode, above n 21, at 31.

⁶⁶ At 31.

⁶⁷ Kenneth Thompson, ebrary, Inc *Moral Panics* (Routledge, London ; New York, 1998) at 8.

⁶⁸ At 8.

⁶⁹ For the characteristics of a moral panic see Goode, above n 21, at 33–41.

⁷⁰ Quayle and Ribisl, above n 27, at 116–119.

⁷¹ See Roberto Hugh Potter and Lyndy A Potter “The Internet, Cyberporn, and Sexual Exploitation of Children: Media Moral Panics and Urban Myths for Middle-class Parents?” (2001) 5 Sex Cult 31.

⁷² Potter and Potter, above n 45.

⁷³ See Charles Krinsky *Moral Panics Over Contemporary Children and Youth* (Ashgate Publishing, Ltd, 2008) at ch 2.

the Internet is the tool that is most often utilised to commit such offences.⁷⁴ However, the Internet is only a transmission medium that makes no distinction between the morality and immorality or legality or illegality of the information it transmits.⁷⁵ For that reason, to claim that the Internet is the source of the problem is groundless and simply untrue⁷⁶ as the Internet can also be used to convey information that is both morally acceptable and legal.⁷⁷

There are also symbolic politics which concern threats to children being played out in this field of activity,⁷⁸ where interest groups move their focus from one issue to another in order to maintain pressure on the first issue of concern.⁷⁹ One of the major spurs for attempts to regulate the Internet is the moral panic concerning cyber-porn.⁸⁰ Shifting the focus of public attention onto children's rights and their involvement with the Internet has the potential to fundamentally change the moral and legal climate in order to protect and maintain the social order of society.⁸¹ Therefore, it is argued by the author that this moral panic which is supposedly based on protecting children from harm is at least in part, a covert attempt to regulate all forms of pornography and the Internet itself.⁸² Moreover, the necessity to regulate the Internet is amplified by the threat it poses to the traditional role of parents and the State in the regulation process which controls all aspects of society.⁸³ This concern is compounded by the fact that children are often more technologically savvy than their parents.⁸⁴ The author therefore argues, that the Internet is not the

⁷⁴ This assumption is untrue. Research establishes that the number of sex crimes against youth that are not Internet related far outweighs those that do involve the Internet. For more information see Janis Wolak, Kimberly Mitchell and David Finkelhor *Internet Sex Crimes Against Minors: The Response of Law Enforcement* (2003); Howard Snyder and Melissa Sickmund *Juvenile Offenders and Victims: 2006 National Report* (2006).

⁷⁵ Krinsky, above n 47, at 32.

⁷⁶ See Ost, above n 8, at 171; Chas Critcher "Media, Government and Moral Panic: the Politics of Paedophilia in Britain 2000-1" (2002) 3 *Journalism Studies* 521; Allison Cavanagh "Taxonomies of Anxiety: Risks, Panics, Paedophilia and the Internet" [2007] *Electronic Journal of Sociology* 1.

⁷⁷ Krinsky, above n 47, at 32.

⁷⁸ Philip Jenkins *Intimate Enemies* (Transaction Publishers, 1992) at 10.

⁷⁹ At 10.

⁸⁰ Lelia Green *Communication, Technology and Society* (SAGE, 2002) at 150.

⁸¹ Jenkins, above n 52, at 10.

⁸² At 10.

⁸³ Krinsky, above n 47, at 34.

⁸⁴ At 34.

real culprit in the moral panic about child pornography. In this particular instance it is less the technology that turns out to be the subject of concern, and more the potential for loss of parental and State control.⁸⁵

A moral panic such as that described above implies that this thesis, the present law, and official actions taken in response to child pornography are irrational and are in no way based on sound evidence.⁸⁶ The author contends that in the present situation that is simply untrue. It is argued that this PhD thesis and the current legal stance toward child pornography offending are both rational and necessary.⁸⁷ Moreover, the desire of society to protect children from potential harm is the foundation and legitimating factor that underpins both this thesis and most importantly of all, New Zealand's present legislation.⁸⁸ This is because the possession of child pornography encourages the consumption of such material and the acceptance and tolerance of children as sexual objects.⁸⁹ Nevertheless, in wanting to protect children from potential harm, there is a need to recognise that many of the widely held societal beliefs regarding sexual offenders are myths⁹⁰ and are not based on empirical evidence.⁹¹ Furthermore, and most significantly, the criminal sanctions for the possession of child pornography within New Zealand's legislation, which serve to discourage those who actively seek out this material,⁹² will become more effective when policymakers reject this type of unfounded evidence and reject such myths.⁹³

The author argues that policy based on sound research that is not a knee-jerk reaction to reports in the media is the most effective way to provide children with the best defence against child pornographers. Such policy would aim to limit the market for child pornographic material and act as a hindrance to those who consume

⁸⁵ Justine Cassell and Meg Cramer *High Tech or High Risk: Moral Panics about Girls Online* (2008) at 70.

⁸⁶ Ronald Weitzer "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade" (2007) 35 *Politics Society* 447 at 448.

⁸⁷ Ost, above n 20, at 459.

⁸⁸ At 445.

⁸⁹ At 455.

⁹⁰ Galeste, Fradella and Vogel, above n 24, at 16.

⁹¹ At 16.

⁹² Ost, above n 20, at 459.

⁹³ Galeste, Fradella and Vogel, above n 24, at 16.

child pornography.⁹⁴ This is the point of departure for this thesis from the above-mentioned moral panic. The author perceives that there is no one straightforward solution to this issue. It requires a modulated response which deals with each specific aspect independently from the others. Therefore, all recommendations within this thesis will be based on sound academic research and a comprehensive analysis of each individual issue. The main thrust of this thesis, unlike the aforementioned moral panic, is an attempt to provide improved protection to children by informed and enhanced legislative responses to child pornography.

Thus, the author argues that the strongest legitimating force behind New Zealand's current legislation which completely prohibits all forms of child pornography exists in the protection it offers to children.⁹⁵ It acts as a deterrent which discourages individuals from downloading⁹⁶ child pornography and from committing sexual abuse against children in order to create it.⁹⁷ For that reason, the author argues that New Zealand has no choice but to take a preventive stance. Without clear evidence New Zealand must not run the risk that child pornography on the Internet disinhibits sexual offenders. If this pre-emptive position is not taken and the dangers associated with child pornography becomes fully manifest, it has the potential to have a devastating effect on New Zealand's children. The present legislation is a reinforcement of the fact that New Zealand's society will not tolerate child sexual abuse and the use of children as sexual objects.⁹⁸ Accordingly, New Zealand's legislation ensures that a child cannot be regarded as a sexual commodity on the Internet or an instrument of sexual pleasure without regard to their dignity as a person.⁹⁹ This in itself may well be the most powerful justification for the current legal position which is to completely outlaw all forms of child pornography.¹⁰⁰

⁹⁴ Ost, above n 20, at 459.

⁹⁵ At 459.

⁹⁶ Downloading is the transmission of a file or data from one computer system to another. For more information see: Anastasia Suen *Downloading and Online Shopping Safety and Privacy* (The Rosen Publishing Group, New York, 2013) at ch 1.

⁹⁷ Ost, above n 20, at 459.

⁹⁸ At 459.

⁹⁹ See the enforcement provisions of the Films, Videos, and Publications Classification Act 1993; Crimes Act 1961 (NZ).

¹⁰⁰ Ost, above n 20, at 460.

The Internet has also facilitated an extensive escalation in consumption of child pornography that can be accessed by paedophiles anywhere in the world, including New Zealand.¹⁰¹ This thesis investigates how the availability of this material has the potential to create numerous problems in the community.¹⁰² These issues include assisting to validate, then normalise the actions of paedophiles and child molesters who prey on young children for their own sexual gratification.¹⁰³ Although it is recognised that some offenders only collect and fantasise about child pornography without acting out their fantasies, for others the arousal and fantasies fuelled by the pornography are a prelude to actual sexual activity with children.¹⁰⁴

1.2.3.1 The Correlation between Child Pornography Offending and Contact Offences against Children

Establishing a link between pornography and offending is critical to the law and to this thesis. The proposition is supported by the comments of sexual offenders involved with the Lucy Faithfull Foundation in the United Kingdom.¹⁰⁵ These offenders revealed during clinical treatment that they are certain that viewing and collecting child abuse images dramatically increases the likelihood of an individual going on to offend against children in the real world.¹⁰⁶ Furthermore, there is an increasing amount of academic information to support this correlation.¹⁰⁷ One study investigated whether being charged with a child pornography offence is a valid

¹⁰¹ BBC “Industry Vows Fight on Child Porn” *BBC* (UK, 28 June 2006)

<<http://news.bbc.co.uk/2/hi/technology/5123936.stm>>.

¹⁰² Ost, above n 20, at 448.

¹⁰³ At 448.

¹⁰⁴ Kenneth V Lanning *A Behavioral Analysis For Professionals Investigating the Sexual Exploitation of Children* (2010) at 90.

¹⁰⁵ The Lucy Faithfull Foundation operates closely with the Courts in the UK. The Foundation provides intervention programmes for the perpetrators of child sexual abuse and also administers clinics for the survivors of childhood sexual abuse.

¹⁰⁶ John Carr *Child Abuse, Child Pornography and the Internet* (2004) at 8.

¹⁰⁷ See Candice Kim *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children* (2004); Ryan CW Hall and Richard CW Hall “A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues” (2007) 82 *Mayo Clin Proc* 457; Drew A Kingston and others “Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography use on Recidivism Among Sexual Offenders” (2008) 34 *Aggressive Behavior* 341; Michael C Seto and Angela W Eke “The Criminal Histories and Later Offending of Child Pornography Offenders” (2005) 17 *Sex Abuse* 201.

diagnostic indicator of paedophilia.¹⁰⁸ The results of the study show that child pornography offending is indeed a strong diagnostic indicator of paedophilia.¹⁰⁹ A Federal Prosecutor employed by the US Department of Justice discussed the dangers posed by offenders who possess child pornography and stated:¹¹⁰

Imagine an offender who spends several hours every night on the Internet ‘enjoying’ and fantasizing to images of children being sexually abused, and congregating with like-minded people in these trading communities, where they validate and normalize each other’s behaviour and desires. Assume that he does this several times a week, for several months, maybe even years—which is not at all unusual. Common sense tells you that his 5-year-old daughter, sleeping in the bedroom next door, is at great risk—particularly if the images he collects involves girls in that age bracket. Can we say for certain that he will act out his fantasies on the little girl? No, we can’t. But there’s real cause to fear for her safety.

Studies also demonstrate that when an opportunity presented itself, many child pornography offenders molested or raped children, and engaged in a variety of other sexually deviant behaviours.¹¹¹ The Federal Correctional Institution in North Carolina, which has treated several hundred inmates convicted of child pornography offences in their Sex Offender Treatment Program, found that a large percentage of offenders had committed contact offending against children.¹¹² This Programme conducted a study on sentenced child pornography offenders and found that 85 percent of the offenders reported having committed actual contact offending against children¹¹³ that had not been reported to law enforcement agencies.¹¹⁴ Statistics generated by the US Postal Inspection Service correspond with these

¹⁰⁸ Michael C Seto, James M Cantor and Ray Blanchard “Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia” (2006) 115 J Abnorm Psychol 610 at 610.

¹⁰⁹ At 613.

¹¹⁰ US Department of Justice *The National Strategy for Child Exploitation Prevention and Interaction* (2010) at 19.

¹¹¹ Michael L Bourke and Andres E Hernandez “The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders” (2009) 24 J Fam Viol 183 at 190.

¹¹² Ernie Allen *Statement of Ernie Allen President and CEO National Centre for Missing and Exploited Children* (2009) at 10.

¹¹³ For more on the progression from viewing child pornography to actual contact offending see Martin C Calder *Child sexual abuse and the Internet* (Russell House, Lyme Regis, 2004) at 1–24.

¹¹⁴ Allen, above n 86, at 10.

figures.¹¹⁵ These statistics reveal that 80 percent of child pornography purchasers are active abusers and almost 40 percent of the child pornographers investigated had sexually molested children in the past.¹¹⁶

While it must be stated that no study can quantify the risk that any given child pornography offender poses to children, the significant correlation between child pornography offending and contact offences¹¹⁷ means that the risk to children is indeed substantial.¹¹⁸ Obviously, not every offender who masturbates to child pornography will inevitably progress to contact sexual offences on children or other vulnerable members of society.¹¹⁹ However, the subjective risk of their doing so may increase as the conditional pairing of fantasy with masturbation may lower their inhibitions against committing such offences.¹²⁰ Some evidence confirms that there is a correlation between the possession of child pornography and an increased risk of contact offending against children.¹²¹ Such investigations indicate that offenders who possess child pornography are often actively engaged in the sexual abuse of children.¹²² However, there is also research that suggests that the link between child pornography and contact offending is unclear, with some evidence indicating that the consumption of child pornography is not a significant risk factor in contact offending against children.¹²³ The bulk of the published research suggests some risk and it is clear that the possession of child pornographic images frequently extends beyond merely looking at the images.¹²⁴ Possession is often an indication

¹¹⁵ Kim, above n 81, at 1.

¹¹⁶ At 1.

¹¹⁷ For additional information on this issue see Allyson MacVean and Peter Spindler *Policing Paedophiles on the Internet* (New Police Bookshop, London, 2003) at 11–20.

¹¹⁸ US Department of Justice, above n 84, at 19.

¹¹⁹ MacVean and Spindler, above n 91, at 11–20.

¹²⁰ At 11–20.

¹²¹ Kim, above n 81, at 1.

¹²² US Department of Justice, above n 84, at 19.

¹²³ For further information on child pornography and contact offending see Michael C Seto, Alexandra Maric and Howard E Barbaree “The Role of Pornography in the Etiology of Sexual Aggression” (2001) 6 *Aggression and Violent Behavior* 35; Maxwell Taylor and Ethel Quayle *Child pornography* (Brunner-Routledge, Hove [u.a], 2004); Andreas Frei and others “Paedophilia on the Internet - A Study of 33 Convicted Offenders in the Canton of Lucerne” (2005) 135 *Swiss Med Wkly* 488; Jérôme Endrass and others “The Consumption of Internet child Pornography and Violent and Sex Offending” (2009) 9 *BMC Psychiatry* 43.

¹²⁴ Kim, above n 81, at 2.

that the offender has been involved in the actual sexual abuse of children.¹²⁵ Accordingly, the accessing of child pornography on the Internet represents a significant risk to New Zealand's society, especially its children.¹²⁶

1.2.3.2 The Viewing of Child Pornography is Not a Victimless Crime

The threat of sexual abuse to New Zealand's children is not the only reason to prohibit the dissemination of child pornography. The central component of this argument is the acknowledgement that the consumption of child pornography is not a victimless crime.¹²⁷ This goes against the common misconception among the general population of New Zealand that the viewing of child pornography is indeed a victimless crime.¹²⁸ Offenders who agree with this proposition like to contend that the children portrayed in the images have given consent to participate in this type of sexual activity because they genuinely enjoy it.¹²⁹ While they may begrudgingly admit that abusing children is wrong, the same individuals will declare that there is no harm in viewing child pornography.¹³⁰ This mistaken belief is founded on the assumption that the downloader is not party to the sexual abuse of the child and, for that reason, has caused no actual harm to the child.¹³¹ Those who support this stance focus their attention on the end product, which is the image itself.¹³² They downplay the actual sexual abuse of a child that occurred during the production and consumption of the image.¹³³ Furthermore, this belief enables the downloader to differentiate between themselves and those who are directly involved in child sexual abuse.¹³⁴ It enables them to create distance between their own behaviour, the

¹²⁵ At 2.

¹²⁶ Ost, above n 8, at 108–123.

¹²⁷ Max Taylor, Ethel Quayle and Gemma Holland *Child Pornography, the Internet and Offending* (2001) at 95.

¹²⁸ Allen, above n 86, at 10.

¹²⁹ Jeremy Prichard and others "Young People, Child Pornography, and Subcultural Norms on the Internet" (2013) 64 *Journal of the American Society for Information Science and Technology* 992 at 994.

¹³⁰ At 994.

¹³¹ Interview with Mr Blue, Convicted Child Sexual Offender (12 June 2014).

¹³² Fabian M Saleh and others *Sex Offenders* (Oxford University Press, Oxford, 2009) at 17.

¹³³ At 317.

¹³⁴ At 317.

viewing of images, and the sexual abuse of the child.¹³⁵ Support for this misguided view was disclosed by ‘Mr Blue’¹³⁶ who stated:¹³⁷

Yeah, my mate was busted with child porn and ended up in the [Kia Marama] Programme with us. He got stoned and sent some pictures to the wrong email and they rang the cops. All he was doing was looking at the pictures. He also made a few pictures of himself and his sister. He didn’t hurt anyone; he was just slapping his dick on her mick...

Research scientists studying the harm caused to children by the distribution¹³⁸ of child pornography report that where the victims of this abuse know that images of their abuse are being traded, they often experience recurring psychological disorders.¹³⁹ These disorders¹⁴⁰ include depression, post-traumatic stress disorders and withdrawal that can continue well into adulthood.¹⁴¹ The mere knowledge that this type of image exists and is being circulated causes the victims of this type of crime to feel powerless, and to experience shame and humiliation.¹⁴² Moreover, this form of victimisation has the potential to last forever, as the Internet enables the images to resurface indefinitely.¹⁴³ Therefore, the act of deliberately searching the

¹³⁵ At 317.

¹³⁶ Mr Blue is a nom de plume. He is a convicted child sexual offender who was also convicted for bestiality. Mr Blue graduated from the *Kia Marama* Treatment Programme for Sex Offenders against Children which is administered by the Department of Corrections.

¹³⁷ Blue, Convicted Child Sexual Offender, above n 105.

¹³⁸ Distribution in this context refers to digital distribution which is a method in which content is delivered to the user without the use of physical media, normally by downloading from the Internet to a personal computer. For additional information see: USLegal “Digital Distribution Law & Legal Definition” (26 January 2016) USLegal <<http://definitions.uslegal.com/d/digital-distribution/>>.

¹³⁹ Allen, above n 86, at 12.

¹⁴⁰ For more information on the psychological harm caused to children involved in child pornography see David M Fergusson, Joseph M Boden and L John Horwood “Exposure to Childhood Sexual and Physical Abuse and Adjustment in Early Adulthood” (2008) 32 Child Abuse Negl 607; P Bebbington S Jonas “Sexual Abuse and Psychiatric Disorder in England: Results From the 2007 Adult Psychiatric Morbidity Survey” (2011) 41 Psychological medicine 709; Elizabeth Oddone Paolucci, Mark L Genuis and Claudio Violato “A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse” (2001) 135 The Journal of Psychology 17; KS Kendler and others “Childhood Sexual Abuse and Adult Psychiatric and Substance Use Disorders in Women: An Epidemiological and Cotwin Control Analysis” (2000) 57 Arch Gen Psychiatry 953.

¹⁴¹ Elena Martellozzo *Online child sexual abuse* (Routledge, Milton Park, Abingdon, Oxon ; New York, 2012) at 9.

¹⁴² Allen, above n 86, at 13.

¹⁴³ At 12.

Internet for child pornography in the full knowledge of what kind of images could be viewed¹⁴⁴ is in no way a victimless crime.¹⁴⁵ Such an action causes actual harm to the child portrayed in the images, and as mentioned above, the downloading of these images inflicts further shame and humiliation upon that same child.¹⁴⁶

Even if there is disagreement with the argument that the possession of child pornography does not cause direct harm to children, it is claimed that it may still do so indirectly.¹⁴⁷ Possession and consumption of this material encourages further production and therefore increases the frequency of child sexual abuse.¹⁴⁸ This production of content and the sexual abuse of children is driven by people actively searching for these images on the Internet.¹⁴⁹ As a result, the possessors of child pornography are simply active abusers by proxy.¹⁵⁰ They prefer that others sexually abuse children and do their unpleasant work for them.¹⁵¹ It is for these reasons that the author argues that, regardless of the content of the picture, each time an image of a child is accessed for any sexual purpose; it is a continuation of the original abuse of the child concerned.¹⁵²

1.2.4 The Evolution of Child Pornography

The sexual exploitation of children by adults is by no means a new phenomenon. This form of exploitation and the treatment of children as sexual objects has existed throughout the ages, and so too has the production and consumption of erotic literature and drawings involving children.¹⁵³ However, it was the invention of the camera in the early part of the nineteenth century which resulted in the production

¹⁴⁴ For an illustration of how this behaviour amounts to possession in New Zealand see *Department of Internal Affairs v Young* [2004] DCR 231 (NZ DC).

¹⁴⁵ See *US v Sherman*, 268 F3d 539 (us CA7 (Ill) 2001); *US v Pugh*, 515 F3d 1179 (us CA11 (Ala) 2008).

¹⁴⁶ Audrey Rogers "Child Pornography's Forgotten Victims" (2007) 28 Pace L Rev 847 at 862.

¹⁴⁷ Ost, above n 20, at 452.

¹⁴⁸ At 452.

¹⁴⁹ At 452.

¹⁵⁰ Ian O'Donnell and Claire Milner *Child Pornography Crime, Computers and Society* (Willan Publishing, Devon, 2007) at 70.

¹⁵¹ At 70.

¹⁵² Ethel Quayle and Max Taylor "Child Pornography and the Internet: Perpetuating a Cycle of Abuse" (2002) 23 Deviant Behavior 331 at 345–351.

¹⁵³ Richard Wortley and Stephen Smallbone *Child Pornography on the Internet* (41 2006) at 1.

of sexualised images involving children and these were almost immediately traded and collected.¹⁵⁴ The invention of photography enabled an actual event, such as the sexual exploitation of a child, to be captured and memorialised forever.¹⁵⁵

Nude photographs and prints of young teenagers and pre-pubescent children are known to have existed from the Victorian period.¹⁵⁶ These images often sought a kind of respectability by portraying their subjects in classical or artistic poses, but the prominent displaying of the genitalia leaves little doubt about the suggestive purpose of these images.¹⁵⁷ Even so, the distribution and collection of child pornography during the early part of the twentieth century remained a largely restricted and underground activity.¹⁵⁸

The increase in availability of child pornography was aided by the changing attitudes and the sexual liberalisation movement that engulfed the United States and Europe during the 1960s.¹⁵⁹ They gave rise to a relaxation of censorship standards in the United States and Europe during the 1960s which led to an increase in the availability of child pornography.¹⁶⁰ Consequently, by 1977 some 250 child pornographic magazines were circulating in the United States, many of which were imported from Europe.¹⁶¹ This era marked the beginning of a production and consumption boom in child pornography which achieved legendary status among devotees and is described as ‘the ten year madness’ (1969–1979).¹⁶²

¹⁵⁴ Tim Tate *Child pornography* (Methuen, London, 1990) at 17.

¹⁵⁵ Ferraro, Casey and McGrath, above n 1, at 10.

¹⁵⁶ Philip Jenkins *Beyond Tolerance - Child Pornography on the Internet* (New York University Press, New York, 2001) at 31.

¹⁵⁷ At 31.

¹⁵⁸ Wortley and Smallbone, above n 127, at 1.

¹⁵⁹ Jenkins, above n 130, at 31.

¹⁶⁰ John Crewdson *By Silence Betrayed* (Little Brown, New York, 1988) at 35.

¹⁶¹ At 35.

¹⁶² Jenkins, above n 130, at 31.

1.2.5 The Role of the Internet in Sexual Abuse

Although the Internet is a relatively modern phenomenon that has its origins in the early 1990s, it has revolutionised the child pornography industry.¹⁶³ The United States Department of Justice disclosed that by the late 1980s paedophiles and child pornography enthusiasts were among the most experienced and knowledgeable members of the computerised communication world.¹⁶⁴ They were therefore well placed to benefit from the many technological leaps over the next few years, including the invention of the Internet.¹⁶⁵

The Internet has completely transformed the scale and nature of the consumption and distribution of child pornography.¹⁶⁶ Global networks such as the Internet enable the transmitting of unlimited amounts of information, which can reach an almost limitless number of recipients in a very short time.¹⁶⁷ It is the technological ease, lack of expense and anonymity involved in obtaining and distributing child pornography which has resulted in an explosion in the availability, accessibility and volume of the material.¹⁶⁸ Whereas a piece of child pornography might have only reached the few thousand people who bought an issue of a hardcopy magazine,¹⁶⁹ the Internet now enables images and digitalised movies to be reproduced and disseminated to tens of thousands, possibly millions of individuals at the click of a button.¹⁷⁰ The Internet has increased the prevalence of child pornography by increasing the amount of material that is available, and has aided both in efficiency of distribution and ease of accessibility.¹⁷¹ As a result, there is no longer any requirement for paedophiles to travel to an unsavoury neighbourhood to purchase

¹⁶³ Ferraro, Casey and McGrath, above n 1, at 11.

¹⁶⁴ Jenkins, above n 130, at 47.

¹⁶⁵ At 44.

¹⁶⁶ Julia C Davidson and Petter Gottschalk *Internet child abuse* (Routledge, New York, 2011) at 54.

¹⁶⁷ Malgorzata Skorzevska-Amberg "Pornography in Cyberspace - European Regulations" (2011) 5 Masaryk University Journal of Law and Technology 261 at 262.

¹⁶⁸ The United States Department of Justice "Child Pornography" (2002) The United States Department of Justice <<http://www.justice.gov/criminal/ceos/childporn.html>>.

¹⁶⁹ Neal Kumar Katyal "Criminal Law in Cyberspace" (2001) 149 University of Pennsylvania Law Review 1003 at 1028.

¹⁷⁰ The United States Department of Justice, above n 142.

¹⁷¹ Wortley and Smallbone, above n 127, at 8.

child pornography and risk arrest.¹⁷² Child pornography can be viewed on the Internet and downloaded for future use at a later date in the privacy of the individual's own home.¹⁷³

Accordingly, the availability and distribution of child pornography through the Internet has become a serious social concern for society.¹⁷⁴ As previously noted, it has escalated the problem of child pornography by increasing the amount of material available, the efficiency of its distribution and the ease of its accessibility.¹⁷⁵ This dilemma is complicated by the fact that for some users the Internet may provide the only outlet for intense and suppressed sexual feelings towards children, and that such images directly serve this end.¹⁷⁶ This is an argument that has been used to support the availability of pornographic material.¹⁷⁷ Wolak indicates that those groups who support this proposition argue that research illustrates that easy access to high-quality child pornography on the Internet could serve as a substitute for contact offending with actual victims.¹⁷⁸ In addition, such research indicates that the utilisation of child pornography can operate as a diversion or form of compensation for contact offending against children.¹⁷⁹ One investigation revealed that the viewing of this type of pornography was found to be a useful substitute for actual sexual contact with young boys.¹⁸⁰ The study found that the urges of offenders were redirected and given an outlet that reduced the chances of contact offending against young boys.¹⁸¹ Hence, this material is claimed

¹⁷² Ferraro, Casey and McGrath, above n 1, at 11.

¹⁷³ At 11.

¹⁷⁴ Yaman Akdeniz *Internet child pornography and the law* (Ashgate, Burlington, VT, 2008) at 1.

¹⁷⁵ Wortley and Smallbone, above n 127, at 8.

¹⁷⁶ Max Taylor "The Nature and Dimensions of Child Pornography on the Internet" (paper presented to Combating Child Pornography on the Internet, Vienna, 1999).

¹⁷⁷ Angela Carr *Internet Traders of Child Pornography and Other Censorship Offenders in New Zealand* (2004) at 9.

¹⁷⁸ Janis Wolak and others "Online 'Predators' and Their Victims Myths, Realities, and Implications for Prevention and Treatment" (2008) 63 *American Psychologist* 111 at 120.

¹⁷⁹ Matthew L Long, Laurence A Alison and Michelle A McManus "Child Pornography and Likelihood of Contact Abuse A Comparison Between Contact Child Sexual Offenders and Noncontact Offenders" (2013) 25 *Sex Abuse* 370 at 371.

¹⁸⁰ David L Riegel "Effects on Boy-attracted Pedosexual Males of Viewing Boy Erotica" (2004) 33 *Arch Sex Behav* 321 at 323.

¹⁸¹ At 323.

to reduce the number of sexual assaults,¹⁸² by providing an acceptable outlet for dangerous sexual urges.¹⁸³

This type of argument first came to prominence when evidence from Europe appeared to demonstrate that the greater availability of hardcore pornography was closely correlated with an actual decline in sex crimes.¹⁸⁴ This decline in sexual assaults indicated that violent pornography provided a beneficial safety valve for individuals with violent sexual instincts.¹⁸⁵ Those who support the proposition also contended that individuals who were aroused by such material could satisfy their sexual needs through fantasy-induced masturbation¹⁸⁶ and this reduced the number of sexual assaults.¹⁸⁷

However, these propositions have since proved to be false. The illusory decline in sex crimes across European countries such as Denmark has now been linked with a change in Police recording practices, not the lifting of restrictions on pornography.¹⁸⁸ The overall statistics on sex crimes appeared to have decreased only because lesser crimes such as exhibitionism, voyeurism and prostitution were no longer recorded by Police.¹⁸⁹ Furthermore, scientific and empirical studies have demonstrated that rapists and child molesters frequently use extreme forms of pornography to prepare themselves to commit an offence.¹⁹⁰

Research has demonstrated that we know relatively little about child pornography,¹⁹¹ this is due to the lack of systematic research in this area.¹⁹²

¹⁸² Sexual assault can be defined as the unlawful sexual connection with another person. For additional information see: Crimes Act 1961 (NZ), s 128(1)(b).

¹⁸³ Neil Levy "Virtual Child Pornography: The Eroticization of Inequality" (2002) 4 Ethics and Information Technology 319 at 320.

¹⁸⁴ Jenkins, above n 130, at 31.

¹⁸⁵ At 31.

¹⁸⁶ Levy, above n 157, at 320.

¹⁸⁷ At 320.

¹⁸⁸ Diana EH Russell *Making Violence Sexy* (Teachers College Press, Buckingham, 1993) at 2.

¹⁸⁹ At 2.

¹⁹⁰ William L Marshall "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Non Offenders" (1988) 25 The Journal of Sex Research 267 at 267.

¹⁹¹ Taylor and Quayle, above n 97, at 1.

¹⁹² At 1.

Knowledge is also scarce about the exact nature and extent of child pornography because it is an illegal trade.¹⁹³ The distinctive qualities of the Internet, the current principal medium of distribution, add even further complexity.¹⁹⁴ However, the fact remains that the production and consumption of child pornography almost always involves the sexual abuse of a child.¹⁹⁵ Children are firstly sexually assaulted in order to produce these often violent images¹⁹⁶ and they are then victimised again, when the images of their sexual assault are traded over the Internet by people around the world.¹⁹⁷ Central to this notion of victimisation is an acknowledgement that child pornography is not a victimless crime.¹⁹⁸ Therefore, the author argues that each time that an image of a child is accessed from the Internet, the child concerned is victimised once again.¹⁹⁹ In effect, and most dangerously of all, this type of activity has the potential to encourage the non-consensual use of New Zealand's children as sexual objects for the sexual gratification of another individual.²⁰⁰

1.2.6 The Expansion of Child Pornography

Between 1997 and 2003, the number of images of children on the Internet increased by 1500 percent, and 20 percent of all pornography traded over the Internet during this period was child pornography.²⁰¹ In 2007 there were approximately 14 million child pornography websites and each website contained as many as one million images of child sexual abuse.²⁰² Each week, over 20,000 new child pornographic images are posted on the Internet around the world.²⁰³ Alberto Gonzales, the former US Attorney General has stated that the Internet has created an epidemic of child

¹⁹³ Max Taylor, Gemma Holland and Ethel Quayle "Typology of Paedophile Picture Collections" (2001) 74 Police J 97 at 97.

¹⁹⁴ At 97.

¹⁹⁵ Taylor and Quayle, above n 97, at 21.

¹⁹⁶ US Department of Justice, above n 84, at 3.

¹⁹⁷ At 3.

¹⁹⁸ Taylor, Quayle and Holland, above n 101, at 95.

¹⁹⁹ At 95.

²⁰⁰ Carr, above n 151, at 9.

²⁰¹ Jeff Anderson *Child Pornography Initiative Masha's Law* (2010) at 3.

²⁰² Royal Canadian Mounted Police Government of Canada "Internet Based Sexual Exploitation of Children and Youth Environmental Scan" (17 November 2008) <<http://www.rcmp-grc.gc.ca/ncecc-cncc/factsheets-fichesdocu/enviroscan-analyseenviro-eng.htm>>.

²⁰³ Government of Canada, above n 176.

pornography.²⁰⁴ This increase in content is graphically illustrated by data from Manchester in England which demonstrates that in 1995 Police seized 12 child pornographic images and all of them were in the form of photographs or videos.²⁰⁵ Four years later, there were 41,000 seizures, and all but three of those were sourced from the Internet and computers.²⁰⁶ In 2004 the same Manchester Police Force arrested one man who was found to be in possession of almost 1,000,000 images.²⁰⁷ These figures highlight the considerable increase in the consumption and distribution of child pornography which has also seen an upsurge in the quantity of material that has been disseminated via the Internet.²⁰⁸

The United Kingdom has seen a steady increase in the number of successful prosecutions for the possession and distribution of child pornography.²⁰⁹ Between the years 1985 and 1995 there were on average 40 successful prosecutions per annum, which is in marked contrast to 1999 where there were 303 in the one year.²¹⁰ Correspondingly, in 2007 German authorities reported 11,357 child pornography offences, up from 7,318 the previous year.²¹¹ Similar increases in statistics have also been observed in New Zealand by Detective Senior Sergeant John Michael of the New Zealand Police.²¹² Statistics of recorded offences reveal that offences relating to the consumption and supply of objectionable publications²¹³ are

²⁰⁴ BBC, above n 75.

²⁰⁵ Hansard, above n 5, at 3978.

²⁰⁶ At 3978.

²⁰⁷ Davidson and Gottschalk, above n 140, at 54.

²⁰⁸ Elizabeth Harlow and Stephen A Webb *Information and Communication Technologies in the Welfare Services* (Jessica Kingsley Publishers, London; Philadelphia, Pa, 2003) at 114.

²⁰⁹ At 114.

²¹⁰ At 114.

²¹¹ DW “Top Cop: New Laws Needed to Fight Organized Crime, Child Porn” DW (2008) <<http://www.dw.de/dw/article/0,,3598040,00.html>>.

²¹² Email from John Michael (Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand)) “Annual Statistics” (28 November 2013).

²¹³ It must be stated that these statistics are not limited to child pornography. They include other forms of objectionable publications such as bestiality and torture. However, Detective Senior Sergeant John Michael of the New Zealand Police informs the author that the vast majority of these prosecutions are related to child pornography. In addition, Steve O’Brien, National Manager of the Censorship Compliance Unit of the Department of Internal Affairs, has advised the author that in the last five years the Unit has successfully prosecuted 150 individuals for objectionable publication offences. Most of these prosecutions were also in relation to child pornography offences.

definitely increasing as a direct result of the Internet.²¹⁴ In 2009 there was a total of 22 recorded offences by the New Zealand Police and this number doubled to a total of 44 recorded offences in 2011.²¹⁵ Likewise, it is now not uncommon for New Zealanders who trade in child pornography via the Internet to have many thousands of images of child abuse in their possession.²¹⁶

Child pornography is also running at expanded proportions in Australia where the abusive material is used as currency by paedophiles to buy their way into online groups.²¹⁷ The Australian Federal Police have stated that where once there might have been hundreds of images on a suspect's computer, there are now hundreds of thousands, sometimes millions, of images of young children being molested.²¹⁸ This is partly because modern computers can facilitate the automated downloading of a large volume of images in ways that previously were not possible.²¹⁹ It is also a reflection of the fact that a larger number of images are now available which can be accessed and exchanged via the Internet.²²⁰ The shift to the mass consumption of digitalised cameras by the general population has also enabled people to create thousands of images at minimal cost.

Child advocates, law enforcement agencies and others concerned about the sexual exploitation of children worry that growing numbers of children may be victimised by child pornography production if increasing numbers of images are being created to feed an expanding online market.²²¹ Each year, an estimated 30,000 children are sexually exploited by child pornographers in order to produce new pornography in

²¹⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 186.

²¹⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 186.

²¹⁶ See the High Court case of *Department of Internal Affairs v Wigzell* High Court Wellington CRI-2007-485-110, 20 November 2007. This case illustrates the quantity of child pornography that offenders in New Zealand have been found to have in their possession.

²¹⁷ AdelaideNow "Police Fear Child Porn Epidemic in Australia" *AdelaideNow* (Australia, 8 February 2012) <<http://www.adelaidenow.com.au/child-porn-epidemic-in-australia/story-e6freol3-1226265498601>>.

²¹⁸ AdelaideNow, above n 191.

²¹⁹ Davidson and Gottschalk, above n 140, at 54.

²²⁰ At 54.

²²¹ Ethel Quayle and Maxwell Taylor *Viewing child pornography on the Internet* (Russell House, Lyme Regis, 2005) at 31.

the Los Angeles region alone.²²² Although these figures are no indication of the numbers of children being sexually abused internationally, they would suggest that many hundreds of thousands of children are being abused and simultaneously photographed to keep pace with demand.²²³ Therefore, any increase in demand for this material will require more children to be recruited and sexually abused.²²⁴

The relevance of this situation to New Zealand's children is that the greater availability and accessing of child pornography from the Internet will more than likely aid in the creation of additional active paedophiles, who will prey on New Zealand's children. This proposition is supported by a 2006 study conducted by the University of Toronto.²²⁵ The study indicated that child pornography offending is a valid diagnostic indicator of paedophilia.²²⁶ Research also indicates that exposure to child pornography from the Internet can contribute to the awakening of paedophilic behaviour, which otherwise would remain dormant.²²⁷ In a study conducted by the COPINE Project²²⁸ at the University of Cork, it has been established that the organised exchange of child pornography can both legitimise and normalise an adult sexual interest in children.²²⁹ A convicted offender in Germany confirmed the COPINE Project's findings from many private discussions in prisons and elsewhere with convicted child sexual offenders and child pornographers.²³⁰ The offender disclosed that he had never previously realised that he had any interest in child pornography and he would never have gone looking for

²²² R Barri Flowers "The Sex Trade Industry's Worldwide Exploitation of Children" (2001) 575 The ANNALS of the American Academy of Political and Social Science 147 at 152.

²²³ Quayle and Taylor, above n 195, at 76.

²²⁴ Carr, above n 80, at 7.

²²⁵ Seto, Cantor and Blanchard, above n 82, at 613.

²²⁶ At 613.

²²⁷ Skorzewska-Amberg, above n 141, at 271.

²²⁸ The COPINE (Combating Paedophile Information Networks in Europe) Project was founded in 1997, and was based at the Department of Applied Psychology, University College Cork, Ireland. The Project actively researched in the area of child sexual abuse on the Internet.

²²⁹ See Rachel O'Connell *Untangling the Complexities of Combating Paedophile Activities in Cyberspace* (1999).

²³⁰ John Carr *Child Pornography* (2008) at 16.

it in the real world.²³¹ It was when he found some accidentally on the Internet that he discovered he was drawn to it by a compulsion he was then unable to resist.²³²

This availability of child pornography online and the reality that an individual can unintentionally access it is particularly dangerous for New Zealand's adolescent and teenage population. Teenagers and young adults aged 15 to 20 comprise one-quarter of all child pornography users tracked and prosecuted by investigators within New Zealand.²³³ What makes this trend even more alarming is that cases of adolescents committing various offences such as enticing other children into the production of child pornography after being lured into it themselves are also known to exist.²³⁴ The empirical literature suggests that a range of risk factors²³⁵ are associated with adolescent sexual offending.²³⁶ Overall, the findings of studies indicate that early contact with pornography is an important risk factor for adolescent sexual offending that has a child pornography element attached to it.²³⁷ This feature, combined with the consumption of child pornography and a deviant sexual interest, is the strongest predictor of sexual recidivism in adolescent sex offenders.²³⁸ Therefore, these outcomes suggest that viewing child pornography may play a significant role in adolescent sexual offending against children.²³⁹

These findings illustrate the importance of understanding how the consumption and distribution of child pornography on the Internet will affect New Zealand's society. However, the ability to fully understand the matrix that surrounds child pornography will require further research that is beyond the scope of this thesis. It

²³¹ At 16.

²³² At 16.

²³³ New Zealand Herald "Teens Top Viewers of Child Porn" *New Zealand Herald* (New Zealand, 14 January 2005)

<http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=10006544>.

²³⁴ Mary Graw Leary "Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation" (2007) 15 *Va J Soc Pol'y & L* 1.

²³⁵ These risk factors include sexual abuse history, exposure to violence, social isolation, early exposure to sex or pornography, anxiety and low self-esteem.

²³⁶ See Michael C Seto and Martin L Lalumière "What Is So Special About Male Adolescent Sexual Offending? A Review and Test of Explanations Through Meta-Analysis" (2010) 136 *Psychological Bulletin* 526.

²³⁷ Prichard and others, above n 103, at 998.

²³⁸ At 998.

²³⁹ At 998.

is further argued that only through an in-depth understanding of this phenomenon will there be any realistic chance of ensuring that New Zealand's regulations and enforcement provisions are sufficient to respond to the changes in technology which have created an avalanche of child pornography. Additionally and most importantly of all, it is further argued that only through a critical evaluation of New Zealand's approach to this paradox can greater protection be afforded to New Zealand's children.

1.2.7 The Internet and New Opportunities for Offenders

Digital technologies, including the Internet, open up new possibilities for child molesters and as a result totally new methods of seducing potential victims have emerged.²⁴⁰ In addition to allowing pornographic material to be disseminated quickly and unobtrusively to anyone with access to a computer and modem, the Internet also provides an easy, non-threatening means to contact potential victims.²⁴¹ Twenty years ago, child molesters used to go to circuses and playgrounds; today they go to places like Facebook, Twitter and Bebo.²⁴²

David Townsend who has served as an expert witness in several high-profile Court cases believes the prevalence of child pornography is a direct result of the anonymity that people believe they have online.²⁴³ The anonymity of the Internet allows an adult to masquerade as a child and initiate friendships with trusting children by communicating with a child on any number of well-known social networking sites such as Facebook or Bebo.²⁴⁴ Online child molesters often seduce children and adolescents by using online communications to establish trust and confidence, introducing talk of sex, and then arranging to meet them in person for

²⁴⁰ Skorzewska-Amberg, above n 141, at 262.

²⁴¹ Ministry of Justice *Protecting Our Innocence - New Zealand's National Plan of Action Against the Commercial Sexual Exploitation of Children* (2002) at 10.

²⁴² Thomas Clabur "Study: Child Porn Isn't Illegal In Most Countries" *InformationWeek* (USA, April 2006)
<http://www.canadiancnc.com/Newspaper_Articles/InformationWeek_Study_Child_Porn_Isnt_Ill egal_Most_Countries_06APR06.aspx>.

²⁴³ Clabur, above n 216.

²⁴⁴ Ministry of Justice, above n 215, at 10.

sexual encounters.²⁴⁵ In many cases offenders usually want pictures as souvenirs of encounters with victims or for purposes of sexual fantasy.²⁴⁶ Although the initial intention of taking images at these encounters may not be to distribute this material via the Internet, the nature of the Internet means that the potential harm of Internet distribution exists for victims long after the crime has ceased.²⁴⁷ The potential for distribution is significantly amplified by the reality that newly produced images serve as form of ‘super-currency’²⁴⁸ that allows producers to trade with other offenders for additional child pornography.²⁴⁹ The production and distribution of previously unseen images also serves to provide the producer of new images with greater status in underground communities devoted to child pornography and the sexual abuse of children.²⁵⁰

Official crime statistics report increasing numbers of cases of online sexual victimisation that involved some form of grooming carried out in social networking sites being recorded by Police.²⁵¹ A recent cybercrime survey in the United Kingdom estimated that 850,000 cases of unwanted online sexual approaches were made in chat rooms during 2006 and that 238 offences of meeting a child following sexual grooming were recorded.²⁵² An undercover investigation by Television New Zealand’s Closeup reveals that New Zealand paedophiles and child molesters are following international trends and exploiting social networking sites in order to groom children for possible sexual abuse.²⁵³ A comparative analysis of challenging online behaviours of adolescent girls in the United States and New Zealand supports

²⁴⁵ Wolak and others, above n 152, at 116.

²⁴⁶ Quayle and Taylor, above n 195, at 43.

²⁴⁷ At 41.

²⁴⁸ Newly created child pornography is a highly sought-after commodity. It becomes a form of super-currency that can be utilised by an offender to gain access to other offenders’ collections of child pornography. The production of previously unseen child pornography is also known to be a prerequisite requirement of entry and membership to a number of child pornography groups, such as the Wonderland Club.

²⁴⁹ Quayle and Taylor, above n 195, at 43.

²⁵⁰ At 43.

²⁵¹ Kim-Kwang Raymond Choo *Online Child Grooming: A Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences* (103 2009) at xi.

²⁵² At xi.

²⁵³ TVNZ Close Up “Stronger Powers to Catch Online Paedophiles” (New Zealand, 12 January 2012) <<http://tvnz.co.nz/national-news/police-investigate-men-in-online-sex-grooming-sting-4699087/video?vid=4699300>>.

this proposition.²⁵⁴ The survey confirms that when online, a significant number of New Zealand's adolescent girls are engaging in risky activities including disclosing personal information and sending personal photos to online acquaintances.²⁵⁵ These girls were also arranging face-to-face meetings with these online acquaintances as they are unaware that they could be interacting with a potential paedophile.²⁵⁶ The sexual grooming of children through social networking sites is a clear and increasing danger to New Zealand's children. The author argues that this threat is twofold. It increases the risk of sexual abuse and also actual harm from the production and consumption of new images.

1.2.8 Child Pornography and Organised Crime

A contributing factor to the proliferation of child pornography is the commercial reality that this commodity is highly sought after and is distributed through pay-per-view websites which are known to be affiliated with organised crime.²⁵⁷ The distribution of child pornography is a multi-billion dollar industry which has been further fuelled by the Internet.²⁵⁸ The exact amount of revenue that is generated by the sale of child pornography is impossible to calculate due to the nature of the material.²⁵⁹ Child pornography is generally illegal in most jurisdictions, and consequently any financial transactions involving these images are generally concealed and conducted well out of sight in order to avoid law enforcement activity.²⁶⁰ Nevertheless, it is the potential for vast profits from the consumption and distribution of child pornography around the world which has ensured that this industry is now intrinsic to numerous criminal organisations.²⁶¹ As a result, the

²⁵⁴ Ilene R Berson and Michael J Berson "Challenging Online Behaviors of Youth Findings from a Comparative Analysis of Young People in the United States and New Zealand" (2005) 23 Social Science Computer Review 29 at 29.

²⁵⁵ At 29.

²⁵⁶ At 29.

²⁵⁷ Europol *High Tech Crimes within the EU: Old Crimes New Tools Threat Assessment 2007* (247781 2007) at 41.

²⁵⁸ Strategic Police Matters Unit *Improving Law Enforcement's Response to Combat Sexual Exploitation of Children on the Internet* (2007) at 1.

²⁵⁹ See United Nations *Globalization of Crime, The* (United Nations Publications, New York, 2010) at 216, 217.

²⁶⁰ At 214.

²⁶¹ Arnold I Burns *Remarks of Arnold I Burns Before the Florida Law Enforcement Committee on Obscenity, Organized Crime and Child Pornography* (NCJ 109133 1987) at 1–15.

sexual exploitation of children on the Internet is now a \$20 billion dollar a year industry²⁶² and one of the fastest-growing criminal segments of the Internet.²⁶³ In Germany alone, sales of child pornography during the early 1990s²⁶⁴ exceeded \$250 million.²⁶⁵ However, the most lucrative market for child pornography is the United States.²⁶⁶ It is claimed that in the United States, \$6 billion is generated annually from the sale of all forms of child pornography.²⁶⁷

In Asia, Japan has been identified as the most active area for the production of child pornography.²⁶⁸ Large volumes of Japanese child pornography have been found to exist on the Internet²⁶⁹ and this illegal content has traditionally been controlled by the Japanese criminal syndicate known as the *Yakuza*.²⁷⁰ Likewise, it is frequently asserted that 90 percent of all commercially available child pornography comes from the former Soviet bloc countries.²⁷¹ Although Russian organised crime networks are known to be involved in the commercial distribution of child pornography,²⁷² it now appears that the involvement of organised crime with child pornography has diminished due to the greater risk of detection by law

²⁶² Joshua Brockman "Child Sex as Internet Fare, Through Eyes of a Victim" *The New York Times* (5 April 2006) <<http://www.nytimes.com/2006/04/05/washington/05porn.html>>.

²⁶³ Anderson, above n 175, at 3.

²⁶⁴ Unfortunately, no current statistics are readily available due to the nature of the content under investigation by this thesis. This complication emphasises the seriousness of this challenging and complicated subject matter. However, in 2001 an FBI investigation uncovered a child pornography website operated by Landslide Productions. This website sold subscriptions to websites harbouring child pornography. Landslide Productions grossed \$1.4 million dollars in one month and was found to have 35,000 subscribers in the United States of America. Moreover, New Zealand's Censorship Compliance Unit has confirmed that in 2012 there were 25 prosecutions for child pornography offences and only one of these prosecutions had a commercial element attached to it. In 2013 there were 20 prosecutions and again only one prosecution had a commercial component involved in the offending.

²⁶⁵ Michael S Serrill "Defiling the Children" [2001] *Time Magazine World*.

²⁶⁶ Flowers, above n 196, at 152.

²⁶⁷ At 152.

²⁶⁸ Frank Shanty and Patit Paban Mishra *Organized Crime* (ABC-CLIO, Santa Barbara, 2007) vol 1 at 196.

²⁶⁹ At 196.

²⁷⁰ At 196.

²⁷¹ United Nations, above n 233, at 215.

²⁷² Taylor and Quayle, above n 97, at 8.

enforcement²⁷³ and reductions in profits.²⁷⁴ Nevertheless, this has by no means stemmed the tide of child pornography that is available on the Internet. Instead of pay-per-view websites being operated by organised crime syndicates such as the Russian Mafia, the acceleration in the consumption and distribution of child pornography is being driven by paedophiles that employ the services offered by file-sharing sites.²⁷⁵ Furthermore, although commercial activity is extensive, the vast majority of this category of offending is conducted with the assistance of unrestricted peer-to-peer and digital technology. The increased consumption of this content is assisted by the recognition that no one with access to the Internet need ever pay for access to digital images of child pornography.²⁷⁶ As a result, amateurs frequently utilise this inexpensive digital technology to consume and distribute child pornography via the Internet.²⁷⁷

1.2.9 Child Pornography and Digital Imaging Technology

The development of new and inexpensive technology such as digital cameras has transformed the consumption and distribution of child pornography into a sophisticated global industry.²⁷⁸ Digital cameras and similar technologies have become relatively cheap and readily available. These devices have greatly facilitated the consumption, distribution and mass storage of child pornographic images and made their large-scale distribution possible.²⁷⁹ Furthermore, digital technology has ensured that producing and consuming child pornography has now

²⁷³ The continual utilisation of new software by law enforcement agencies has ensured that the tracking of offenders and the identification of their victims is becoming less complicated. The launch in 2012 of Microsoft's new software PhotoDNA has enabled the Censorship Compliance Unit of the Department of Internal Affairs in New Zealand to trace the origin of an objectionable image, even after it has been manipulated into a pseudo image or further edited. This software enables any law enforcement agency to go through many thousands of images and quickly identify whether these images involve new victims and which distribution networks were used to disseminate the material.

²⁷⁴ Robert Booth "EU Fights Huge Increase in Web Child Abuse" *The Guardian* (4 March 2009) <<http://www.guardian.co.uk/society/2009/mar/04/child-sex-abuse-websites-increase>>.

²⁷⁵ Booth, above n 248.

²⁷⁶ Ferraro, Casey and McGrath, above n 1, at 13.

²⁷⁷ At 13.

²⁷⁸ Margaret A Healy "Child Pornography: An International Perspective" (2 August 2004) Computer Crime Research Center <<http://www.crime-research.org/articles/536>> at 3.

²⁷⁹ Carr, above n 204, at 19.

become inexpensive and no longer requires that material be commercially processed in order to be duplicated.²⁸⁰ An individual can now consume and duplicate an almost unlimited amount of material in the complete privacy of their home. Pornographic pictures of children can now be scanned and stored on computers with no loss of quality, either over time or when copies are produced.²⁸¹

The portability of devices such as Apple's iPhones mean that a child can be abused almost anywhere in the world and the footage digitally captured, sent to a web server and viewed online in real time.²⁸² Competition between Apple, Samsung and Google has created a series of smartphones that can be purchased almost anywhere in the world, including New Zealand. Cheap smartphones can now be purchased in New Zealand from Trademe for under \$500.²⁸³ They consist of Android handsets that have been streamlined to provide the user with new and improved camera applications. These applications include cameras with a refined lens that ensures digital images are of the highest quality.²⁸⁴ Additionally, Android handsets have thousands of applications that can be utilised for numerous activities including the production and consumption of high-resolution digitally enhanced video clips.²⁸⁵ The clips can be sent via the Internet to another mobile or email address, as most smartphones are also compatible with Vodafone's wireless network in New Zealand.²⁸⁶

It is expected that the increased competition between the suppliers of these smartphones will ensure that they remain relatively cheap. As the price of smartphones continues to fall, they will become more accessible to paedophiles and

²⁸⁰ Quayle and Taylor, above n 195, at 31.

²⁸¹ Healy, above n 252, at 3.

²⁸² Charlie White "6 Awesome Ways Apps Could Use iPhone 4's Front-Facing Camera" (7 June 2010) DVICE (Syfy) <<http://dvice.com/archives/2010/06/iphone-4-wish-1.php>>.

²⁸³ Trademe "Smart Phone for Sale, New Zealand" (13 December 2013) <http://www.trademe.co.nz/Browse/SearchResults.aspx?&cid=422&searchType=&searchString=smart+phone&x=0&y=0&searchregion=100&type=Search&sort_order=&redirectFromAll=False&rptpath=344-&generalSearch_keypresses=11&generalSearch_suggested=0>.

²⁸⁴ Joshua Topolsky "Nexus One Review" (24 January 2010) Engadget <<http://www.engadget.com/2010/01/04/nexus-one-review/>>.

²⁸⁵ Vodafoneconz "What is Android?" (2012) <<http://www.vodafone.co.nz/mobile/android.jsp?gclid=CK3eysGd5a4CFVGApAod0lKfxQ>>.

²⁸⁶ Vodafoneconz "Google Nexis One" (2012) <<http://www.vodafone.co.nz/online-shop/>>.

will be utilised as another weapon in their arsenal to facilitate the sexual abuse of children. Digital technology and the Internet are becoming an increasingly significant factor in child sexual exploitation.²⁸⁷ In addition to the development of progressively less expensive personal computers and modems it has given rise to what has become the most important exchange medium for child pornography, both in New Zealand and around the world.²⁸⁸

1.2.10 Child Pornography and Peer-to-Peer Technology

Child pornography has become easily accessible through websites, chat rooms, newsgroups, and the increasingly popular peer-to-peer technology.²⁸⁹ Peer-to-peer²⁹⁰ and file-sharing technology is a form of networking that allows direct communication between computer users so that they can access and share each other's files.²⁹¹ Such files can contain images, videos and various other forms of software.²⁹² This technology was primarily developed to provide free access to music on the Internet, but now enables people to download objectionable material from computers anywhere around the world without ever meeting or knowing the people they trade with.²⁹³ Steve O'Brien, the National Manager of New Zealand's Censorship Compliance Unit, confirmed in an interview that file-sharing environments such as Giga Tribe²⁹⁴ have now become one of the favoured means to disseminate child pornography.²⁹⁵ The ability to socialise in virtual communities and utilise the services of peer-to-peer networks has enabled the collectors of child pornography to interact with many thousands of like-minded individuals without

²⁸⁷ Healy, above n 252, at 3.

²⁸⁸ At 3.

²⁸⁹ United States General Accounting Office, above n 6, at 2.

²⁹⁰ A peer-to-peer network in its simplest form is created when two or more computers are connected and share resources without utilising a server computer.

²⁹¹ United States General Accounting Office, above n 6, at 2.

²⁹² At 2.

²⁹³ Report of the Government Administration Committee "Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and Related Issues" (2003) I Appendix to the Journals of the House of Representatives I.5A at 56.

²⁹⁴ For an example of an offender who has been downloading child pornography from a file-sharing site, see the High Court case of *Shaw v DIA* HC Wellington CRI-2005-485-121, 23 September 2005.

²⁹⁵ Interview with Steve O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand (22 May 2014) at 2.

having to leave any traceable credit card details or deal with third party authorities that may be monitoring content.²⁹⁶

What is more, many peer-to-peer networks do not denounce child pornography or the harms it causes to the children involved with it.²⁹⁷ The consequence is that young people who identify with the subculture of a network may become influenced by the norms or standards of that network regarding a topic, including the failure to condemn child pornography.²⁹⁸ This may serve to undermine the deviant status of child pornography,²⁹⁹ a conclusion supported by research which has clearly shown that online norms can influence individual behaviour.³⁰⁰ Additionally, peer-to-peer exchange may enable child pornographers to reduce the seriousness of child pornography offending so that this content can be categorised merely as the exchange of general information similar to the downloading of music or movies.³⁰¹ It could also encourage the mistaken belief that whether or not child pornography is accessed is no one's business but the user of the network.³⁰²

The popular peer-to-peer file-sharing network known as Kazaa was searched by US officials using 12 keywords known to be associated with child pornography on the Internet.³⁰³ This search identified 1,286 items, of which about 42 percent were found to be associated with child pornographic images.³⁰⁴ A 2011 study recorded the top search terms over a three-month period of a peer-to-peer network named isoHunt.³⁰⁵ This study found that three child pornography search terms consistently appeared.³⁰⁶ The most frequently used of the three was the acronym Pthc (pre-teen

²⁹⁶ Audrey Gillian "Race to Save New Victims of Child Porn" *The Guardian* (4 November 2003) <<http://www.guardian.co.uk/society/2003/nov/04/childrensservices.childprotection>>.

²⁹⁷ Prichard and others, above n 103, at 999.

²⁹⁸ At 999.

²⁹⁹ At 999.

³⁰⁰ See Christina Demetriou and Andrew Silke "A Criminological Internet 'Sting' Experimental Evidence of Illegal and Deviant Visits to a Website Trap" (2003) 43 Br J Criminol 213.

³⁰¹ Prichard and others, above n 103, at 999.

³⁰² At 999.

³⁰³ United States General Accounting Office, above n 6, at 3.

³⁰⁴ At 4.

³⁰⁵ See Jeremy Prichard, Paul A Watters and Caroline Spiranovic "Internet Subcultures And Pathways To The Use Of Child Pornography" (2011) 27 Computer Law & Security Review 585.

³⁰⁶ These search terms were 'Pthc', 'Lolita' and 'Teen'.

hardcore).³⁰⁷ This search term was entered more frequently than Star Wars, Disney or Harry Potter, despite the fact that Harry Potter and the Deathly Harrows Part 1 was released in 2010.³⁰⁸ Senior Police Officers in the United Kingdom have revealed that the scale of peer-to-peer traffic in illegal images of children now dwarfs almost any other paedophile network they have encountered.³⁰⁹ However, what is even more alarming is that these images are becoming more extreme.³¹⁰ The material is commonly traded in chat channels like Internet Relay Chat, where the channels carry explicit titles such as ‘pre-teen sex’ or ‘baby rape’ leaving no doubt about the material being offered.³¹¹ Furthermore, collectors of objectionable material who utilise Internet chat rooms are known to establish ‘clubs’ where they can discuss and trade in child pornography and other forms of objectionable material.³¹²

Police believe that the utilisation of file-sharing technology by paedophiles is feeding demand for real-time victims of abuse.³¹³ Readily available and cheap web cameras have enabled a heinous marketing of abuse-to-order, where, for a fee, one can request the specific type of abuse of a child and watch it happen live.³¹⁴ In 1996, members of a paedophile group that named itself the Orchid Club were arrested in the United States.³¹⁵ Using a digital camera, one of the group’s members transmitted real-time images of a child being sexually assaulted.³¹⁶ This member then acted upon requests from other club members to view certain sexual acts which were performed on the child in real-time.³¹⁷ The fact that members of the Orchid

³⁰⁷ Prichard and others, above n 103, at 993.

³⁰⁸ At 995.

³⁰⁹ Audrey Gillian, above n 270.

³¹⁰ Audrey Gillian, above n 270.

³¹¹ Netsafe “Confronting the Reality of Child Pornography” (2012) Netsafe <http://www.netsafe.org.nz/keeping_safe.php?sectionID=Library&titleID=Confronting%20the%20Reality%20of%20Child%20Pornography&pageID=182&menuID=182>.

³¹² Report of the Government Administration Committee, above n 267, at 55.

³¹³ Audrey Gillian, above n 270.

³¹⁴ Netsafe, above n 285.

³¹⁵ Taylor, Quayle and Holland, above n 101, at 97.

³¹⁶ At 97.

³¹⁷ At 97.

Club living in the United States, Europe and Australia had access to the material demonstrates the international dimension of this type of offending.³¹⁸

In March 2011, it was revealed that six New Zealanders were among the main participants in the world's largest Internet paedophile ring.³¹⁹ This paedophile ring comprised 70,000 paedophiles in some 20 countries.³²⁰ The victims of the six men included three New Zealand children who were filmed being sexually abused³²¹ and were identified after images of them were found on the computer of a man Police had been investigating at the time.³²² The New Zealand Police have also revealed that 16 other children have been protected from potential abuse after they were identified as being at risk of being groomed for sexual assault.³²³ These incidences indicate that new and more effective remedies must be sourced to protect New Zealand's children. An examination of other jurisdictions' responses to this dilemma will highlight the deficiencies in New Zealand's legislation and, more importantly, provide potential remedies to this situation.

1.2.11 The Role of the Internet in Sexual Abuse

The Internet has become an 'information superhighway'³²⁴ with its own forms of 'cyberculture'.³²⁵ This cyberculture³²⁶ enables an individual to find information and connect with like-minded people who share their views on any subject imaginable. As a result, the individual becomes less inhibited and the author argues that for anyone who has ever been curious about deviant sexual behaviours such as sex with

³¹⁸ At 97.

³¹⁹ Blair Ensor "Frustration at Repeated Sexual Predator Warnings" *Stuff.co.nz* (1 December 2011) <<http://www.stuff.co.nz/dominion-post/news/6065187/Frustration-at-repeated-sexual-predator-warnings>>.

³²⁰ Ensor, above n 293.

³²¹ Ensor, above n 293.

³²² Vaimoana Tapaleao "Paedophile Ring Bust Nets NZ Offenders" *New Zealand Herald* (18 March 2011) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10713172>.

³²³ Tapaleao, above n 296.

³²⁴ Keith F Durkin "Misuse of the Internet by Pedophiles: Implications for Law Enforcement and Probation Practice" (1997) 61 *Fed Probation* 14 at 14.

³²⁵ For more information on the diverse forms of cyberculture see Les Back "Aryans Reading Adorno: Cyber-Culture and Twenty-First Century Racism" (2002) 25 *Ethnic and Racial Studies* 628.

³²⁶ Cyberculture refers to the social conditions brought about by the extensive use of computer networks for entertainment, business and all forms of communication.

children, cyberspace³²⁷ offers a private, safe and anonymous way to explore those fantasies.³²⁸ The author further argues that the formation and online activities of organisations such as the *North American Man/Boy Love Association*³²⁹ encourages people to experiment sexually with children.³³⁰ This argument finds credence in the beliefs and online actions of this group. Indeed, members profess that when they entice children into sexual relationships, they are in reality enriching the youngsters' lives.³³¹ Moreover, this well-known paedophile group is known to utilise chat rooms and bulletin boards in order to promote support for men and boys in mutually 'consensual' relationships, while also supporting the distribution of pornographic material from these 'relationships' over the Internet.³³²

This ominous aspect of the Internet has enabled paedophiles and child molesters in New Zealand to connect and interact with compatible individuals and organised groups around the world. An example of this interaction can be seen in the 2010 so-called 'Lost Boy bulletin board' investigation that was exposed by European Authorities and the Federal Bureau of Investigation in the United States.³³³ This investigation involved a 29-year-old New Zealand man³³⁴ who was part of an international child pornography ring that spanned three continents, including New Zealand.³³⁵ The Lost Boy bulletin board was dedicated to men who have a sexual

³²⁷ Cyberspace is an abstract environment in which communication over computer networks occurs.

³²⁸ Mark Griffiths "Sex on the Internet: Observations and Implications for Internet Sex Addiction" (2001) 38 *The Journal of Sex Research* 333 at 335.

³²⁹ The North American Man/Boy Love Association is a paedophile and pederasty organisation founded in the United States that advocates for the recognition of adult sexual relations with minors and for the age-of-consent laws criminalising such activity to be abolished.

³³⁰ Janet Stanley *Child Abuse and the Internet* (15 2001) at 4.

³³¹ Leslie Z Cellentano and others *Computer Crime A Joint Report* (2000) at 14.

³³² Parry Aftab *The Parent's Guide to Protecting Your Children in Cyberspace* (McGraw-Hill, New York, 2000) at 17.

³³³ Los Angeles County Sheriff's Department "'Lost Boy' Internet Child Ring Dismantled" (2012) Los Angeles County Sheriff's Department
<http://sheriff.lacounty.gov/wps/portal/lasd/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hLAwMDd3-nYCN3M19LA0_nEDPvMJMAQ39jA_2CbEdFAFVdgp4!/?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/lasd+content/lasd+site/home/home+top+stories/lost_boys_ring_busted>.

³³⁴ Robin Lopez of New Zealand has been named as 1 of 19 suspects who remain at large across the world.

³³⁵ TVNZ "NZ Included in International Child Porn Ring" *TVNZ* (New Zealand, 15 December 2010) <<http://tvnz.co.nz/world-news/nz-included-in-international-child-porn-ring-3974291>>.

interest in young boys and was established to provide a forum for trading in child pornography.³³⁶

The Lost Boy investigation draws attention to a global subculture that exists not only for the purpose of trading child pornography but also to offer other tools that can be employed to sexually exploit children on the Internet.³³⁷ These tools include what was known to users of the bulletin board as the ‘Handbook Project’. The Handbook Project was a forum where members could read and contribute to a grooming handbook, which was a guide for adult men on how to find and groom young boys so that they would engage in sexual activity.³³⁸ It contained detailed advice on how to deal with physical aspects of sexual contact, and how to move on to harm other victims when the current victim becomes too old to be attractive.³³⁹

1.3 The Theory of Harm

1.3.1 Introduction

This section examines Feinberg’s theory of harm to determine whether it can justify the outlawing of this type of content on the Internet. It then discusses how the harm principle responds to the notion of freedom of expression and whether limitations on this right can be encompassed by the theory. This section also illustrates some of the different types of harm that child pornography causes to children and society. However, the crucial point of this section is to determine whether the legislative restrictions on child pornography under New Zealand’s classification system can be ruled out or declared beyond the coercive jurisdiction of the Government.³⁴⁰

1.3.2 The Harm of Child Pornography and Punishment

The question of harm is fundamental to this thesis as it endeavours to understand and assess the legal and social responses to child pornography on the Internet.³⁴¹ It

³³⁶ Los Angeles County Sheriff’s Department, above n 307.

³³⁷ TVNZ, above n 309.

³³⁸ Los Angeles County Sheriff’s Department, above n 307.

³³⁹ Los Angeles County Sheriff’s Department, above n 307.

³⁴⁰ Steven D Smith “Is the Harm Principle Illiberal” (2006) 51 Am J Juris 1 at 20.

³⁴¹ Ost, above n 8, at 103.

is the recognition of the social harms caused by the existence of child pornography which is the primary motivation behind any decision to aggressively combat this concern.³⁴² There are many different types of harm which have shaped the way in which society and the law have responded to the issue of child pornography on the Internet.³⁴³ These harms include the harm to the children depicted in the images and also the potential harm to society as a whole,³⁴⁴ as child pornography can be utilised to justify paedophilia.³⁴⁵ The latter harm also extends to other children who are exposed to this type of pornography or who may be sexually victimised because of an offender's contact with this same material.³⁴⁶

Although choosing the most appropriate legislative response to the different types of harm that relate to child sexual abuse has been the subject of intense political debates,³⁴⁷ child pornography legislation does make a valuable contribution to reducing child sexual abuse.³⁴⁸ The enactment of this type of legislation has enabled the Government's law enforcement agencies to specifically target the consumption and dissemination of child pornography.³⁴⁹ The Government's concern about the sexualisation of children is considered a part of law enforcement's general duty to protect the health and safety of its citizens.³⁵⁰ This concern is grounded in ancient and medieval theories about the impact of harmful behaviour³⁵¹ that claim that behaviour which violates the dominant moral structure of the society dissolves the glue that holds the social order together.³⁵² In New Zealand the view that society may be harmed by the availability of certain types of material was recognised by

³⁴² Leary, above n 208, at 9.

³⁴³ Ost, above n 8, at 103.

³⁴⁴ Leary, above n 208, at 9.

³⁴⁵ Michael J Henzey "Going on the Offensive: a Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action" (2011) 11 *Appalachian Journal of Law LegalTrac* at 9.

³⁴⁶ Leary, above n 208, at 9.

³⁴⁷ Harris Mirkin "The Social, Political, and Legal Construction of the Concept of Child Pornography" (2009) 56 *Journal of Homosexuality* 233 at 234.

³⁴⁸ Bruce Ryder "The Harms of Child Pornography Law" (2003) 36 *University of British Columbia Law Review* 101 at 103.

³⁴⁹ At 103.

³⁵⁰ Mirkin, above n 321, at 234.

³⁵¹ At 234.

³⁵² At 234.

statute³⁵³ in the Victorian era and remains generally accepted to this day.³⁵⁴ The desired outcome of this stance is the reduction of potential harm to the community.³⁵⁵ Nevertheless, classical theorists of liberal democracy developed a more restrictive view of the Government's role in moral issues.³⁵⁶ The views of these theorists grounded the Government's right to limit behaviour in what became known as the 'harm principle'.³⁵⁷

1.3.2.1 Harm and Punishment

Although there are continuing conflicts in terms of where and how the harm principle should be applied, it has become the dominant theory in the regulation of sexual conduct in the Western industrialised world in the late-twentieth century.³⁵⁸ In line with this view and because this thesis is a critique of the law, and the authority to enforce these laws, the issue of punishment under the law must be raised.³⁵⁹ The reason why this subject needs to be addressed is that few of the important functions that we expect of the Government can be conducted without the Government's reliance on the ability to punish people according to the law.³⁶⁰ The philosophical topics of harm and punishment are very complex notions.³⁶¹ These notions have been addressed by John Locke and HLA Hart who have both discussed the application of the harm principle and whether it could be utilised to justify the State's reaction to immoral conduct.³⁶² John Locke, in his work *The Second Treatise of Government*, states:³⁶³

³⁵³ The Offensive Publications Act 1892.

³⁵⁴ The Department of Internal Affairs "Censorship Policy" (2012) The Department of Internal Affairs <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Our-Policy-Advice-Areas-Censorship-Policy?OpenDocument>.

³⁵⁵ The Department of Internal Affairs, above n 328.

³⁵⁶ Mirkin, above n 321, at 234.

³⁵⁷ At 234.

³⁵⁸ At 235.

³⁵⁹ Hugo Adam Bedau "Feinberg's Liberal Theory of Punishment" (2001) 5 Buff Crim L Rev 103 at 104.

³⁶⁰ At 105.

³⁶¹ At 104.

³⁶² Sophia A Stone "Harm Principle" in Deen K Chatterjee (ed) *Encyclopedia of Global Justice* (Springer Netherlands, 2011) 472 at 473.

³⁶³ John Locke and CB Macpherson *Second Treatise of Government* (Hackett Pub Co, Indianapolis, Ind, 1980) at 8.

To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.

Locke is suggesting that prior to the imposition of the law man lived in a state of freedom and that the law is a restriction on this freedom.³⁶⁴ The relationship between the moral limits of the criminal law and theories of punishment has also been referred to by Hart as:³⁶⁵

Primary laws setting standards for behaviour and secondary laws specifying what officials must or may do when they are broken.

According to Hart, the central question is: When should the law intervene?³⁶⁶ The harm principle is employed to set the basic reasoning for legal intervention.³⁶⁷ However, Hart³⁶⁸ has also deployed the harm principle for liberal purposes such as the deregulation of homosexual conduct.³⁶⁹ Liberals such as Hart believe that homosexual conduct is beyond the legitimate jurisdiction of the law because no one is actually harmed by this type of behaviour.³⁷⁰ Other theorists such as John Stuart Mill³⁷¹ have also championed the harm principle.³⁷² Mill's formulation is probably the most famous³⁷³ and is defined as:³⁷⁴

³⁶⁴ At 8.

³⁶⁵ HLA Hart "Prolegomenon to the Principles of Punishment" in H L A Hart (ed) *Punishment and Responsibility: Essays in the Philosophy of Law* (2 edition ed, Oxford University Press, Oxford, 2008).

³⁶⁶ Hart, above n 339.

³⁶⁷ Hart, above n 339.

³⁶⁸ See Herbert Lionel Adolphus Hart *Law, Liberty, and Morality* (Stanford University Press, California, 1963).

³⁶⁹ Smith, above n 314, at 1.

³⁷⁰ Joel Bakan "Pornography, Law and Moral Theory" (1985) 17 *Ottawa L Rev* 1 at 5.

³⁷¹ See John Stuart Mill *J S Mill*, Stefan Collini (ed) (Cambridge University Press, Cambridge, 1989).

³⁷² Smith, above n 314, at 1.

³⁷³ Mirkin, above n 321, at 235.

³⁷⁴ Mill, above n 345, at 13.

One simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control ... That principle holds that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is... to prevent harm to others.

Mill believed that this principle only applied to adults who were free, competent to choose and informed of the issues.³⁷⁵ Jorge Menezes Oliveira suggests that Mill's definition of the harm principle is in fact two separate principles:³⁷⁶ The harm principle itself, and a more practical principle of expediency.³⁷⁷ According to these two principles, where an individual's conduct is harmless, then it is outside the authority of the State³⁷⁸ but if an individual's conduct does cause harm, then this conduct is within the State's domain of regulation and authority.³⁷⁹ Whether or not the regulation of the conduct is practical depends on the application of the principle of expediency, to ascertain whether or not it is appropriate to the purpose at hand.³⁸⁰

In this sense, the harm principle can be viewed as jurisdictional in character.³⁸¹ Gerald Dworkin perceives that in Mill's definition the harm principle is only intended to settle the issue of the State's jurisdiction and not the problem of when the State should exercise its power.³⁸² Donald Dripps provides a simplified version of the characteristics of the harm principle and states:³⁸³

The harm principle operates catastrophically; conduct is either harmless and therefore immune from punishment, or harmful and thus fair game.

³⁷⁵ Mirkin, above n 321, at 235.

³⁷⁶ Jorge Menezes Oliveira *Harm and Offence in Mill's Conception of Liberty* (2012) at 19.

³⁷⁷ At 19.

³⁷⁸ Smith, above n 314, at 5.

³⁷⁹ At 5.

³⁸⁰ At 5.

³⁸¹ At 5.

³⁸² Gerald Dworkin "Devlin Was Right: Law and the Enforcement of Morality" (1998) 40 Wm & Mary L Rev 927 at 934.

³⁸³ Donald A Dripps "The Liberal Critique of the Harm Principle" (1998) 17 Criminal Justice Ethics 3 at 10.

Therefore, any harmful conduct undertaken by an individual comes within the State's coercive jurisdiction and any harmless conduct does not.³⁸⁴ Bernard Harcourt also notes:³⁸⁵

The harm principle offered a bright-line rule. A rule that was simple to apply. A rule that was simply applied.

Therefore, it is argued that the broader purpose of the harm principle is to decide whether legislative intervention is justified. Moreover, this apparent simplicity makes the harm principle appear to be almost tailor-made for the judiciary,³⁸⁶ with its commitment to the separation of powers in a system of constitutional democracy such as New Zealand.³⁸⁷

1.3.3 Joel Feinberg's Theory of Harm and Child Pornography

1.3.3.1 Feinberg's Harm Principle and the State's Right to Punish

Perhaps the most intricate and impressive works on the harm principle are those written by philosopher Joel Feinberg.³⁸⁸ Feinberg's writings on punishment are defined by their reference to the constraint of individual behaviour and the instrumentality of punishment in providing that constraint.³⁸⁹ The harm principle is not treated by Feinberg as a decisive argument but as a consideration that has weight in an argument for or against criminalisation.³⁹⁰ As a result, the harm principle is a coercion-legitimising principle,³⁹¹ which is designed to justify State intrusion into individual liberty and behaviour.³⁹² Feinberg approaches the issue of which conduct the State should make criminal³⁹³ by considering the application of several liberty-

³⁸⁴ Smith, above n 314, at 6.

³⁸⁵ Bernard E Harcourt "The Collapse of the Harm Principle" (1999) 90 *The Journal of Criminal Law and Criminology* (1973-) 109 at 138.

³⁸⁶ Smith, above n 314, at 6.

³⁸⁷ At 7.

³⁸⁸ See Joel Feinberg *Harm to Others* (Oxford University Press, USA, Oxford, 1984).

³⁸⁹ Bedau, above n 333, at 106.

³⁹⁰ Feinberg, above n 362, at 9–10.

³⁹¹ Joel Feinberg *Harmless Wrongdoing* (Oxford University Press, Oxford, 1988) at 5.

³⁹² Bedau, above n 333, at 106.

³⁹³ See Feinberg, above n 362, at 3.

limiting principles to conduct that might be prohibited.³⁹⁴ He defines a liberty-limiting principle as:³⁹⁵

a given type of consideration that is always a morally relevant reason in support of penal legislation even if other reasons may in the circumstances outweigh it.

Liberty-limiting principles justify the State's restrictions on a person's liberty by implementing prohibitions against certain conduct.³⁹⁶ Feinberg argues that liberty-limiting principles are limited to the harm and offence principles:³⁹⁷

The harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions.

These prohibitions are rendered effective by a threat of inflicting punishment on the individual.³⁹⁸ The use of prohibitions is clearly set out in Feinberg's writing on the harm principle.³⁹⁹ Feinberg initially states of the harm principle that:⁴⁰⁰

It is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices.

Thus, he rejects criminal prohibition principles that rest on arguments of paternalism that prohibit conduct that harms oneself or immoral conduct that is neither harmful nor offensive.⁴⁰¹ Paternalism is simply the interference of the State in a person's life, often against their will, which is motivated and defended by the claim that the person interfered with will be protected from harm or immoral behaviour.⁴⁰² Paternalism as the harm principle suggests it is not moral paternalism,

³⁹⁴ Hamish Stewart "Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law" (2001) 5 Buff Crim L Rev 47.

³⁹⁵ Feinberg, above n 362, at 9.

³⁹⁶ Bedau, above n 333, at 106.

³⁹⁷ Feinberg, above n 362, at 26.

³⁹⁸ Bedau, above n 333, at 106.

³⁹⁹ At 106.

⁴⁰⁰ Feinberg, above n 362, at 11.

⁴⁰¹ Stewart, above n 368, at 50.

⁴⁰² See Gerald Dworkin "Paternalism" in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Summer 2014 ed, 2014).

and it is this stance which underpins New Zealand's censorship legislation, the Films, Videos, and Publications Classification Act 1993.⁴⁰³ The Act's approach to censorship does not acknowledge issues such as moral decency⁴⁰⁴ but rather whether or not the publication in question is going to be injurious to the public good.⁴⁰⁵ Although this determination reflects the moral and ethical standards of the community at a given time, there is no reliance on morality or ethics in any decision under the Act, because a publication is either harmful or not and this is where the Act draws the line.⁴⁰⁶ Moreover, Feinberg indicates that where the State prohibits conduct, the State can also punish for this conduct.⁴⁰⁷ Feinberg's formulation of this principle is straightforward.⁴⁰⁸

Considerations of harm prevention are always relevant reasons in support of coercion.

Whatever the State determines that it will do by way of coercion, it will do with threats of punishment.⁴⁰⁹ Thus, when the Government wants to prevent its citizens from downloading child pornography from the Internet, it will do so with the threat of punishment.⁴¹⁰ Feinberg's construction of the harm principle places much prominence on the concept of punishment.⁴¹¹ He states:⁴¹²

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.

⁴⁰³ Films, Videos, and Publications Classification Act 1993.

⁴⁰⁴ Interview with Dr Andrew R Jack, Chief Censor, Office of Film and Literature Classification, New Zealand (9 June 2014) at 6.

⁴⁰⁵ See Films, Videos, and Publications Classification Act 1993, s 3.

⁴⁰⁶ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 6.

⁴⁰⁷ Bedau, above n 333, at 107.

⁴⁰⁸ Feinberg, above n 362, at 12.

⁴⁰⁹ Bedau, above n 333, at 107.

⁴¹⁰ An example of this can be seen in the introduction of the Objectionable Publications and Indecency Legislation Bill 2013 (124-1).

⁴¹¹ Bedau, above n 333, at 107.

⁴¹² Feinberg, above n 362, at 26.

The centrality of punishment in Feinberg's construction of the harm principle is clearly evident in this quote from his jurisprudential classic *Harm to Others*.⁴¹³ Feinberg insists that no reasonable theorist can deny the legitimacy of the harm principle.⁴¹⁴ The rationale for this stance is based on the fact that it is possible to extract the principle from the clearest cases of genuine criminal activity.⁴¹⁵ Feinberg states:⁴¹⁶

The whole purpose of the criminal prohibition is to discourage the particular antisocial behaviour that is forbidden, and that behaviour can be characterized quite independently of the legal statute that forbids it.

In its most basic form, Feinberg is implying that each of us is aware of what is harmful to us, and we want to belong to a society in which we are not victimised by such harmful acts.⁴¹⁷ It should also be obvious without the enactment of a law that the conduct is harmful. The harm principle assumes that as humans we are able to identify what is harmful to other humans like us.

The principle of expediency is only appropriate when the harms together with other social benefits outweigh the social costs generated by criminalisation.⁴¹⁸ As a result, the most obvious way to try to prevent these acts from occurring is to outlaw them,⁴¹⁹ provided there is no other means that is equally effective at no greater cost to other values⁴²⁰ such as freedom of expression.⁴²¹ This prohibition must then be backed up with a threat of criminal sanctions for non-compliance, and then be able to inflict the appropriate punishment for any disobedience.⁴²²

⁴¹³ Bedau, above n 333, at 107.

⁴¹⁴ Feinberg, above n 362, at 14.

⁴¹⁵ At 15.

⁴¹⁶ At 20.

⁴¹⁷ Bedau, above n 333, at 107.

⁴¹⁸ Oliveira, above n 350, at 19.

⁴¹⁹ Bedau, above n 333, at 107.

⁴²⁰ Feinberg, above n 362, at 26.

⁴²¹ Locke and Macpherson, above n 337, at 8.

⁴²² Bedau, above n 333, at 107.

1.3.3.2 The Application of Feinberg's Harm Principle to Child Pornography

The dissemination of child pornography across the Internet constitutes the sort of issue that liberal theorists such as Feinberg have envisioned that the harm principle should address.⁴²³ Feinberg is in favour of criminalising any pornography that involves wanton and painful violence against helpless victims.⁴²⁴ The philosopher also concedes that:⁴²⁵

If there is a clear enough causal connection to rape, a statute that prohibits violent pornography could be a morally legitimate restriction of liberty.

Therefore, assuming there is a clear connection, it is the devastating harm child pornography causes the children portrayed in such images which justifies its criminalisation.⁴²⁶ It is the abusive and exploitative harm caused during its creation which overwhelmingly rationalises the outlawing of this behaviour.⁴²⁷ It is contended that the production and consumption of child pornography is not a victimless crime because the children themselves are victims. The Supreme Court of Canada in *R. v. Sharpe*⁴²⁸ agrees and stated:⁴²⁹

Child pornography also undermines children's right to life, liberty and security of the person ... Their psychological and physical security is placed at risk by their use in pornographic representations. Those children who are used in the production of child pornography are physically abused in its production. Moreover, child pornography threatens the physical and psychological security of *all* children, since it can be encountered by any child. Regardless of its authorship, be it of the child or others, it plays on children's weaknesses and may lead to attitudinal harm...

⁴²³ For a more elaborate example see Feinberg, above n 365, at 57–60.

⁴²⁴ Joel Feinberg *Offense to Others* (Oxford University Press, Oxford, 1985) at 146.

⁴²⁵ Feinberg, above n 362, at 154.

⁴²⁶ Leary, above n 208, at 9.

⁴²⁷ Ost, above n 8, at 104.

⁴²⁸ *R v Sharpe* (2001) (ca SCC) at [189].

⁴²⁹ Ryder, above n 322, at [189].

According to Feinberg, harm prevention is definitely a legitimate use of the criminal law.⁴³⁰ Therefore, Feinberg's harm principle can be employed by this thesis to justify New Zealand's rigorous restrictions⁴³¹ on the downloading and viewing of child pornography.⁴³² The stance of community stake holder Debbi Tohill, Interim General Manager of Ecpat⁴³³ Child Alert New Zealand's⁴³⁴ on why child pornography should be outlawed is consistent with Feinberg's theory of criminalisation. Tohill stated that:⁴³⁵

The primary reason is the harm and damage that it is doing to our children. We really need to think about the victims in this.

This comment by Tohill and the harms that are perpetrated upon children raises serious questions about the rights of children as rights holders. The availability of child pornography on the Internet causes a particular harm to adolescents and another distinct form of harm to younger children. The nature of the State's response must, therefore, take these different harms into account and the State must recognise and respond to each of these harms with specific responses. Nevertheless, the regulation of child pornography in New Zealand first began because of an understanding of the devastating harm that child pornography causes the children depicted in such images.⁴³⁶ The Chief Censor of the Classification Office, Dr Andrew Jack also acknowledges the harm inherent in child pornography and states:⁴³⁷

⁴³⁰ Feinberg, above n 398, at 154.

⁴³¹ See the enforcement provisions within the Films, Videos, and Publications Classification Act 1993.

⁴³² Smith, above n 314, at 15.

⁴³³ Ecpat stands for 'Ending Child Prostitution, Child Pornography and Child Trafficking for Sexual Purposes'.

⁴³⁴ This community organisation is the New Zealand member of the Ecpat International network of agencies established in 1990 now operating in 75 countries around the world. It works closely with Government, law enforcement agencies and tourism industries to prevent the sexual exploitation of children.

⁴³⁵ Interview with Debbi Tohill, Interim General Manager, Ecpat Child Alert New Zealand (11 June 2014) at 1.

⁴³⁶ Leary, above n 208, at 9.

⁴³⁷ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 1, 6.

It is the inherent harm of child pornography to the community that justifies the censorship of this material.

Further recognition of the social harms caused by child pornography have taken place in the United States where legislation maintains⁴³⁸ that every instance that images of child pornography are viewed represents a renewed violation of the privacy of the victims and a repetition of their abuse.⁴³⁹ This legislation recognises that such images cause continuous harm to the children portrayed in them.⁴⁴⁰ The Child Pornography Prevention Act 1996⁴⁴¹ notes that every time an image is viewed or downloaded the victim is once again revictimised.⁴⁴² This Act also accepts that child pornography offending is a crime of perpetuity.⁴⁴³

1.3.4 Liberalism and Freedom of Expression

1.3.4.1 Limiting Freedom of Expression

Liberal theorists argue that any constraints on pornography means limiting freedom of expression and the right to individual liberty.⁴⁴⁴ Liberal theorists such as Feinberg have traditionally taken a very strict view of the circumstances in which they consider that free speech can be legally restrained or criminalised.⁴⁴⁵ They believe that censorship is only justified where the exercise of these rights can be shown to cause harm to an individual.⁴⁴⁶ Feinberg's commitment to freedom of expression is unquestionable and the philosopher has written extensively on its

⁴³⁸ Adam Walsh Child Protection and Safety Act 2006.

⁴³⁹ Adam Walsh Child Protection and Safety Act 2006, s 501(2)(D).

⁴⁴⁰ Adam Walsh Child Protection and Safety Act 2006, s 501(2)(D).

⁴⁴¹ Child Pornography Prevention Act 1996.

⁴⁴² Child Pornography Prevention Act 1996, s 10.

⁴⁴³ Child Pornography Prevention Act 1996, s 10.

⁴⁴⁴ Bakan, above n 344, at 1.

⁴⁴⁵ Stewart, above n 368, at 56.

⁴⁴⁶ Bakan, above n 344, at 1.

application to specific issues.⁴⁴⁷ One of these issues is that of pornography, where Feinberg states in his discussion on freedom of expression and pornography:⁴⁴⁸

Given that “communication” is a form of expression, and thus has an important social value, obviously it cannot be rightly made criminal simply on the ground that it may lead some others on their own to act harmfully. Even if works of pure pornography are not to be treated as “communication,” “expression,” or “speech”.... but as mere symbolic aphrodisiacs or sex aids without further content... they may yet have an intimate personal value to those who use them, and a social value derived from the importance we attach to the protection of the private erotic experience.

According to Ronald Dworkin, freedom of expression is justified.⁴⁴⁹

Not just in virtue of the consequences it has, but because it is an essential and “constitutive” feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents.

It follows that the Government can never infringe upon a person’s right to freedom of speech based on the views they expressed, as this would undo one of the essentials of a just and political society.⁴⁵⁰ In order to infringe upon a person’s right, the Government would have to deny that the person in question was a responsible moral agent.⁴⁵¹ Thus, Richards contends that according to Dworkin’s theory, the criminalisation of pornographic expression such as child pornography cannot be justified because it would not be consistent with the liberal democratic commitment to treating everyone as a responsible moral agent.⁴⁵² Any such restriction on pornography violates two of the fundamental principles of liberal ideology, freedom of expression and an individual’s right to liberty.⁴⁵³ For that reason, it could be

⁴⁴⁷ See Feinberg, above n 398, at 281–287.

⁴⁴⁸ At 156–157.

⁴⁴⁹ Ronald M Dworkin *Freedom’s Law* (Oxford University Press, Oxford, 1996) at 200.

⁴⁵⁰ At 206.

⁴⁵¹ At 206.

⁴⁵² See David Richards “Liberalism, Free Speech, and Justice for Minorities, in In Harm’s Way” in Jules L Coleman and Allen Buchanan (eds) *In Harm’s Way: Essays in Honor of Joel Feinberg* (Cambridge University Press, Cambridge, 1994).

⁴⁵³ Bakan, above n 344, at 3.

argued that the censorship of child pornography cannot be justified under the harm principle because it is inconsistent with the liberal commitment to democracy.⁴⁵⁴

1.3.4.2 Freedom of Expression is Not Absolute

In New Zealand the right to freedom of expression is not only recognised, but protected by the provisions contained within Section 14 of the New Zealand Bill of Rights Act 1990⁴⁵⁵ (Bill of Rights Act 1990) which states:⁴⁵⁶

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

This provision not only restricts the actions of law enforcement agencies but also provides the public with limited protection from censorship under New Zealand's censorship regime.⁴⁵⁷ As the Chief Censor, Dr Jack explains in the following comment on the classification procedure:⁴⁵⁸

You also need to bear in mind that the Classification Office will be construing the legislation as consistently as possible with the New Zealand Bill of Rights Act 1990. This means that where a provision within Section 3 of the Classification Act 1993 is difficult to apply they will apply the decision that is most liberal.

As a result, liberals must concede that neither the right to freedom of expression nor the right to individual liberty can be absolute.⁴⁵⁹ This thesis and law enforcement agencies can counter the argument against censorship under freedom of expression by referring to other works by Feinberg. In these works, Feinberg

⁴⁵⁴ See Richards, above n 426.

⁴⁵⁵ New Zealand Bill of Rights Act 1990 (NZ).

⁴⁵⁶ New Zealand Bill of Rights Act 1990, s 14.

⁴⁵⁷ For a demonstration of the importance of Freedom of Expression to New Zealand's censorship regime see *Mooney v Film and Literature Board of Review* [2002] NZCA 69 (NZ Court of Appeal Wellington).

⁴⁵⁸ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

⁴⁵⁹ Bakan, above n 344, at 4.

employs the metaphor of weighing to describe situations in which other values compete with the right to freedom of expression.⁴⁶⁰ Feinberg states:⁴⁶¹

The greater the certainty and imminence of danger, the more the interest in public safety moves on to the scale, until at the point of clear and present danger it is heavy enough to tip the scales its way.

It is argued that extreme pornography such as child pornography poses a ‘clear and present’ danger to public safety because of its potential to cause certain and imminent harm.⁴⁶² The potential to cause harm means that its ability to contribute to public safety is outweighed by the harms that it causes to children.⁴⁶³ This thesis will substantiate this claim by providing evidence⁴⁶⁴ throughout its chapters that demonstrates the existence of such harms.⁴⁶⁵

Although Mill does not accept the principle of prohibiting indirectly harmful acts, the philosopher does, however, allow the State to interfere in specific cases.⁴⁶⁶ A careful analysis of Mill’s work *On Liberty* reveals that the theorist would allow the State to suppress freedom of expression when it is used to promote harm to others.⁴⁶⁷ This is not a principle that Mill openly advocates, but it can be deduced from the philosopher’s discussion on the promotion of self-regarding acts of which society disapproves.⁴⁶⁸ Mill’s states that there is:⁴⁶⁹

⁴⁶⁰ Joel Feinberg *Freedom and Fulfillment* (Princeton University Press, 1994) at 124–151.

⁴⁶¹ At 151.

⁴⁶² O’Donnell and Milner, above n 124; Taylor and Quayle, above n 97; Alisdair Gillespie *Child pornography* (Routledge, Abingdon, Oxon; New York, 2011).

⁴⁶³ Stewart, above n 368, at 61.

⁴⁶⁴ Marshall, above n 164; B Print and T Morrison “Treating Adolescents who Sexually Abuse Others” in Catherine Itzin (ed) *Home Truths about Child Sexual Abuse: A Reader* (Psychology Press, London, 2000); David Middleton and others “An Investigation into the Applicability of the Ward and Siegert Pathways Model of Child Sexual Abuse with Internet Offenders” (2006) 12 *Psychology, Crime & Law* 589.

⁴⁶⁵ Stewart, above n 368, at 61.

⁴⁶⁶ John Stuart Mill *On Liberty* (Penguin Books, London, 1974) at 119.

⁴⁶⁷ Leo Groarke “Pornography, Censorship, and Obscenity Law in Canada” (1990) 2 *Windsor Rev Legal & Soc Issues* 25 at 28.

⁴⁶⁸ At 28.

⁴⁶⁹ Mill, above n 440, at 170.

Considerable force in the arguments for interfering with anyone who makes it his occupation, for subsistence or pecuniary gain, to promote self-regarding acts which society and the State consider to be an evil.

Mill cites gambling and fornication as examples of acts the theorist believes must be allowed to exist.⁴⁷⁰ Nevertheless, Mill considers that allowing an individual to become a keeper of a gaming house or a pimp crosses the boundary line between what is and what is not acceptable.⁴⁷¹ This is because the criterion which underpins acceptability is whether or not an individual is benefiting from promoting directly harmful acts.⁴⁷² The above example indicates that Mill would probably regard the consumption of child pornography as unacceptable.⁴⁷³ The consumption and dissemination of child pornography across the Internet is more offensive than any self-regarding act and any attempt to benefit from it must, therefore, cross the boundary line between what should and what should not be tolerated.⁴⁷⁴ Given the limits on freedom of expression that rule out the promotion of harm to others, the censorship of child pornography can thus be justified.⁴⁷⁵ Where freedom of expression is used to condone both harm to others and the promotion of violence through the consumption of child pornography, this form of promotion would, it has been suggested, be rejected by traditional liberals such as Mill.⁴⁷⁶

1.3.5 The Harm of Child Pornography to the Community and Society

1.3.5.1 The Harm Principle and Child Pornography

The harm principle can be employed to explain how child pornography that has been downloaded from the Internet is causing harm to the wider community.⁴⁷⁷ The knowledge that people are downloading and watching child pornography in their homes causes emotional distress to the members of the community who view this

⁴⁷⁰ Groarke, above n 441, at 28.

⁴⁷¹ Mill, above n 440, at 170.

⁴⁷² Groarke, above n 441, at 28.

⁴⁷³ At 28.

⁴⁷⁴ At 28.

⁴⁷⁵ At 29.

⁴⁷⁶ At 29.

⁴⁷⁷ Smith, above n 314, at 16.

behaviour as deviant and a potential danger to their children.⁴⁷⁸ Members of the community are aware that children are abused during the production and consumption of child pornography⁴⁷⁹ and that these images are a permanent record of that sexual abuse.⁴⁸⁰ The Supreme Court of the United States agrees with this proposition and in *New York v Ferber*,⁴⁸¹ the Court acknowledged the harm caused to children by the permanent record of these images.⁴⁸² The community in New Zealand is also conscious of the fact that child pornography images can be used by offenders to groom children so that they can be sexually molested⁴⁸³ and to decrease the inhibitions of potential victims such as children.⁴⁸⁴ Moreover, liberalism does permit State interference when the security and autonomy of an individual is threatened⁴⁸⁵ and according to Feinberg's theory:⁴⁸⁶

If witnessing and enjoying this spectacle would predictably so affect the attitudes and dispositions of the spectators that they would be likely to commit crimes of violence against innocent victims, the harm principle would again give us good reason to criminalise it.

As a result, most liberals would acknowledge that the security and autonomy of an individual may be compromised by pornography when this pornography incites the viewer to commit a violent assault on another individual.⁴⁸⁷ To draw the line there and say that the affront to a person's dignity and the psychological harm that may be caused to them by pornography is not prejudicial to that person's security and autonomy is not a rational or convincing argument.⁴⁸⁸ Surely, security and autonomy include freedom from mental pain and distress.⁴⁸⁹ Therefore, the

⁴⁷⁸ At 16.

⁴⁷⁹ Roberta Lynn and Daniel Sugar Sinclair *Internet Based Sexual Exploitation of Children and Youth Environmental Scan* (2005) at 7.

⁴⁸⁰ At 7.

⁴⁸¹ *New York v Ferber*, 458 747 (us 1982).

⁴⁸² At 759–760.

⁴⁸³ Healy, above n 252.

⁴⁸⁴ Ethel Quayle and Max Taylor "Paedophiles, Pornography and the Internet - Assessment Issues" (2002) 32 *British Journal of Social Work* 863 at 866.

⁴⁸⁵ Bakan, above n 344, at 20.

⁴⁸⁶ Feinberg, above n 365, at 131–133.

⁴⁸⁷ Bakan, above n 344, at 19.

⁴⁸⁸ At 19.

⁴⁸⁹ At 20.

immediate question in this situation is not whether this thesis or New Zealand's censorship legislation, the Films, Videos, and Publications Classification Act 1993 is justified, but whether, under the harm principle, the matter is outside the State's coercive jurisdiction.⁴⁹⁰

According to the harm principle, the Government has jurisdiction if and only if an individual's action causes harm.⁴⁹¹ In this situation anyone who is viewing or downloading child pornography cannot reasonably deny that some members of the community suffer emotional distress because of their actions.⁴⁹² Feinberg suggests that a:⁴⁹³

Legitimate reason for prohibiting conduct is the need to protect others from certain sorts of offensive, irritating or inconveniencing experiences.

The immediate negative effects on the children of physical abuse during the production of child pornography are clearly apparent.⁴⁹⁴ It is, however, the harmful effects on their future development that arguably cause the most harm.⁴⁹⁵ As previously explained, there is evidence that these children suffer from physical trauma and emotional symptoms including moodiness, fear, anxiety and hopelessness.⁴⁹⁶ 'Mr White',⁴⁹⁷ a Registered Psychologist with eight years' experience in dealing with child pornography offending, agrees and states:⁴⁹⁸

Well, it's the same as, and beyond that of traditional hands-on offending. Not only are they sexually abused, but they have an awareness that these images are out in the world. Once they are on the Internet, they will be there forever and a day. They

⁴⁹⁰ Smith, above n 314, at 16.

⁴⁹¹ At 16.

⁴⁹² At 16.

⁴⁹³ Joel Feinberg "Pornography and the Criminal Law" (1978) 40 U Pitt L Rev 567 at 567.

⁴⁹⁴ Halper Silbert Mimi "The Effects on Juveniles of Being Used for Pornography and Prostitution" in Dolf Zillmann and Jennings Bryant (eds) *Pornography: Research Advances and Policy Considerations* (L Erlbaum Associates, London, 1989) at 226.

⁴⁹⁵ At 216.

⁴⁹⁶ At 226.

⁴⁹⁷ Mr White is a nom de plume.

⁴⁹⁸ Interview with Mr White, Registered Psychologist (23 June 2014) at 1.

may have been physically abused by one or two people; the Internet means that they are going to be further abused by countless other people.

The suffering and damage caused to these children during the production and consumption of child pornography affects them well into the future.⁴⁹⁹ The Supreme Court of the United States in *Osborne v Ohio* agreed.⁵⁰⁰ The Court explained that the victimisation of the children involved in the production and consumption of child pornography does not end when the pornographer's camera is put away.⁵⁰¹ The continued existence of the pornography causes the children harm by haunting them in years to come.⁵⁰² Furthermore, it cannot be denied that emotional distress is a kind of suffering or pain.⁵⁰³ It is readily acknowledged that emotional distress is a form of harm and that the prevention of such distress by the State is justified.⁵⁰⁴ Richard Arneson perceives that:⁵⁰⁵

Emotional reactions to what one's neighbours and fellow citizens are doing can be powerful and can be virtually unavoidable for persons who have not detached themselves from all personal concern for the quality of life in their community.

Arneson suggests that if some citizens are appalled at the thought of living in a community that tolerates a certain type of behaviour then society should consider that they would be harmed by the bare knowledge that such events are occurring.⁵⁰⁶ Applying this suggestion to New Zealand, it would follow that the availability of child pornography on the Internet is harming New Zealand's society.⁵⁰⁷

⁴⁹⁹ Leary, above n 208, at 10.

⁵⁰⁰ *Osborne v Ohio*, 495 US 103 (1990).

⁵⁰¹ Leary, above n 208, at 12.

⁵⁰² *Osborne v Ohio*, above n 474, at 111.

⁵⁰³ Smith, above n 314, at 16.

⁵⁰⁴ At 16.

⁵⁰⁵ Richard J Arneson "Liberalism, Freedom, and Community" (1990) 100 *Ethics* 368 at 374.

⁵⁰⁶ At 374.

⁵⁰⁷ An indication of this harm to society can be seen in the following news releases: James Ihaka "Sharp Cop Spots NZ Link in Italian Child-Porn Case" *New Zealand Herald* (7 July 2012) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10817981>; Aaron Leaman "Te Awamutu Man Sentenced for Role in Global Child Pornography Ring" *Stuff.co.nz* (26 April 2013) <<http://www.stuff.co.nz/waikato-times/news/8600745/Te-Awamutu-man-sentenced-for-role-in-global-child-pornography-ring>>; Matthew Backhouse "NZ Helps Bring Down Child Porn Ring" *New Zealand Herald* (22 May 2012) <http://www.nzherald.co.nz/indonesia/news/article.cfm?l_id=50&objectid=10807635>.

Harm occurs towards the child who is portrayed in the images and further harm transpires when someone views the images of the child online.⁵⁰⁸ Regular consumption of child pornography can numb an individual to the harm caused by these images and also encourages the view of children as legitimate sexual objects.⁵⁰⁹ Being able to network with countless other like-minded individuals via the Internet reinforces the belief that a sexual interest in children is both common and normal.⁵¹⁰ This belief, enables the consumer of child pornography to convince themselves that their behaviour is not abnormal because thousands of other people online share their views.⁵¹¹ Therefore, it is argued that because child pornography can be utilised to normalise and validate paedophilia, it harms society.⁵¹²

Child pornographers can also become obsessed with a quest to find complete sets of images because photo shoots are often posted online in incomplete sets.⁵¹³ As a result, society is harmed by the nature of the exchange, which drives individuals to seek out more graphic and extreme child pornography.⁵¹⁴ This compulsion to acquire more material also stimulates the market to produce and consume more hardcore child pornography which again harms society.⁵¹⁵ However, the relevance of the harm argument is reduced when it is applied to the outlawing of pseudo images.⁵¹⁶ Suzanne Ost argues that it is difficult to find a legitimate reason for the criminalisation of completely fictional images through the application of the harm principle.⁵¹⁷ Nevertheless, the argument that the consumption of pseudo images drive the market for actual child pornography and thereby cause substantial indirect

⁵⁰⁸ Ethel Quayle and Roberta Sinclair “An Introduction to the Problem” in Ethel Quayle and Kurt M Ribisl (eds) *Understanding and Preventing Online Sexual Exploitation of Children* (Routledge, Abingdon, Oxon ; New York, 2012) at 4.

⁵⁰⁹ O'Donnell and Milner, above n 124, at 74.

⁵¹⁰ Sara M Smyth “Child Pornography on the Internet : An International ‘Crisis’ from a Canadian perspective” (PhD Thesis, York University, 2008) at 52, 56.

⁵¹¹ O'Donnell and Milner, above n 124, at 75.

⁵¹² Henzey, above n 319, at 9.

⁵¹³ Jenkins, above n 130, at 103.

⁵¹⁴ Henzey, above n 319, at 10.

⁵¹⁵ At 10.

⁵¹⁶ Quayle and Sinclair, above n 482, at 5.

⁵¹⁷ Suzanne Ost “Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?” (2010) 30 *Legal Studies* 230 at 235–238.

harm to society is a view firmly held by many experts concerned about their use and criminalisation.⁵¹⁸

Another issue of concern to society is that many child pornographic images depict children smiling as though they are enjoying themselves.⁵¹⁹ As already noted, child pornography consumers seize on this apparent denial of victimhood as a means of neutralising their behaviour.⁵²⁰ Paedophiles who engage in online networking are known to use language that neutralises the inherent harm of child pornography.⁵²¹ Neutralisation is a technique that enables paedophiles to justify the downloading of child pornography even though they subconsciously recognise it as being wrong.⁵²² Neutralisation tactics utilised by child pornographers include portraying children as legitimate sexual objects and denying their victimhood by believing that the child enjoyed the sex and the act was fully consensual.⁵²³ This justification for the downloading of child pornography is founded on the conceptual transformation of children from victims to willing sexual partners of adults.⁵²⁴ Moreover, this rationalisation harms society as it enables paedophiles to deceive themselves and those they associate with.⁵²⁵ It also perpetrates the market for the production and consumption of additional child pornography which also harms society.⁵²⁶

Society is also further harmed by child pornography as this material can incite paedophiles to seek out and sexually abuse children.⁵²⁷ The reasoning behind this assumption is that watching child pornography may increase the likelihood of a paedophile committing a contact offence against a child at some point in the

⁵¹⁸ See Benjamin Mains “Virtual Child Pornography, Pandering, and the First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence Have Affected the Criminalization of Child Pornography” (2010) 37 Hastings Constitutional Law Quarterly 809.

⁵¹⁹ Henzey, above n 319, at 10.

⁵²⁰ At 10.

⁵²¹ O'Donnell and Milner, above n 124, at 74.

⁵²² Jenkins, above n 130, at 116.

⁵²³ At 116–117.

⁵²⁴ Mary DeYoung “The World According to NAMBLA: Accounting for Deviance” (1989) 16 J Soc & Soc Welfare 111 at 122.

⁵²⁵ Henzey, above n 319, at 10.

⁵²⁶ At 10.

⁵²⁷ At 10.

future.⁵²⁸ When a paedophile regularly views child pornography their arousal is intensified and this increases their desire for a sexual relationship with a child.⁵²⁹ Accounts from paedophiles indicate that viewing child pornography can sustain them because it gives them ‘hope’ that they would one day be able to have sexual relations with a child.⁵³⁰ This explanation supports the notion that for some paedophiles, the viewing of child pornography is intertwined with contact offending against children.⁵³¹

The distribution of child pornography via the Internet harms society by creating a market for its consumption, which encourages the further sexual exploitation of children.⁵³² The online grouping of paedophiles within marginalised communities both normalises and legitimises outlawed activities such as the viewing of child pornography.⁵³³ This normalisation further promotes the dangerous belief that children are legitimate sexual targets.⁵³⁴ Furthermore, although it is possible to contend that conduct should be outlawed only if it is directly harmful, it can also be argued that the criminal law recognises that wrongdoing can take place when no direct harm is caused to an individual as exhibited by the offence of trespass.⁵³⁵ In such cases, as with child pornography a robust case is made for indirect harm to the community or society as the justification for absolute criminalisation.⁵³⁶

1.3.5.2 The Communal Harm of Child Pornography

Watching downloaded child pornography also causes harm in other ways.⁵³⁷ It alters the overall disposition of the community in a way that people find disturbing or undesirable.⁵³⁸ As previously discussed, the accessing of child pornography from

⁵²⁸ Quayle and Sinclair, above n 482, at 4.

⁵²⁹ Ethel Quayle and Max Taylor “Child Seduction and Self-Representation on the Internet” (2001) 4 *CyberPsychology & Behavior* 597 at 606.

⁵³⁰ Tate, above n 128, at 111.

⁵³¹ O’Donnell and Milner, above n 124, at 76.

⁵³² Henzey, above n 319, at 11.

⁵³³ At 11.

⁵³⁴ At 11.

⁵³⁵ Quayle and Sinclair, above n 482, at 5.

⁵³⁶ At 5.

⁵³⁷ Smith, above n 314, at 17.

⁵³⁸ At 17.

the Internet encourages the sexualisation of minors which supports the view of children as sexual objects.⁵³⁹ It can also create an unwholesome environment which can lead to further sexual abuse of children throughout the community.⁵⁴⁰ This type of harm is known as ‘communal harm’.⁵⁴¹ Considering child pornography to cause communal harm is not to claim that the downloading of such material harms the community or an entity within the community but instead that it causes harm to individuals within a community.⁵⁴² Moreover, communal harm is based on the notion that people in New Zealand care about the kind of community they live and work in.⁵⁴³ Child pornography expert Dr Ethel Quayle suggests that the viewing of child pornography increases the likelihood that children will continue to be abused⁵⁴⁴ because viewing such material stimulates the market to produce and consume more hardcore pornography.⁵⁴⁵ Therefore, the downloading of child pornography from the Internet is changing the nature of New Zealand’s society in a way that diminishes the value and appeal of the community for its citizens.⁵⁴⁶ The availability of child pornography is causing communal harm by harming individual members of the community.⁵⁴⁷

Child pornographers may argue that they view child pornography in the complete privacy of their own homes and that consequently no harm is done to anyone else in the community.⁵⁴⁸ This type of justification was disclosed by Mr Blue who was convicted and sentenced to five years’ jail for several sexual offences against children. Mr Blue stated:⁵⁴⁹

One thing that I do remember is that there was the belief that what is done in the privacy of your own home is your business. As long as you are not physical

⁵³⁹ See Child Pornography Prevention Act 1996, s 121(1)1.

⁵⁴⁰ See Child Pornography Prevention Act 1996, s 121(1)1.

⁵⁴¹ Smith, above n 314, at 17.

⁵⁴² At 17.

⁵⁴³ At 17.

⁵⁴⁴ See Ethel Quayle “The Impact of Viewing an Offending Behavior” in Martin Calder (ed) *Child Sexual Abuse and the Internet: Tackling the New Frontier* (Russell House Publishing, 2004).

⁵⁴⁵ Henzey, above n 319, at 10.

⁵⁴⁶ Smith, above n 314, at 17.

⁵⁴⁷ At 17.

⁵⁴⁸ At 17.

⁵⁴⁹ Blue, Convicted Child Sexual Offender, above n 105, at 2.

interacting or abusing children then you aren't actually harming anyone in the community.

The author would respond to this claim by stating that child pornographers are being sociologically naïve and self-deceptive.⁵⁵⁰ What they do in private will eventually influence their views and the activities that they engage in and support.⁵⁵¹ Dr Diana Russell agrees and argues that viewing child pornography predisposes some males to sexually desire children.⁵⁵² It undermines their internal inhibitions and their social boundaries with minors, and reduces the ability of children to avoid sexual victimisation.⁵⁵³ The watching of extreme pornography such as child pornography is likely to influence the viewer's conduct.⁵⁵⁴ It will also affect the wider community as they interact with the community.⁵⁵⁵

In addition, it is not unrealistic to suppose that other people, including any children of viewers, will not in some way be influenced by their activities.⁵⁵⁶ As these children grow older they will be permitted to participate in the viewing of child pornography and may expose other children to downloaded child sexual abuse images.⁵⁵⁷ This has in fact already happened in New Zealand. Former National Party Member of Parliament Trevor Rodgers revealed to Parliament that:⁵⁵⁸

I was horrified when teachers told the committee about children who were held down by other children and molested in the playground. When teachers approached the children on a consultative basis to find out the reason for their behaviour, the children said that they had watched Dad's movies the night before.

⁵⁵⁰ Smith, above n 314, at 17.

⁵⁵¹ At 17.

⁵⁵² Diana EH Russell and Natalie J Purcell "Exposure to Pornography as a Cause of Child Sexual Victimization" in Nancy E Dowd, Dorothy G Singer and Robin Fretwell Wilson (eds) *Handbook of Children, Culture, and Violence* (SAGE Publications, Inc, Thousand Oaks, Calif, 2006) at 66.

⁵⁵³ At 66.

⁵⁵⁴ Smith, above n 314, at 17.

⁵⁵⁵ Robert P George "The Concept of Public Morality" (2000) 45 Am J Juris 17 at 18.

⁵⁵⁶ Smith, above n 314, at 17.

⁵⁵⁷ At 18.

⁵⁵⁸ Hansard (29 July 1993) 573 17051 at 17066.

It must also be stated that exposure to child pornography is known to be a significant factor in child sexual victimisation.⁵⁵⁹ One study found that in twenty two percent of juvenile sexual abuse cases, pornography was used by the offender to groom the victim prior to the attack.⁵⁶⁰ Consequently, the parents of the viewer's children's friends would more than likely prefer that their children were not exposed to child pornography.⁵⁶¹ It would also be much more difficult for them to encourage and enforce acceptable values upon their children if their friends were viewing child pornography.⁵⁶² The parents of these children may be fearful that they might develop a liking for this type of pornography and this would result in a decline in moral standards.⁵⁶³ This sort of concern is described by Arneson as 'self-paternalism'.⁵⁶⁴ Arneson claims that self-paternalism is in principle a legitimate reason for instituting criminal prohibitions⁵⁶⁵ and states:⁵⁶⁶

I do not want to extend legal tolerance to a type of activity because I fear that in time the legal ability will alter my character and values in ways that I now find odious.

It is almost undeniable that what we do in the privacy of our own homes will in time have a very real influence on the sort of community we live and work in.⁵⁶⁷ Liberal theorist Dworkin agrees and concedes this point when arguing for the right to pornography.⁵⁶⁸ Citizens who have no desire to be intrusive or to impede the lives of others will, however, naturally have a strong personal interest in the kind of community that they and their children live in.⁵⁶⁹ Arneson explains that such desires

⁵⁵⁹ Russell and Purcell, above n 526, at 64.

⁵⁶⁰ Mimi, above n 468, at 224–225.

⁵⁶¹ Smith, above n 314, at 18.

⁵⁶² At 18.

⁵⁶³ At 18.

⁵⁶⁴ Arneson, above n 479, at 375.

⁵⁶⁵ At 375.

⁵⁶⁶ At 375.

⁵⁶⁷ Smith, above n 314, at 18.

⁵⁶⁸ Ronald Dworkin *A Matter of Principle* (Harvard University Press, Cambridge, Mass, 1985) at 349.

⁵⁶⁹ See George, above n 529, at 25; John Copeland Nagle "Moral Nuisances" (2001) 50 Emory L J 265.

are deeply felt and are expressed in the sense of which society people decide that they will live with their family.⁵⁷⁰ Arneson states that:⁵⁷¹

People, as a matter of fact, do tend to want to live in proximity to likeminded others and share ways of life in common with others. The kind of life that any person wants to live almost invariably includes relations to others beyond immediate family and close friends. Face-to-face arm's-length transactions with one's neighbours, the residents of one's local community, colleagues at work, and inhabitants of one's city or county can be important determinants of the degree, to which one's life is experienced as satisfying. Call such concerns "communitarian." The difference in price between otherwise identical houses located in "desirable" and "undesirable" neighbourhoods is one indicator of the extent to which people care about such matter.

As a result, behaviour that is likely over time to make a society contradictory to the values of many of its citizens, harms those people in a very tangible and commonsensical way.⁵⁷²

1.3.6 Conclusion

The crucial point of this section is to evaluate whether the restrictions on child pornography under New Zealand's classification legislation can be ruled out or declared beyond the coercive jurisdiction of the Government.⁵⁷³ New Zealand's legislation guarantees the right to freedom of expression and also recognises the limits that this right places upon the harm principle.⁵⁷⁴ This safeguard ensures that the Classification Act 1993 does not infringe upon the harm principle and does in fact acknowledge its importance and its limitations. In the present situation, it is argued that there also appears to be no good reason for not prohibiting this obviously harmful behaviour.⁵⁷⁵ Therefore, the harm principle justifies the outlawing of child pornography by the Classification Act 1993. This justification

⁵⁷⁰ Arneson, above n 479, at 378–79.

⁵⁷¹ At 378–379.

⁵⁷² See Feinberg, above n 362, at 57–64; Dworkin, above n 542, at 359–372.

⁵⁷³ Smith, above n 314, at 20.

⁵⁷⁴ See the discussion on freedom of expression in Chapter 3.

⁵⁷⁵ Smith, above n 314, at 20.

does, however, raise other issues concerning the rights of children as individuals under the law. Children are rights holders who suffer a particular form of harm from child pornography which must be recognised by the State. This concern will require the analysis of academic information and also the production of qualitative information to ascertain whether the State is fulfilling its increased obligations to New Zealand's children.

1.4 Methodology

1.4.1 The Qualitative Production of Information

The legal profession undertakes qualitative empirical research on a regular basis.⁵⁷⁶ Establishing the law through case-based precedent law is a form of qualitative research that uses previous Court cases as source material.⁵⁷⁷ Qualitative research is characterised by observing people and interacting with them on their own terms and within their own space.⁵⁷⁸ In political science and other disciplines qualitative research has also been described as naturalistic, ethnographic and participatory.⁵⁷⁹ The naturalistic element means that the research is conducted in the field and not in a foreign environment constructed by the researcher.⁵⁸⁰ 'Ethnographic' refers to a holistic anthropological approach⁵⁸¹ and 'participatory' to the active part that research subjects play in the process of qualitative research.⁵⁸²

This thesis required the qualitative production of empirical data as there is a very limited pool of academic information available on child pornography offending within New Zealand. These interviews will complement the existing data and add to the field of academic research. Individual interviews are commonly utilised by

⁵⁷⁶ Lisa Webley "Qualitative Approches to Empirical Legal Research" in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford, 2010) at 927.

⁵⁷⁷ At 927.

⁵⁷⁸ Marc L Miller *Reliability and Validity in Qualitative Research* (SAGE Publications, 1986) at 9.

⁵⁷⁹ At 9.

⁵⁸⁰ Webley, above n 550, at 927.

⁵⁸¹ At 927.

⁵⁸² At 927.

qualitative researchers examining legal issues.⁵⁸³ The interviews conducted provided this thesis with access to the perceptions and experiences⁵⁸⁴ of experts in this area of offending and are therefore able to provide highly informative and relevant information.⁵⁸⁵ These insights make an important contribution to New Zealand's response to child pornography offending on the Internet as they highlight issues affecting the operation and enforcement of New Zealand's legislation that would otherwise be closed to academic research.⁵⁸⁶ The initial step in this type of study is to implement a substantive framework that encapsulates the different topics of study.⁵⁸⁷ Interviews enabled this thesis to build and remodel its substantive framework in response to the qualitative information disclosed by interview participants.⁵⁸⁸

This qualitative research involves an analytical element which enables the researcher to comment on what the participant discloses during an interview. The questions posed during the interview process were semi-structured and used open-ended set questions.⁵⁸⁹ The reliability or soundness of this study depends on the likelihood of the research findings being repeated in other studies.⁵⁹⁰ It is the collective nature of the qualitative information that has been generated by the interview participants and the meanings attached to them that are expected to be repeated in other investigations of child pornography offending over the Internet.⁵⁹¹ Therefore, the information disclosed during the interview phase of this thesis has been frequently referred to in other publications on Internet child pornography

⁵⁸³ Hilary Sommerlad "Researching and Theorizing the Processes of Professional Identity Formation" (2007) 34 *Journal of Law and Society* 190; Margaret Thornton *Dissonance and Distrust* (Oxford University Press, Melbourne ; New York, 1996).

⁵⁸⁴ Webley, above n 550, at 936.

⁵⁸⁵ Robert Stuart Weiss *Learning from Strangers* (Free Press, New York, 1994) at 17.

⁵⁸⁶ At 1.

⁵⁸⁷ At 15.

⁵⁸⁸ At 15–17.

⁵⁸⁹ Webley, above n 550, at 937.

⁵⁹⁰ Jane Lewis and Jane Ritchie "Generalising from Qualitative Research" in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (1 edition ed, SAGE Publications Ltd, London, 2003) at 270.

⁵⁹¹ At 271.

offending and therefore has validity.⁵⁹² Validity refers to the correctness or precision of the information revealed during the interviews.⁵⁹³

As previously noted, without the qualitative production of empirical data there would be no conceivable way to analyse and critique New Zealand's response to the dissemination of child pornography across the Internet. These interviews were extremely effective at gathering from law enforcement agencies and community organisations expert information and their perceptions and reasoning for their views.⁵⁹⁴ These interviews also provided this thesis with an invaluable insight into the participants' experiences in dealing with child pornography downloaded from the Internet.⁵⁹⁵ Finally, as previously stated, these interviews were conducted in accordance with ethical approval by Te Piringa, Faculty of Law Ethics Committee.

1.5 Overall Conclusion for Chapter 1

Child pornography was once extremely difficult for New Zealanders to obtain because of our geographical isolation. The equipment required to produce such material was expensive and also required some expertise to create publishable content.⁵⁹⁶ However, this is no longer the case. The Internet and advances in information technology⁵⁹⁷ have revolutionised the production, consumption and dissemination of child pornography.⁵⁹⁸ As a result of this technological revolution, there is now no doubt that child pornography is a serious concern to New Zealand because of its potential to harm children and those who become involved with it.⁵⁹⁹

⁵⁹² MacVean and Spindler, above n 91; Gillespie, above n 436; O'Donnell and Milner, above n 124; Akdeniz, above n 148; Davidson and Gottschalk, above n 140; Ost, above n 8; Richard Wortley *Internet child pornography* (Praeger, Santa Barbara, Calif, 2012); Taylor and Quayle, above n 97; Jenkins, above n 130; Julian Sher *Caught in the web* (Carroll & Graf, New York, 2007); Seto, American Psychological Association, above n 9.

⁵⁹³ Lewis and Ritchie, above n 564, at 273.

⁵⁹⁴ Webley, above n 550, at 937.

⁵⁹⁵ At 937.

⁵⁹⁶ Interview with John Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand) (10 June 2014) at 1.

⁵⁹⁷ Information technology is the application of computers and the Internet to create, store, and communicate data or information. For more information see: Carl French *Data Processing and Information Technology* (Cengage Learning EMEA, London, 1996) at ch 1.

⁵⁹⁸ Ferraro, Casey and McGrath, above n 1, at 11.

⁵⁹⁹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 2.

It is this potential to harm children and also society which in the opinion of the author justifies legislative intervention and the complete outlawing of this material. However, this censorship will require New Zealand to continuously review the efficacy of the Classification Act 1993. Such reviews will require the examination of empirical data from experts in law enforcement to determine the effectiveness of the Statute and also to highlight any shortcomings. The significance of these reviews is that they will enable the Statute and New Zealand's institutional responses to keep up-to-date with the main medium of supply, the Internet. It must also be stated that although these proposed measures are not a definitive answer to the issue of child pornography on the Internet, they are an important aspect of the international community's struggle against the distribution of child pornography via this medium.

Chapter 2

The International Legal Framework

1.6 Overall Introduction

The critical concerns discussed in the previous chapter include the ability of the Internet to provide paedophiles with new avenues to seduce children⁶⁰⁰ and to disseminate child pornography across the world.⁶⁰¹ The significance of these concerns is that the traditional domestic response to child sexual abuse is no longer adequate due to the international nature of the main medium of supply, the Internet. The children sexually abused during the consumption of child pornography are nevertheless recognised as legal rights holders by international law⁶⁰² and New Zealand's domestic legislation.⁶⁰³ These instruments place an obligation on the State to provide children with the same protection afforded to adults.⁶⁰⁴ However, it is contended that due to the vulnerability of children they require additional protection which indicates that the State is under a *special duty* to respond to the concerns surrounding the availability of child pornography on the Internet.⁶⁰⁵ This chapter will demonstrate that additional measures must be employed in recognition of the fact that children have the right to a form of protection that accommodates their particular requirements. Moreover, new and more dynamic legislative measures are required to adequately counter the dissemination of child pornography via the Internet. The National Manager of the Censorship Compliance Unit of New Zealand's Department of Internal Affairs Steve O'Brien is adamant that the implementation of universal legislative standards across the world is essential to

⁶⁰⁰ Skorzevska-Amberg, above n 141, at 262.

⁶⁰¹ Ministry of Justice, above n 215, at 10.

⁶⁰² Convention on the Rights of the Child 1989 (UN); Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN); Universal Declaration of Human Rights 1948 (un.org).

⁶⁰³ Care of Children Act 2004 (NZ).

⁶⁰⁴ Convention on the Rights of the Child 1989, art 3; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 8(1)(a); Universal Declaration of Human Rights 1948, arts 1, 6.

⁶⁰⁵ Convention on the Rights of the Child 1989, preambular, arts 4, 5, 9.

combat child pornography.⁶⁰⁶ This chapter will examine the United Nations Convention on the Rights of the Child 1989⁶⁰⁷ and its subsequent Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000.⁶⁰⁸ It will illustrate how these international instruments can be utilised as the foundation for the advancement of children's rights and improved legislation. This chapter will also make appropriate recommendations.

1.7 Children as Rights Holders and the United Nations Convention on the Rights of the Child 1989

1.7.1 Children as Rights Holders

An assumption that children are rights holders can be derived from the wealth of international material based on the recognition of children's rights.⁶⁰⁹ This notion is also evident in the acceptance and protection of children's rights among the international community.⁶¹⁰ Further evidence of this view can be ascertained from the fundamental obligations of the Convention on the Rights of the Child 1989 ('Convention').⁶¹¹ The essential requirement for the implementation of the Convention is that a child is fully recognised as a human being with human rights.⁶¹² This requirement and the fact that no other international human rights instrument has been more widely ratified⁶¹³ in the history of human rights⁶¹⁴ suggests that children's rights are a widely accepted notion.⁶¹⁵ Moreover, the premise that children's rights are human rights is affirmed by Article 6 of the⁶¹⁶ Universal

⁶⁰⁶ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.

⁶⁰⁷ Convention on the Rights of the Child 1989.

⁶⁰⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000.

⁶⁰⁹ Jane Fortin *Children's Rights and the Developing Law* (Cambridge University Press, London, 2003) at 12.

⁶¹⁰ At 12.

⁶¹¹ Jaap E Doek "What Does the Children's Convention Require?" (2006) 20 Emory Int'l L Rev 199 at 1–2.

⁶¹² At 199.

⁶¹³ The two most notable exceptions to the ratification of the Convention are the United States and Somalia.

⁶¹⁴ UNICEF "UNICEF - Convention on the Rights of the Child - Frequently Asked Questions" (23 April 2014).

⁶¹⁵ Fortin, above n 583, at 13.

⁶¹⁶ Jan CM Willems *Developmental and autonomy rights of children* (Intersentia ; Distribution for North America [by] Transnational Publishers, Antwerpen; New York; New York, 2002) at 13.

Declaration of Human Rights 1948,⁶¹⁷ which states that everyone has the right to recognition everywhere as a person before the law.⁶¹⁸

Article 1 of the Universal Declaration of Human Rights 1948 also extends human rights to everyone and states that all human beings including children deserve to be treated with dignity and equality.⁶¹⁹ The significance of these rights for children is in their potential to account for the imbalance between themselves and adults.⁶²⁰ Children's rights identify and respond to the power differential between children and adults.⁶²¹ The importance of children's rights is that they enable an individual child to be heard and to have value as a human being.⁶²² Nevertheless, the concept of children as rights holders requires a sound theoretical justification.⁶²³ This assessment of children rights would be incomplete without recourse to the jurisprudential and philosophical arguments⁶²⁴ concerning whether or not children can be regarded as rights holders.⁶²⁵ The main issue in this debate is the disagreement over the nature of the rights themselves⁶²⁶ and whether children can exercise the right of choice.⁶²⁷

Positivist theory envisions the rights holder as a competent being who has the power to undertake duties and impose obligations, and the accordance of rights is reliant upon the capacity of the individual.⁶²⁸ In this sense, rights are the exclusive domain of the rational adult.⁶²⁹ There is the view that unless a person can exercise a choice over the right in question, that person cannot be regarded as a rights holder.⁶³⁰ Proponents of the choice theory argue that children lack the ability to make

⁶¹⁷ Universal Declaration of Human Rights 1948 (un.org).

⁶¹⁸ Universal Declaration of Human Rights 1948, art 6.

⁶¹⁹ Universal Declaration of Human Rights 1948, art 1.

⁶²⁰ Katherine Hunt Federle "Rights Flow Downhill" (1994) 2 Int'l J Child Rts 343 at 345.

⁶²¹ At 345.

⁶²² At 345.

⁶²³ Fortin, above n 583, at 13.

⁶²⁴ Freeman provides a useful discussion on the concepts relating to children's rights in Michael DA Freeman *The Rights and Wrongs of Children* (F Pinter, London; Dover, NH, 1983) at ch 3.

⁶²⁵ Fortin, above n 583, at 13.

⁶²⁶ At 13.

⁶²⁷ At 13.

⁶²⁸ Herbert Lionel Adolphus Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 28.

⁶²⁹ Federle, above n 594, at 346.

⁶³⁰ Fortin, above n 583, at 13.

informed choices and therefore, they cannot be given rights.⁶³¹ The implication here is that choice theory recognises children as rights holders only if those children have the necessary degree of competency to exercise their rights.⁶³² The assertion that children who are incapable of asserting their rights are not rights holders is logically unappealing and contrary to what is generally accepted by the signatories of the Convention.⁶³³ This stance contradicts the instinctive and ethical view that it is wrong to deny children their rights, as children are human beings and the most vulnerable members of society.⁶³⁴

In contrast, other theorists⁶³⁵ argue that the concept of rights does not have to be confined to those who have the capacity to exercise those rights.⁶³⁶ According to the interest theory of rights, a person has a right where their interests are protected by legal constraints on the activities and conduct of other people regarding their safety and welfare.⁶³⁷ The justification for this concept is that it avoids denying children legal and moral rights on the assumption that they must have first acquired the capacity to undertake reasoned decisions.⁶³⁸ Such a rights model fully supports the view that children are rights holders and that their lack of adult capacities should in no way undervalue them.⁶³⁹ The interest theory of rights is supported by Feinberg's theory of harm, which accepts that the type of beings who can have rights are surely those who have interests.⁶⁴⁰ However, the significance of the interest theory to this thesis is that it raises the visibility of children by recognising that they require a specific form of protection before the law.

⁶³¹ At 13.

⁶³² Katherine Hunt Federle "Looking Ahead: An Empowerment Perspective on the Rights of Children" (1995) 68 Temple L Rev 1585 at 1591.

⁶³³ Fortin, above n 583, at 13.

⁶³⁴ At 13.

⁶³⁵ Neil MacCormick *Legal Right and Social Democracy Essays in Legal and Political Philosophy* (Oxford University Press, Oxford, 1982) at ch 8; Joseph Raz *The Morality of Freedom* (Oxford University Press, Oxford, 1986) at 156–165.

⁶³⁶ Fortin, above n 583, at 13.

⁶³⁷ Raz, above n 609, at 165–192; MacCormick, above n 609, at 154.

⁶³⁸ Fortin, above n 583, at 14.

⁶³⁹ T Campbell "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights, and the Law* (Oxford University Press, Oxford, 1992) at 5.

⁶⁴⁰ See Joel Feinberg "Duties, Rights, and Claims" (1966) 3 American Philosophical Quarterly 137.

According to Neil MacCormick, the child has an unquestionable interest in being nurtured and cared for, and as such, that interest is deserving of protection as a moral, if not a legal right.⁶⁴¹ MacCormick criticises the proponents of choice theory for their emphasis on needing to ensure that there is redress for a violation of a child's right.⁶⁴² Before they can consent to the existence of the right itself, the advocates of choice theory claim that this redress must be enforceable through someone else's corresponding duty, such as a parent, who has a moral obligation to care for a child.⁶⁴³ However, MacCormick's model of rights allows children to be included as rights holders under the interest theory because their rights are not viewed as any obligations.⁶⁴⁴ Interest theory positions the protection of children's rights upon children's interests and the obligations of others to act in accordance with those interests.⁶⁴⁵

The supporters of choice theory are accused of putting the cart before the horse⁶⁴⁶ as this approach is considered to be an obsession with remedies rather than the rights themselves.⁶⁴⁷ It is because children have the right to care and nurture that the imposition of legal provisions requiring others to provide this care and nurture is justified.⁶⁴⁸ Furthermore, to take children's rights seriously requires society to take the notions of nurturance and self-determination passionately.⁶⁴⁹ It demands that society adopts policies, structures and legislation which protect both children and their rights.⁶⁵⁰ To clarify this point, the existence of the right presupposes the remedy⁶⁵¹ and contradictions and other classifications should not distract from the

⁶⁴¹ Neil MacCormick "Children's Rights: A Test-Case for Theories of Rights" in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford University Press, Oxford, 1982) at 154.

⁶⁴² Fortin, above n 583, at 14.

⁶⁴³ At 14.

⁶⁴⁴ Federle, above n 606, at 1591.

⁶⁴⁵ At 1591.

⁶⁴⁶ Fortin, above n 583, at 14.

⁶⁴⁷ At 14.

⁶⁴⁸ At 14.

⁶⁴⁹ Michael DA Freeman "Taking Children's Rights More Seriously" (1992) 6 Int'l JL & Fam 52 at 69.

⁶⁵⁰ At 69.

⁶⁵¹ Fortin, above n 583, at 14.

fact that any genuine attempt to give protection to children does in reality protect their rights and their ability to exercise autonomy.⁶⁵²

1.7.1.1 The Concept of Children's Autonomy

To respect a child's autonomy is to recognise that child as a person and as a rights holder.⁶⁵³ It is the respect for the child's ensuing capacity for autonomy, rather than the autonomy itself, which is significant.⁶⁵⁴ Nevertheless, those who argue that the law should provide greater recognition for the capabilities of children to make decisions do not always make it entirely clear what they are actually referring to.⁶⁵⁵ Some opponents of the Convention express the view that the rights it protects promote an independence or autonomy that is not always in the interest of the child.⁶⁵⁶ They often fail to distinguish between children's rights, children's choices and the right of the child to contribute in the decision-making process.⁶⁵⁷ According to Article 12, children as rights holders are entitled to express their views and those views should be given due weight pursuant to the age and maturity of the child.⁶⁵⁸ Article 12 is a key provision and also lays the foundation for the implementation of other rights⁶⁵⁹ in the Convention.⁶⁶⁰

Article 12(1) does not give any guarantee of autonomy but instead refers to the consultation and participation of children in any decision-making processes.⁶⁶¹ It is merely a benchmark or an indicator of the degree to which a State Party⁶⁶²

⁶⁵² Freeman, above n 623, at 69.

⁶⁵³ At 65.

⁶⁵⁴ Freeman, above n 598, at 54–57.

⁶⁵⁵ Fortin, above n 583, at 19.

⁶⁵⁶ Doek, above n 585, at 200.

⁶⁵⁷ Fortin, above n 583, at 20.

⁶⁵⁸ Doek, above n 585, at 201.

⁶⁵⁹ See Convention on the Rights of the Child 1989 (UN), arts 13 - 16.

⁶⁶⁰ Doek, above n 585, at 201.

⁶⁶¹ Fortin, above n 583, at 20.

⁶⁶² Further recognition of children as rights holders can be seen with the introduction of a third Optional Protocol to the Convention on the Rights of the Child. This new Optional Protocol is known as The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure 2014 (un.org). It enables individual children to submit complaints to the Committee on the Rights of the Child regarding specific violations of their rights under the Convention and its first two Optional Protocols. Although New Zealand has yet to sign or ratify

distinguishes a child as a rights holder⁶⁶³ and the decision making rights under Article 12 should be used to acknowledge that children have the right to have their capacity for autonomy endorsed but not necessarily acted upon.⁶⁶⁴ Moreover, it is also contended that recognising the right to autonomy for children is important because it raises their status and visibility in society which provides them with the right to articulate their views. The significance of allowing children to articulate their views is that it reduces their vulnerability by preventing adults from being able to overlook them. This improved visibility reduces the potential for children to be harmed by the availability of child pornography on the Internet.

The Officer in charge of the Online Child Exploitation Across New Zealand Unit of the New Zealand Police, Detective Senior Sergeant John Michael, stated that one of the trends being witnessed by child pornography investigators is a significant reduction in the age of the victims.⁶⁶⁵ Child pornographers are targeting younger children because they are perceived to be more amenable to victimisation.⁶⁶⁶ This increased obligation to children relates to one of the themes of Articles 4 and 5 of the Convention. Article 5 states that the State must respect and recognise the evolving responsibility of parents and caregivers.⁶⁶⁷ When this duty is combined with the obligation to act in the best interests of the child⁶⁶⁸ this requirement signifies that parents have a greater responsibility to younger children and this obligation evolves as the child becomes more autonomous with age.⁶⁶⁹ It is contended that this evolving responsibility can be extended to the State. The State must recognise that with all forms of child abuse the vulnerability of the victim is

this new Optional Protocol, it clearly reaffirms that children are rights holders in accordance with international law.

⁶⁶³ Doek, above n 585, at 200.

⁶⁶⁴ Fortin, above n 583, at 20; E Toope "The Convention on the Rights of the Child: Implications for Canada" in Michael D A Freeman (ed) *Children's Rights: a Comparative Perspective* (Dartmouth, Aldershot; Brookfield, USA, 1996) at 42.

⁶⁶⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

⁶⁶⁶ Interview with Tim Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service (6 June 2014) at 2.

⁶⁶⁷ Convention on the Rights of the Child 1989 (UN), art 5.

⁶⁶⁸ Convention on the Rights of the Child 1989, art 4.

⁶⁶⁹ Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) at 77.

determined by their age. Therefore, any response to this victimisation must be informed by the reality that younger children require more dedicated protection and specialised assistance.⁶⁷⁰ As a result, the State has an *increased obligation* to act with due diligence to ensure that the law can respond to this issue.⁶⁷¹ This thesis will also help address this issue by raising awareness of these obligations with other States.

1.7.1.2 New Zealand's International Obligations and the Due Diligence Standard

New Zealand also has an obligation to confirm that our classification system and enforcement activities are adequate to deal with the issue of child pornography on the Internet.⁶⁷² This obligation requires the Government to provide a framework of protection through legislation which is sufficient to merit the investigation and prosecution of child pornographers.⁶⁷³ Thus, the Convention should inform and guide Government in planning, policy and practice.⁶⁷⁴ This approach to the problem of child pornography on the Internet is critically important due to the international nature of the Internet.⁶⁷⁵ It is the consistency of enforcement legislation around the world that will be a major component in the future suppression and investigation of

⁶⁷⁰ Committee on the Rights of the Child *General Comment No 16 on State Obligations Regarding the Impact of Business on Children's Rights* (CRC/C/GC/16 2013) at [24].

⁶⁷¹ Convention on the Rights of the Child 1989, arts 43 - 45.

⁶⁷² For a discussion on New Zealand's law in an international context see David Wilson "Responding to the Challenges: Recent Developments in Censorship Policy in New Zealand - Ministry of Social Development" [2007] 30 Social Policy Journal of New Zealand 65.

⁶⁷³ Quayle and Ribisl, above n 27, at 61.

⁶⁷⁴ Laurie O'Reilly "Look Back - Step Forward: Everyone an Advocate for Children" (1998) 2 New Zealand Family Law Journal 213 at 220.

⁶⁷⁵ For more information on the transnational nature of the Internet and its effects on law enforcement see Roderic Broadhurst "Developments in the Global Law Enforcement of Cyber-Crime" (2006) 29 Policing: Int'l J Police Strat & Mgmt 408; John T Soma, Thomas F Jr Muther and Heidi ML Brissette "Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed" (1997) 34 Harv J on Legis 317; Louise Shelley *Transnational Crime The Case of Russian Organised Crime and the Role of International Cooperation in Law Enforcement* (2002).

child pornography offending⁶⁷⁶ on the Internet.⁶⁷⁷ As previously noted, the Convention provides the Government with a conceptual framework on which all assistance for children should be based.⁶⁷⁸

This conceptual framework also supports the implementation of new and improved legislation.⁶⁷⁹ The Convention's implementation mechanisms under Articles 43–45 mandate that all governments that have ratified the Convention are obligated to take every measure possible, whether individually or in co-operation with other governments, to meet these general obligations.⁶⁸⁰ It is contended that this duty also extends to preventing child pornography within their respective jurisdictions.⁶⁸¹ Consequently, if these governments fail to enact and enforce their own laws against the consumption and dissemination of child pornography, they are in violation of their agreement as signatories of the Convention.⁶⁸² Moreover, countries such as New Zealand who become States Parties to instruments such as the Convention also assume an obligation to submit periodic reports⁶⁸³ to the United Nations.⁶⁸⁴ These reports must contain the measures that have been adopted to reduce violations under the Convention⁶⁸⁵ such as the enactment of the Films, Videos, and Publications

⁶⁷⁶ For an additional discussion on how uniformity of legislation will impact on the fight against child pornography on the Internet see Lesli C Esposito "Regulating the Internet: The New Battle Against Child Pornography" (1998) 30 Case Western Reserve Journal of International Law 541; Marta Santos Pais "The Protection of Children From Sexual Exploitation - Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography" (2010) 18 International Journal of Children's Rights 551.

⁶⁷⁷ Nevertheless, the author must admit that uniformity of legislation between jurisdictions will not completely eradicate child pornography from the Internet. It will however, ensure that those who are found to be consuming such material will find it considerably more difficult to avoid prosecution by law enforcement agencies.

⁶⁷⁸ O'Reilly, above n 648, at 220.

⁶⁷⁹ Convention on the Rights of the Child 1989 (UN), arts 43 - 45.

⁶⁸⁰ Convention on the Rights of the Child 1989, arts 43 - 45.

⁶⁸¹ Convention on the Rights of the Child 1989, arts 43 - 45.

⁶⁸² Convention on the Rights of the Child 1989, arts 43 - 45.

⁶⁸³ New Zealand submitted its first Period Report on the Optional Protocol to the Committee on the Rights of the Child on 22 July 2014. As yet there has been no response from the Committee concerning this Report. For more information, see Ministry of Social Development "Optional Protocols to UNCROC - Ministry of Social Development" (20 May 2015) Ministry of Social Development <<https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/monitoring/uncroc/optional-protocols.html#OptionalProtocolontheSaleofChildrenChildProstitutionandChildPornography2>>.

⁶⁸⁴ Audrey R Chapman "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 Hum Rts Q 23 at 25.

⁶⁸⁵ At 25.

Classification Amendment Act 2005.⁶⁸⁶ New Zealand's report must also detail the progress that this Amendment has made in achieving compliance.⁶⁸⁷ The effect of these implementation mechanisms on New Zealand is that the State has a duty to recognise the special obligations⁶⁸⁸ of due diligence.⁶⁸⁹ This means that the Government must assume its responsibilities towards children not only at the national level, but also at the regional and community levels.⁶⁹⁰ This modulated approach is designed to ensure that all levels of public administration are able to redress human rights violations such as the failure to protect children from child pornography.⁶⁹¹

This due diligence standard forces the State to undertake positive action to prevent all forms of sexual violence against children.⁶⁹² The standard is one of reasonableness⁶⁹³ and requires New Zealand to act with the existing means at its disposal to address both individual acts of downloading child pornography and the structural causes of dissemination so as to prevent all forms of harm to children.⁶⁹⁴ In summary, under the due diligence standard as it applies to child pornography offending, the Government in New Zealand is responsible for the actions of its

⁶⁸⁶ Films, Videos, and Publications Classification Amendment Act 2005.

⁶⁸⁷ Chapman, above n 658, at 25.

⁶⁸⁸ The duty to act with due diligence and subsequent requirements are applicable to most United Nations instruments. These instruments include but are not limited to the Universal Declaration of Human Rights 1948 (un.org); Convention on the Rights of the Child 1989 (UN); International Covenant on Civil and Political Rights 1966 (un.org); International Covenant on Economic, Social and Cultural Rights 1976 (un.org). Although many of these Conventions and Treaties do not expressly address the issue of child pornography, they each contain provisions for the protection of children from all forms of abuse. For more information see United Nations *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women* (E/CN.4/2006/61 2006) at [19–55]; Zarizana Abdul Aziz and Janine Moussa *The Due Diligence Principle and the Role of the State – Discrimination against Women in Family and Cultural Life* (2015) at 4.

⁶⁸⁹ Committee on the Rights of the Child *The Right of the Child to Freedom From All Forms of Violence* (13 2011) at 4.

⁶⁹⁰ At 4.

⁶⁹¹ At 4.

⁶⁹² Julie Goldscheid and Debra Liebowitz *Due Diligence and State Responsibility to Eliminate Violence Against Women* (2014) at 22.

⁶⁹³ The standard of due diligence focuses on the State's responsibilities and, in more recent times, on regulating the actions of individuals under international law. This standard is applied across the spectrum of human rights abuses such as violence against women, human trafficking and all forms of child abuse, including child pornography.

⁶⁹⁴ Jeanmarie Fenrich and Jorge Contesse *"It's Not OK": New Zealand's Efforts to Eliminate Violence Against Women* (2008) at 8.

citizens and must act with due diligence firstly to investigate and punish those responsible for these crimes and secondly to prevent the reoccurrence of such criminal offending.⁶⁹⁵

Article 27 of the Vienna Convention on the Law of Treaties 1969⁶⁹⁶ ('Vienna Convention') also reinforces this due diligence commitment. Article 27 of the Vienna Convention states that a party cannot invoke its internal law as a justification for failing to perform its duty as required by a treaty.⁶⁹⁷ As a result, the Government of New Zealand must incorporate the standards set forth in the Convention and the Optional Protocol into its national legislation and is also bound by the standards contained within the Convention.⁶⁹⁸ It is also contended that these standards must be utilised as a guide to address any deficiencies in the State's institutional response to child pornography offending.

1.7.2 The Source of New Zealand's International Obligations

The source of New Zealand's international obligations to its children can be found in the Convention of the Rights of the Child 1989⁶⁹⁹ which was ratified by the Government in 1993.⁷⁰⁰ Article 4 specifically places a duty upon the Government to ensure that the principles of the Convention are applied to the widest possible extent within New Zealand.⁷⁰¹ This Article states that States Parties shall undertake all appropriate measures for the employment of the rights recognised in the present Convention.⁷⁰² The significance of Article 4 is that its provisions relate to all the

⁶⁹⁵ For further information on due diligence see Robert Barnidge "The Due Diligence Principle Under International Law" (2006) 8 International Community Law Review 81; Lee Hasselbacher "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection" (2009) 8 Nw U J Int'l Hum Rts 190; Carin Benninger-Budel *Due Diligence and Its Application to Protect Women from Violence* (BRILL, Netherlands, 2008).

⁶⁹⁶ Vienna Convention on the Law of Treaties 1969 (un.org).

⁶⁹⁷ Vienna Convention on the Law of Treaties 1969, art 27.

⁶⁹⁸ Esposito, above n 650, at 562.

⁶⁹⁹ Nikki Fisher *Local Government: Respecting the Rights of Our Children* (2010) at 2.

⁷⁰⁰ Ministry of Justice "United Nations Convention on the Rights of the Child" (4 March 2014) <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/united-nations-convention-on-the-rights-of-the-child>>.

⁷⁰¹ Fisher, above n 673, at 2.

⁷⁰² Convention on the Rights of the Child 1989 (UN), art 4.

other rights in the Convention and it is vital for New Zealand's children that these rights are implemented and realised in accordance with Article 4.⁷⁰³

The Government has a duty to do all that can be done to protect and fulfil the rights of every child,⁷⁰⁴ the consequence of which is that New Zealand must take positive action⁷⁰⁵ to facilitate the enjoyment of basic human rights for its children.⁷⁰⁶ Moreover, the Committee on the Rights of the Child has affirmed⁷⁰⁷ that the nature of this obligation in terms of human rights for children can be ascertained from the interpretation of other international instruments on similar subject matters.⁷⁰⁸ Article 2 of the International Covenant on Civil and Political Rights 1976⁷⁰⁹ and Article 2 of the International Covenant on Economic, Social and Cultural Rights 1976⁷¹⁰ can be referred to when guidance is required for setting out the overall obligations which are essential for the implementation of the Convention.⁷¹¹ In its most transparent form, Article 4 implies that the State must do all it can to implement the rights contained within the Convention in order to provide a safe and secure environment for New Zealand's children.⁷¹²

⁷⁰³ M Rishmawi "Article 4 : Nature of States Parties' Obligations" in A Alen and others (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, NLD, 2005) at 57.

⁷⁰⁴ UNICEF *A Summary of the United Nations Convention on the Rights of the Child* (2015) at 1.

⁷⁰⁵ Positive obligations in human rights law are the State's obligation to undertake activity to secure the effective enjoyment of a fundamental right. This is as opposed to a negative obligation which is to simply refrain from human rights violations. For more on positive and negative obligations see Seth F Kreimer "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984) 132 *University of Pennsylvania Law Review* 1293; Ran Hirschl "'Negative' Rights vs 'Positive' Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order" (2000) 22 *Human Rights Quarterly* 1060; Ursula O'Hare "Equality and Affirmative Action in International Human Rights Law and its Relevance to the European Union" (2000) 4 *International Journal of Discrimination and the Law* 3.

⁷⁰⁶ Office of the High Commissioner for Human Rights "International Human Rights Law" (7 April 2014) <<http://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx>>.

⁷⁰⁷ David Weissbrodt, Joseph C Hansen and Nathaniel H Nesbitt "The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law" (2001) 24 *Harvard Human Rights Journal* 115 at 122.

⁷⁰⁸ Rishmawi, above n 677, at 15.

⁷⁰⁹ International Covenant on Civil and Political Rights 1966 (un.org).

⁷¹⁰ International Covenant on Economic, Social and Cultural Rights 1976 (un.org).

⁷¹¹ Weissbrodt, Hansen and Nesbitt, above n 681, at 122.

⁷¹² Peace Pledge Union "The Convention on the Rights of the Child" (7 April 2014) <<http://www.ppu.org.uk/learn/texts/convention1.html>>.

1.7.3 The United Nations Convention on the Rights of the Child 1989 and Child Pornography

The Convention has established a universal definition of children's rights as part of the international law and specifically addresses child pornography.⁷¹³ As already acknowledged, Article 4 of the Convention instructs States to take all legislative and administrative measures possible to ensure the implementation of the Convention.⁷¹⁴ However, the provisions of the Convention that deal directly with the issue of child pornography can be found in Articles 1, 3 and 34. Article 1 outlines the particular scope of the Convention by defining a child as anyone below 18 years of age.⁷¹⁵ This definition provides a foundation for improved conceptual clarity and co-operation between national jurisdictions and their law enforcement agencies.⁷¹⁶ The importance of conceptual clarity and certainty of age to the United Nations is that this concept should provide more effective and appropriate regulation of child pornography.⁷¹⁷ This type of regulation could be achieved by the implementation of a universally recognised standard for the international community.⁷¹⁸

Article 1 must be read in combination with Article 3 of the Convention.⁷¹⁹ Article 3(1) establishes one of the core principles of the Convention with its statement that:⁷²⁰

⁷¹³ Anne-Marie Slaughter and William Burke-White "The Future of International Law Is Domestic (or, The European Way of Law)" (2006) 47 *Harvard International Law Journal* 327 at 328.

⁷¹⁴ Convention on the Rights of the Child 1989 (UN), art 4.

⁷¹⁵ Convention on the Rights of the Child 1989, art 1.

⁷¹⁶ UNICEF Innocenti Research Centre *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (2009) at 5.

⁷¹⁷ Esposito, above n 650, at 562.

⁷¹⁸ At 562.

⁷¹⁹ For a discussion on how Article 3 impacts on the other rights contained within the Convention see Marie-Francoise Lucker-Babel "The Right of the Child to Express Views and to Be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child" (1995) 3 *Int'l J Child Rts* 391.

⁷²⁰ Convention on the Rights of the Child 1989, art 3(1).

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration...

The best interests of the child principle is reflected within New Zealand⁷²¹ by Section 4(1) of the Care of Children Act 2004⁷²² which states:⁷²³

4 Child's welfare and best interests to be paramount

(1) The welfare and best interests of the child must be the first and paramount consideration...

Although Section 4 does not make Article 3 of the Convention part of New Zealand's domestic legislation, all of the Convention's provisions should be enforced with the best interests of the child in mind.⁷²⁴ This should include any political decisions, government policies and legislation to regulate child pornography on the Internet.⁷²⁵

1.7.3.1 The Protection of the Child from Sexual Abuse

As already noted, Article 34(c) of the Convention instructs States to protect children from all forms of sexual exploitation and pornography.⁷²⁶ This Article states that:⁷²⁷

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent...

⁷²¹ Jessica Davies "Untapped Potential: Rethinking the Human Rights Defence in International Child Abduction" [2013] New Zealand Family Law Journal 235 at 242.

⁷²² Care of Children Act 2004 (NZ).

⁷²³ Care of Children Act 2004, s 4(1).

⁷²⁴ Julia Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law" (1995) 11 S Afr J on Hum Rts 401 at 409.

⁷²⁵ At 409.

⁷²⁶ Convention on the Rights of the Child 1989 (UN), art 34(c).

⁷²⁷ Convention on the Rights of the Child 1989, art 34(c).

(c) The exploitative use of children in pornographic performances and materials.

Although Article 34 of the Convention expressly mentions child pornography, there is nevertheless, no precise definition of the scope of this form of child abuse.⁷²⁸ An example of the problem that this lack of definition can cause is that Article 34(b) of the Convention requires that some form of exploitation of children be present during unlawful sexual practices.⁷²⁹ However, the Convention does not define what is considered to be exploitative.⁷³⁰ It is contended that anything exploitative would require some commercial element.⁷³¹ This corresponds with the fact that all forms of exploitation are intrinsically abusive and the distinguishing feature of sexual exploitation is that it generally involves notions of commercial gain.⁷³² Therefore, sexual exploitation under Article 34 of the Convention would include child pornography on the Internet as there is generally a commercial element attached to the distribution of this material.⁷³³

The issue of the sexual exploitation of children for commercial purposes was discussed by the first UN Special Rapporteur⁷³⁴ on the Sale of Children, Child Prostitution and Child Pornography, Vitit Muntarbhorn.⁷³⁵ The Special Rapporteur noted that vague language can cause difficulties in assessing the adequacy of national legal frameworks and this can make the task of protecting children difficult.⁷³⁶ However, others are more optimistic and note that Article 34 of the Convention has led to changes in national legislation⁷³⁷ and acted as a platform

⁷²⁸ Gillespie, above n 436, at 290.

⁷²⁹ At 290.

⁷³⁰ At 290.

⁷³¹ Geraldine Van Bueren "Child Sexual Abuse and Exploitation: A Suggested Human Rights Approach" (1994) 2 Int'l J Child Rts 45 at 52.

⁷³² At 52.

⁷³³ For an example of what is considered to be commercial gain under New Zealand's legislation see *Shaw v DIA*, above n 268.

⁷³⁴ The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography operates in conjunction with the United Nations Human Rights Council to investigate the exploitation of children around the world and make recommendations to governments on how to end such practices.

⁷³⁵ Akdeniz, above n 148, at 210.

⁷³⁶ Vitit Muntarbhorn *Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography* (E/CN.4/1991/51 1991).

⁷³⁷ Article 34 has resulted in countries introducing new offences to their criminal codes to specifically address all forms of sexual abuse via the Internet. Canada ratified the Convention in

upon which other developments to eliminate child exploitation have been built.⁷³⁸ In general, the crucial distinction between what the international community considers to be illegal child pornography and legal depictions of sexual conduct is the absence of consent.⁷³⁹ A legal minor cannot consent, even if that minor appears to say yes.⁷⁴⁰ It is the absence of informed consent which constitutes the essential element of illegality.⁷⁴¹

State Parties to the Convention, such as New Zealand, are obliged to develop and undertake all actions and policies in the light of the best interests of the child.⁷⁴² Undertaking actions and policies in the best interests of the child would include assuming responsibility for the consumption and dissemination of child pornography. The recognition of this obligation could lead to the implementation of more robust legislation to protect children.

1.7.4 The Introduction of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000

Nevertheless, the Convention was never intended to be a definitive statement on the protection to be offered to children from sexual exploitation in New Zealand or around the world.⁷⁴³ In 1995 the United Nations Commission on Human Rights

1991 and, therefore, provides a useful example of national implementation. For instance, in Canada it is now an offence to use the Internet to communicate with a child for the purpose of luring or facilitating the commission of a sexual offence against a child. Accordingly, Section 172.2(1) of the Criminal Code of Canada states that it is an offence to arrange to meet a person by means of telecommunication who is under 18 years of age for any sexual purposes. The Canadian Courts are also currently able to order the deletion and destruction of child pornography that is posted on Canadian websites or computer systems. This provision is contained within Section 164.1 of the Criminal Code of Canada which states that where a Judge is satisfied that child pornography exists on a computer system, the Court can order that material to be deleted. This approach ensures that every part of the supply chain, from the original producer of the material, through to the distributor, publisher and consumer of child pornography is consequently caught by the inescapable legal and moral fact of consent. For more see Jaap E Doek "The CRC 20 Years: An Overview of Some of the Major Achievements and Remaining Challenges" (2009) 33 Child Abuse & Neglect 771 at 775.

⁷³⁸ At 775.

⁷³⁹ Carr, above n 204, at 12.

⁷⁴⁰ At 12.

⁷⁴¹ At 12.

⁷⁴² UNICEF "UNICEF - Convention on the Rights of the Child" (25 April 2012) [unicef.org <http://www.unicef.org/crc/>](http://www.unicef.org/crc/).

⁷⁴³ Gillespie, above n 436, at 290.

(‘Commission’)⁷⁴⁴ established a working group to examine the possibility of an Optional Protocol⁷⁴⁵ to the Convention,⁷⁴⁶ designed to provide specific safeguards in order to protect children from any uncertainties posed by child pornography legislation.⁷⁴⁷

The recognition of the threat of child pornography on the Internet to the international community resulted in the German Government calling upon the United Nations in 1996 to create and develop international standards for acceptable content on the Internet.⁷⁴⁸ In that same year, the Government of Sweden hosted the First World Congress against the Sexual Exploitation of Children.⁷⁴⁹ The First World Congress placed considerable emphasis on the necessity for the international legal community to reconsider its approach to the issue of child pornography,⁷⁵⁰ and urged the community to:⁷⁵¹

b) develop or strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child trafficking, child pornography, including possession of child pornography, and other unlawful sexual activity;

These sentiments were shared by the then Special Rapporteur, Ofelia Calcetas-Santos, who questioned whether the Convention, and in particular Article 34, appropriately covered all types of child pornography, particularly those involving new technologies.⁷⁵² The protection of children from sexual exploitation had long

⁷⁴⁴ The United Nations Commission on Human Rights was the United Nations principal forum concerned with the protection and promotion of human rights.

⁷⁴⁵ A Protocol is a framework of agreements that supplement a principal treaty or convention.

⁷⁴⁶ Gillespie, above n 436, at 290.

⁷⁴⁷ United Nations High Commissioner for Human Rights *Need to Adopt Effective International Measures for the Prevention and Eradication of the Sale of Children, Child Prostitution and Child Pornography* (1994/90 1994).

⁷⁴⁸ Akdeniz, above n 148, at 209.

⁷⁴⁹ Santos Pais, above n 650, at 553.

⁷⁵⁰ World Congress *Declaration and Agenda for Action - 1st World Congress against Commercial Sexual Exploitation of Children* (1996) at 4–5.

⁷⁵¹ At 4–5.

⁷⁵² Ofelia Calcetas-Santos *Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography* (E/CN.4/1997/95 1997) at 12.

been an area of grave concern for the international community⁷⁵³ and although the Special Rapporteur encouraged the development of new wording for the Convention, the view was eventually taken by the Commission that such a request provided further evidence that a new instrument was required.⁷⁵⁴

In 2000 the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography ('Optional Protocol') to the Convention⁷⁵⁵ on the Rights of the Child was opened for signature by the international community.⁷⁵⁶ The implementation of this instrument reveals that although the international approach to human rights law represents a clear commitment to the protection of children from sexual abuse,⁷⁵⁷ the development of the Optional Protocol is a direct response to the inadequacies of the international communities' enforcement instruments.⁷⁵⁸

1.7.4.1 The Concerns of the Special Rapporteur

According to concerns highlighted within a report from the first Special Rapporteur, Vitit Muntarbhorn, in 1994, child pornography had become increasingly transnational and interwoven with child prostitution.⁷⁵⁹ This was due to the advent of new technology which raised many questions regarding the efficacy of existing legislation on the subject.⁷⁶⁰ In addition, Muntarbhorn urged States who did not have such legislation, to criminalise the production, distribution or possession of child pornography and to enact legislation to ensure the protection of children around the world.⁷⁶¹ The subsequent report of the second Special Rapporteur, Ofilia Calcetas-Santos, in 1995 noted the complications that modern technology had

⁷⁵³ Santos Pais, above n 650, at 551.

⁷⁵⁴ Gillespie, above n 436, at 290.

⁷⁵⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN).

⁷⁵⁶ Gillespie, above n 436, at 290.

⁷⁵⁷ See Akdeniz, above n 148, at 209–233.

⁷⁵⁸ See Gillespie, above n 436, at ch 11.

⁷⁵⁹ Vitit Muntarbhorn *Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography* (E/CN.4/1994/84 1994) at [173].

⁷⁶⁰ At [173].

⁷⁶¹ At [174].

brought to the field of child pornography.⁷⁶² The report highlighted that even where legislation already included measures against the proliferation of pornographic materials, actual detection and monitoring may pose serious barriers to the effective prosecution of offenders.⁷⁶³

It is the advance of technology and the globalisation of communications which have created a number of problems concerning pseudo images.⁷⁶⁴ As pseudo-images⁷⁶⁵ are created without the use of children, it was found that many member States had no provisions for the criminalisation of such material.⁷⁶⁶ In Calcetas-Santos's report in 1996 it was stated that the alteration of computer images and the potential for creating computer-generated pornography posed formidable challenges for Courts and law enforcement officials around the world.⁷⁶⁷ The Special Rapporteur stated that:⁷⁶⁸

Challenges to a study on child pornography include and/or obsolescence of any uniform definition of what child pornography entails, lack of data regarding the production and distribution of child pornography in many parts of the world and shifting global patterns of production and consumption of child pornography.

In the next report in 1997, the Special Rapporteur revealed concerns regarding the spread of child pornography, especially through new media such as the Internet.⁷⁶⁹ The Special Rapporteur argued that the Internet rendered the traditional definition of child pornography, namely 'the visual depiction or use of a child for pornographic purposes', outdated.⁷⁷⁰

⁷⁶² Ofilia Calcetas-Santos *Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography* (A/50/456 1995) at [22].

⁷⁶³ At [59].

⁷⁶⁴ At [61].

⁷⁶⁵ A pseudo-image is a photographic image that is created using computer-graphics and is referred to as computer generated child pornography under Section 7(8) of the United Kingdom's Protection of Children Act 1978.

⁷⁶⁶ Calcetas-Santos, above n 736, at [61].

⁷⁶⁷ Ofilia Calcetas-Santos *Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography* (A/51/456 1996) at [30].

⁷⁶⁸ At [30].

⁷⁶⁹ Ofilia Calcetas-Santos *Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography* (A/52/482 1997) at [34].

⁷⁷⁰ At [53].

The report also emphasised the importance of self-regulation⁷⁷¹ in this field alongside any legal measures.⁷⁷² It was revealed that a number of problems existed in Western Europe and other regions.⁷⁷³ These problems included the spread of child pornographic material, especially through the new media and by rings of paedophiles co-operating with each other to guarantee the continual abuse of children.⁷⁷⁴ The Special Rapporteur encouraged the continuing process of adopting extra-territorial legislation by countries of origin whose citizens tour the world to engage in child sexual abuse,⁷⁷⁵ challenging the Committee on the Rights of the Child to:⁷⁷⁶

Reaffirm that the scope of Article 34 of the Convention on the Rights of the Child should be interpreted to include an absolute prohibition on pseudo-child pornography, including the morphing of child and adult bodies to create virtual child pornographic images.

These comments emphasised the serious concerns that the Special Rapporteur had regarding the Internet.⁷⁷⁷ It was the specific concern about the Internet's ability to distribute child pornography which led the United Nations to draft the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 to the Convention on the Rights of the Child 1989.⁷⁷⁸

⁷⁷¹ Self-regulation in this context refers to the Internet industry regulating itself by implementing an industry-recognised code of conduct. For more on this notion of self-regulation see Paola Benassi "TRUSTe: An Online Privacy Seal Program" (1999) 42 Communications of the ACM 56; Jonathan P Cody "Protecting Privacy over the Internet: Has the Time Come to Abandon Self-Regulation" (1998) 48 Cath U L Rev 1183; Philip J Weiser "Internet Governance, Standard Setting, and Self-Regulation" (2001) 28 N Ky L Rev 822.

⁷⁷² Calcetas-Santos, above n 743, at [103].

⁷⁷³ At [17].

⁷⁷⁴ At [17].

⁷⁷⁵ At [34].

⁷⁷⁶ At [53].

⁷⁷⁷ Akdeniz, above n 148, at 212.

⁷⁷⁸ At 212.

1.7.4.2 The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000

As both the Convention and the Optional Protocol are legally binding upon ratification,⁷⁷⁹ a State that is a party to both treaties is obliged to fulfil all its obligations under each treaty.⁷⁸⁰ Article 41 of the Convention states that nothing within the Convention shall affect the operation of domestic⁷⁸¹ or international legislation⁷⁸² that is more beneficial to the realisation of children's rights.⁷⁸³ This Article of the Convention confirms that the Optional Protocol supplements the Convention by providing States with detailed requirements to end the sexual exploitation and abuse of children.⁷⁸⁴ Article 41 also places an obligation upon the Government of New Zealand to guarantee the enforcement of superior national standards.⁷⁸⁵ This duty indicates that where New Zealand's legislation provides better protection of children's rights than the articles in the Convention or the Optional Protocol, the provisions under New Zealand's law should be enforced.⁷⁸⁶ Therefore, the combined effect of Articles 41 and 34 of the Convention is that the highest attainable standard set in law, whether domestically or internationally, must always be adhered to.⁷⁸⁷

The underlying purpose of the Optional Protocol is to make the sexual exploitation of children an offence by creating universal criminal liability in all of the signatory jurisdictions.⁷⁸⁸ These signatories include New Zealand which subsequently ratified the instrument in 2011.⁷⁸⁹ The Optional Protocol embraces the criminalisation of

⁷⁷⁹ UNICEF Innocenti Research Centre, above n 690, at 4.

⁷⁸⁰ At 4.

⁷⁸¹ Convention on the Rights of the Child 1989 (UN), art 41(a).

⁷⁸² Convention on the Rights of the Child 1989, art 41(b).

⁷⁸³ Convention on the Rights of the Child 1989, art 41.

⁷⁸⁴ UNICEF "UNICEF - Convention on the Rights of the Child - Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography" (August 2013) UNICEF <http://www.unicef.org/crc/index_30204.html>.

⁷⁸⁵ UNICEF *Fact Sheet: A Summary of the Rights Under the Convention on the Rights of the Child* (2015) at 4.

⁷⁸⁶ At 4.

⁷⁸⁷ Convention on the Rights of the Child 1989, art 41.

⁷⁸⁸ See Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), arts 1, 2, 3.

⁷⁸⁹ Ministry of Justice, above n 674.

specific acts relating to child pornography⁷⁹⁰ and extends the scope of criminal offending.⁷⁹¹ It obliges the State to outlaw any attempt to access children⁷⁹² or content⁷⁹³ and any form of complicity in these acts.⁷⁹⁴ The significant difference, therefore, between the Optional Protocol and the Convention is in the detail of the former's definitions.⁷⁹⁵ In addition, the Optional Protocol lays down minimum standards for protecting child victims in criminal justice processes⁷⁹⁶ and recognises the right of victims to seek compensation.⁷⁹⁷ Most importantly of all, it encourages the strengthening of international co-operation⁷⁹⁸ and assistance and the adoption of extra-territorial legislation.⁷⁹⁹ These crucial aspects were included in the Optional Protocol after the conclusion of the International Conference on Combating Child Pornography⁸⁰⁰ on the Internet, held in Vienna in 1999.⁸⁰¹ This conference was in complete agreement and recommended that provisions be established for the national criminalisation of all forms of child pornography.⁸⁰² The conference also endorsed the strengthening of law enforcement at national level and improved international co-operation among law enforcement agencies.⁸⁰³ Also stressed by the conference was the importance of closer co-operation and

⁷⁹⁰ UNICEF Innocenti Research Centre, above n 690, at 2.

⁷⁹¹ At 2.

⁷⁹² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(1)(a)(i).

⁷⁹³ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(1)(c).

⁷⁹⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(2).

⁷⁹⁵ Gillespie, above n 436, at 290.

⁷⁹⁶ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 8.

⁷⁹⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 9(4).

⁷⁹⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 10.

⁷⁹⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 5.

⁸⁰⁰ The International Conference on Combating Child Pornography on the Internet called for the complete criminalisation of all forms of child pornography and greater co-operation between law enforcement agencies and the Internet industry.

⁸⁰¹ Akdeniz, above n 148, at 213.

⁸⁰² International Conference on Combating Child Pornography on the Internet *International Conference on Combating Child Pornography on the Internet - Conclusions and Recommendations* (1999) at 1.

⁸⁰³ International Conference on Combating Child Pornography on the Internet, above n 776.

partnership between State governments and the Internet industry.⁸⁰⁴ The conference stated that:⁸⁰⁵

The Internet industry is an indispensable partner of law enforcement agencies in the investigation and prosecution of child pornography but also in exchange of experience and capacity building.

Furthermore, it was recognised that any attempt to address concerns regarding child pornography on the Internet would require the strengthening of the obligations required by States who support the Convention and its ideals.⁸⁰⁶

1.7.4.3 The Optional Protocol and Child Pornography Offending

Encouraged by the overwhelming support for the Convention which demonstrates the widespread commitment to the promotion and protection of children's rights,⁸⁰⁷ the Optional Protocol has extended the measures that States Parties should undertake in order to guarantee the protection of the children from child pornography offending.⁸⁰⁸ Article 1 sets out the scope of the Optional Protocol as it states:⁸⁰⁹

Article 1

States Parties shall prohibit ... child pornography as provided for by the present Protocol.

⁸⁰⁴ International Conference on Combating Child Pornography on the Internet, above n 776.

⁸⁰⁵ International Conference on Combating Child Pornography on the Internet, above n 776.

⁸⁰⁶ International Conference on Combating Child Pornography on the Internet, above n 776.

⁸⁰⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), preamble.

⁸⁰⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 preamble.

⁸⁰⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 1.

As a result, States Parties must agree to implement criminal legislation to outlaw child pornography.⁸¹⁰ In addition, this Article must be administered in conjunction with Article 2 of the Optional Protocol.

1.7.4.4 Criminal and Administrative Responsibility

Article 2 defines the conduct prohibited in the Optional Protocol.⁸¹¹ The importance of Article 2 is that it provides clear and detailed definitions of what constitutes the sale of children,⁸¹² child prostitution⁸¹³ and child pornography⁸¹⁴ with its statement that:⁸¹⁵

Article 2

For the purpose of the present Protocol:

(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

Historically, the major forms of child pornography have been linked with photography and videos, but other depictions such as cartoons⁸¹⁶ and drawings have also featured in comic books and magazines.⁸¹⁷ This is where the provisions contained within Article 2(c) are truly significant as they outlaw all types of

⁸¹⁰ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 1.

⁸¹¹ UNICEF Innocenti Research Centre *The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child Prostitution and Child Pornography and the Jurisprudence of the Committee on the Rights of the Child* (03 2009) at 3.

⁸¹² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 2(a).

⁸¹³ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 2(b).

⁸¹⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 2(c).

⁸¹⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 2(c).

⁸¹⁶ For an example of deviant pornography see Hustler magazine's 1978 issue. This issue of Hustler introduced its readers to *Chester the Molester* and his techniques of molestation, which consisted of kidnapping children and raping his victims.

⁸¹⁷ Carr, above n 204, at 11.

depictions.⁸¹⁸ Therefore, the above reference to ‘by whatever means’ within Article 2(c) clearly covers more than just photographs.⁸¹⁹ This is in recognition of the fact that child pornography is now a digital problem that is no longer restricted to hard-copy photographs or images. The Interpol Specialist Group on Crimes against Children⁸²⁰ is well aware of this development.⁸²¹ Consequently, they have interpreted Article 2(c) broadly, and have ensured that simulated activities are incorporated within the definition.⁸²² This specialist international agency is now an important part of Interpol and currently utilises the following definition:⁸²³

Child pornography is created as a consequence of the sexual exploitation or abuse of a child. It can be defined as any means of depicting or promoting the sexual exploitation of a child, including written or audio material, which focuses on the child’s sexual behaviour or genitals.

Although this working definition cannot be substituted for what is in the Optional Protocol because it is not a legally binding definition, it is, however, broadly typical of those found within national jurisdictions.⁸²⁴ Each emphasises the sexual nature of the representation and, as such, seeks to distinguish child pornography from, say, wholly innocent images of young children, perhaps in a family setting or on the beach.⁸²⁵ Moreover, these definitions expressly consider and differentiate between the traditional image-based forms of child pornography and also the more modern digital-based material.⁸²⁶ Consequently, each definition recognises and anticipates that child pornography can be found on or in several different types of media.⁸²⁷ This is clearly an acknowledgment by Interpol that all pornography, including child

⁸¹⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 2(c).

⁸¹⁹ Gillespie, above n 436, at 19.

⁸²⁰ The Interpol Specialists Group on Crimes against Children consists of a number of sub-groups dealing with particular issues and chaired by investigators from around the world. It provides training and promotes best practice to law enforcement of Interpol’s member countries.

⁸²¹ Gillespie, above n 436, at 19.

⁸²² At 19.

⁸²³ Carr, above n 204, at 11.

⁸²⁴ At 11.

⁸²⁵ At 11.

⁸²⁶ Gillespie, above n 436, at 19.

⁸²⁷ Carr, above n 204, at 11.

pornography, can now be represented through various methods, including live performances, photographs, motion pictures, video recordings and the recording or broadcasting of digital images.⁸²⁸ This, it is argued, is due to the Internet becoming the principal global medium,⁸²⁹ where every type of pictorial representation⁸³⁰ is possible.⁸³¹ Accordingly, it can be stated that the Optional Protocol identifies three forms of material that can now be considered to be a type of child pornography:⁸³² all forms of visual representations, written representations and audio representations.⁸³³

1.7.4.5 The Protection of Children

Article 8 of the Optional Protocol instructs States Parties to protect children and acknowledges that they require additional protections beyond those afforded to adults.⁸³⁴ This Article 8 states that:⁸³⁵

Article 8

- (1) States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:
 - (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses...

The significance of this Article is that it recognises the vulnerability and special requirements necessary to address concerns regarding children and child

⁸²⁸ UNICEF Innocenti Research Centre, above n 690, at 12.

⁸²⁹ A Fournier de Saint Maur "The Sexual Abuse of Children via the Internet: A New Challenge for Interpol" (paper presented to Combating Child Pornography on the Internet, Vienna, 1999) at 1; Quayle and Taylor, above n 458, at 868.

⁸³⁰ For statistical information about Internet pornography please refer to TopTenREVIEWS "Internet Pornography Statistics" (2013) <<http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html>>.

⁸³¹ Carr, above n 204, at 11.

⁸³² Gillespie, above n 436, at 19.

⁸³³ At 19.

⁸³⁴ UNICEF Innocenti Research Centre, above n 690, at 15.

⁸³⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 8.

pornography.⁸³⁶ It supports the contention that States Parties, including New Zealand, are under a *special duty* to respond to concerns about children and child pornography. New Zealand has an obligation as a signatory to the Optional Protocol to implement measures to protect the rights and interests of child victims.⁸³⁷ However, this *special duty* also extends to children beyond the borders of the State. Articles 4 and 5 of the Optional Protocol concern issues of jurisdiction and extradition.⁸³⁸ These Articles require the State to establish procedures to prosecute offences which occur beyond its territory⁸³⁹ and to adequately respond to the harm perpetrated upon the victims of the child pornography industry.⁸⁴⁰

1.7.5 The Establishment of Universal Standards

The first step in regulating child pornography on the Internet is to establish a set of universal standards.⁸⁴¹ This would counter concerns expressed by law enforcement agencies that the law is not responding to the new transnational nature of content investigations.⁸⁴² As previously noted, Steve O'Brien of the New Zealand Censorship Compliance Unit is adamant that the implementation of universal legislative standards across the world is essential to combat child pornography.⁸⁴³ Demands for a universal mechanism can also be seen as recognition that child pornography on the Internet is a growing and constantly expanding issue.⁸⁴⁴ Those struggling against this issue are confronted with particular technical and legal challenges, given the ability to move images across jurisdictions.⁸⁴⁵ Therefore,

⁸³⁶ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 8(1)(a).

⁸³⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 8(1)(a).

⁸³⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 4, 5.

⁸³⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 4, 5.

⁸⁴⁰ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(3).

⁸⁴¹ Esposito, above n 650, at 562.

⁸⁴² O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.

⁸⁴³ At 10.

⁸⁴⁴ Steven Hick and Edward Halpin "Children's Rights and the Internet" (2001) 575 The ANNALS of the American Academy of Political and Social Science 56 at 60.

⁸⁴⁵ At 60.

although this chapter has primarily focused on New Zealand's legal obligations to its own children that stem from international law, child pornography is now an international issue which requires an international response. Furthermore, the significance of the Convention and the Optional Protocol is that if each country were to enforce the same standards it would no longer be possible for paedophiles to obtain materials from countries where child pornography is more readily tolerated.⁸⁴⁶ These instruments encourage the adoption of measures, such as legislation and policy, to both prevent and address these violations of children's rights.⁸⁴⁷

Although the Convention has been successful to a degree in creating a set of uniform standards, it has failed to address concerns regarding the Internet.⁸⁴⁸ This is why the universal ratification of the Optional Protocol and the protection of children from sexual exploitation should now become a global priority, not only as a moral concern but also as a legal imperative.⁸⁴⁹ While creating universal standards is arguably the most important step in regulating child pornography, it is also the most difficult because such a set of standards will have no practical effect if they are not established as legislation in every country.⁸⁵⁰ Nevertheless, with universal ratification there would be a shared normative foundation to guide concerted efforts, to prevent any loopholes in child protection systems and to fight with impunity within and across national borders.⁸⁵¹ Most importantly of all, with universal ratification of the Optional Protocol and the employment of universal standards, there will be no safe haven for those who consume and trade in child pornography.⁸⁵² In addition, this thesis provides a strategic platform to argue for the universal ratification of the international treaties on the protection of children from sexual exploitation.⁸⁵³ This is especially the case with regard to the universal

⁸⁴⁶ Esposito, above n 650, at 562.

⁸⁴⁷ Santos Pais, above n 650, at 551.

⁸⁴⁸ Esposito, above n 650, at 562.

⁸⁴⁹ Santos Pais, above n 650, at 564.

⁸⁵⁰ Esposito, above n 650, at 562.

⁸⁵¹ Santos Pais, above n 650, at 564.

⁸⁵² O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.

⁸⁵³ Santos Pais, above n 650, at 563.

ratification of the Optional Protocol⁸⁵⁴ as this is critical for the protection of children from violence and all forms of sexual exploitation by child pornography.⁸⁵⁵

This response will require resolute international co-operation between nations, law enforcement agencies, the Internet industry and Non-Governmental Organisations.⁸⁵⁶ The sound normative foundation provided by the Convention and its Optional Protocol and the important lessons learnt from the implementation of these standards of children's rights, has resulted in a critical framework that has the potential to accelerate progress in the future.⁸⁵⁷ This framework will enable the international community and New Zealand to respond to concerns about child safety at the legal, industrial, and educational levels in order to protect children from harmful content on the Internet.⁸⁵⁸

1.7.6 Recommendations

1.7.6.1 The Recognition of Children as Rights Holders

It is strongly recommended that children be recognised by the international community as rights holders before the law. This recognition of children's rights will greatly assist to reduce the potential for them to be harmed by child pornographers. The acknowledgement of children as rights holders also advances the visibility of children which makes them less vulnerable to victimisation. However, in order to clarify these rights and adequately protect children in New Zealand and around the world it must be acknowledged that children require *specialised protections* which evolve with the autonomy of the child.⁸⁵⁹ The acceptance of the notion that children have specific needs for protection is also confirmation that the State has an increased obligation to protect its children.⁸⁶⁰ International law recognises children as rights holders and places clear and

⁸⁵⁴ At 563.

⁸⁵⁵ At 563.

⁸⁵⁶ Hick and Halpin, above n 818, at 60.

⁸⁵⁷ Santos Pais, above n 650, at 565.

⁸⁵⁸ Hick and Halpin, above n 818, at 61.

⁸⁵⁹ Convention on the Rights of the Child 1989 (UN), art 5.

⁸⁶⁰ Convention on the Rights of the Child 1989, art 5.

undeniable obligations on signatory States to afford these rights.⁸⁶¹ States have an obligation to their children to recognise and respond to their rights.⁸⁶² Moreover, it may also be useful to address this issue more actively by raising awareness of these obligations with other States. The acknowledgement of these rights by other States could result in more proactive measures to recognise children as full rights holders before the law.

1.7.6.2 The Recognition of Universal Standards

It is recommended that the international community focus on implementing a set of universal standards to assist with child pornography investigations.⁸⁶³ These standards must be guided by the provisions within the Convention and the Optional Protocol as they address this specific concern at the international level.⁸⁶⁴ The Convention and the Optional Protocol recognise that child pornography is a problem and these instruments place obligations on States to address this concern.⁸⁶⁵ These instruments are also intended to provide the international community with the ability to develop new initiatives to protect children such as the introduction of universal standards.⁸⁶⁶ The implementation of this normative foundation will provide guidance to the international community and direct efforts to eradicate child pornography.⁸⁶⁷ States must be reminded of these obligations to ensure that they are responding to these concerns and must acknowledge the importance of universal standards to child pornography investigations.

⁸⁶¹ Universal Declaration of Human Rights 1948 (un.org), art 1, 6; Convention on the Rights of the Child 1989, art 3.

⁸⁶² Convention on the Rights of the Child 1989, arts 43 - 45.

⁸⁶³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.

⁸⁶⁴ Esposito, above n 650, at 562.

⁸⁶⁵ Convention on the Rights of the Child 1989, art 34; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 1.

⁸⁶⁶ Santos Pais, above n 650, at 551.

⁸⁶⁷ At 564.

1.8 Overall Conclusion for Chapter 2

This chapter has established that children are recognised by international law as rights holders. This recognition of children as full rights holders before the law can be ascertained from the abovementioned international instruments and New Zealand's domestic legislation. The Universal Declaration of Human Rights 1948 implies that children have the right to be recognised before the law⁸⁶⁸ and that they deserve to be treated with dignity and equality.⁸⁶⁹ Article 3 of the Convention on the Rights of the Child 1989 mandates that the best interests of the child must be the primary consideration in all actions concerning children.⁸⁷⁰ This appreciation for children as rights holders is reflected within New Zealand's domestic legislation by Section 4 of the Care of Children Act 2004.⁸⁷¹ Article 4 of the Convention places an obligation on the State to provide a safe and secure environment for New Zealand's children.⁸⁷² Further recognition of children as rights holders was confirmed by the introduction of the Optional Protocol, as Article 8 acknowledges the vulnerability of children and also instructs States to adopt measures to protect their rights.⁸⁷³

It has also been established that the State must recognise that the vulnerability of children is determined by their age.⁸⁷⁴ Younger children require more *dedicated services* which places an *increased obligation* on the State to ensure that the law can adequately respond to this issue. These provisions all demonstrate that children are acknowledged as full rights holders before the law. The implication of this acknowledgement is that the international community must implement appropriate mechanisms to respond to concerns regarding child pornography. One such mechanism would be the introduction of universal standards to assist with

⁸⁶⁸ Universal Declaration of Human Rights 1948 (un.org), art 6.

⁸⁶⁹ Universal Declaration of Human Rights 1948, art 1.

⁸⁷⁰ Convention on the Rights of the Child 1989, art 3.

⁸⁷¹ Care of Children Act 2004 (NZ), s 4.

⁸⁷² Peace Pledge Union, above n 686.

⁸⁷³ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 8.

⁸⁷⁴ Convention on the Rights of the Child 1989, art 5.

investigations and prosecutions.⁸⁷⁵ The Convention and the Optional Protocol provide the ideal platform for this initiative because they are specifically intended to protect children from child pornography⁸⁷⁶ and respond to this concern at the international level.⁸⁷⁷ The significance of these universal standards is that once they are fully employed by the international community there will be no safe haven for those who consume and disseminate child pornography across the Internet.⁸⁷⁸ Although the development of effective co-ordinating mechanisms continues to be a challenge,⁸⁷⁹ it is argued that it can be achieved through a strong political will and adequate domestic legislation which in New Zealand has demonstrated that meaningful change is clearly possible.⁸⁸⁰ Furthermore, New Zealand's classification system and its ability to sufficiently outlaw child pornography are in reality a small but critically important component of this initiative. The significance of this system is its ability to afford greater protection to children around the world by utilising the Convention and the Optional Protocol as a framework for such initiatives.

⁸⁷⁵ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.

⁸⁷⁶ Santos Pais, above n 650, at 551.

⁸⁷⁷ Esposito, above n 650, at 562.

⁸⁷⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.

⁸⁷⁹ Marta Santos Pais and Susan Bissell "Overview and implementation of the UN Convention on the Rights of the Child" (2006) 367 *The Lancet* 689 at 689.

⁸⁸⁰ Santos Pais, above n 650, at 565.

Chapter 3

The Classification System in New Zealand

1.9 Overall Introduction

One of the critical concerns of the international community discussed in the previous chapter is the ability of New Zealand's domestic legislation to adequately outlaw all forms of child pornography. The ability to prosecute an offender for any involvement with child pornography is important because it confirms to the international community and the public that New Zealand will not tolerate any interaction with this content. As outlined in Chapter 1, New Zealand's censorship regime is governed by the Films, Videos, and Publications Classification Act 1993⁸⁸¹ ('Classification Act 1993' or 'Act'), which was amended by various amendments such as the Films, Videos, and Publications Classification Amendment Act 2005⁸⁸² ('Amendment Act').⁸⁸³ This chapter will provide an overview of New Zealand's classification system with particular reference to child pornography in accordance with this legislation. It will examine the balancing of the right to freedom of expression and the State's requirement to provide adequate censorship to protect its citizens from the harm associated with child pornography.

1.10 The Optional Protocol and the Outlawing of Child Pornography

As previously noted, the Optional Protocol requires New Zealand to outlaw all forms of child pornography.⁸⁸⁴ This obligation extends to material from the

⁸⁸¹ Films, Videos, and Publications Classification Act 1993.

⁸⁸² Films, Videos, and Publications Classification Amendment Act 2005.

⁸⁸³ The Department of Internal Affairs "Amendment Act 2005" (2012) The Department of Internal Affairs <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Censorship-Compliance-Amendment-Act-2005?OpenDocument>.

⁸⁸⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 1.

Internet⁸⁸⁵ and is intended to prohibit all interaction with this content.⁸⁸⁶ The Articles of the Optional Protocol which detail these requirements must also be read in conjunction with each other.⁸⁸⁷ Thus, Articles 1–3 of this instrument place an obligation on New Zealand to guarantee that its legislation and classification system is responding appropriately to the dissemination of child pornography on the Internet.⁸⁸⁸

1.11 The Development of Censorship in New Zealand

1.11.1 What is Censorship in New Zealand?

Censorship is first and foremost, a state practice.⁸⁸⁹ It is the ‘State’, that is, the Government and its bureaucracy, which has a constitutional obligation to regulate the public sphere.⁸⁹⁰ This includes the right to intervene in the private domain of an individual who is accessing objectionable content via the Internet.⁸⁹¹ Censorship in New Zealand is the means whereby publications are subjected to governmental supervision and control in order to prevent the dissemination of views, opinions or information that are unorthodox, immoral or offensive to society.⁸⁹² Consequently, this country’s censorship regime has primarily been based on the conservative notion that certain publications may pose a dangerous threat to the moral order and to society.⁸⁹³ Therefore, censorship in New Zealand was historically regarded as a moral issue.⁸⁹⁴ This approach is often justified by the negative effects of objectionable publications and the resulting corruption of innocent and vulnerable

⁸⁸⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(1)(c).

⁸⁸⁶ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 2.

⁸⁸⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 2.

⁸⁸⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 1–3.

⁸⁸⁹ Chris Watson and Roy Shuker *In the Public Good? Censorship in New Zealand* (Dunmore Press, Palmerston North, NZ, 1998) at 12.

⁸⁹⁰ At 12.

⁸⁹¹ At 12, 13.

⁸⁹² Justice Greig *Censorship* (LexisNexis, 2012) at 2.

⁸⁹³ Paul Christoffel *Censored - A Short History of Censorship in New Zealand* (12 1989) at 40.

⁸⁹⁴ Watson and Shuker, above n 863, at 12.

members of society such as young adolescents and other vulnerable members of the community.⁸⁹⁵

Although this stance is commonly referred to as a moral one, it is also political as it rationalises censorship as something which is necessary for the public good.⁸⁹⁶ This has meant that the traditional aim of New Zealand's censorship policy, which is the 'upholding of the moral standard' has become susceptible to use for the purposes of political censorship, such as the suppression of political viewpoints.⁸⁹⁷ Politically motivated censorship has historically been a much-utilised tool.⁸⁹⁸ An example of this is the employment of censorship to contain the spread of Bolshevism and the Soviet sphere of influence during the height of the cold war.⁸⁹⁹ Moreover, there have also been exceptional circumstances, such as the First and Second World Wars, which have given rise to censorship in the national interest.

In modern times the main target of censorship in this country has been all forms of immorality and in particular sexual immorality.⁹⁰⁰ This has resulted in the occasional situation where people from all political viewpoints have stood united over a particular issue, such as the dissemination of child pornography and its effect on society.⁹⁰¹ Accordingly, this has given censorship practice in New Zealand more objectivity, with legislative measures being aimed at capturing a specific class of publication, rather than a publication in general.⁹⁰²

1.11.2 The History of New Zealand's Censorship Law

Criminal law is the basis of censorship at common law.⁹⁰³ The criminal precedent was established as early as 1663 in the English case *R v Sidley*.⁹⁰⁴ In this case, Mr

⁸⁹⁵ At 12.

⁸⁹⁶ At 12.

⁸⁹⁷ Christoffel, above n 867, at 18.

⁸⁹⁸ Watson and Shuker, above n 863, at 13.

⁸⁹⁹ At 13.

⁹⁰⁰ Greig, above n 866, at 2.

⁹⁰¹ Christoffel, above n 867, at 40.

⁹⁰² At 40.

⁹⁰³ Greig, above n 866, at 3.

⁹⁰⁴ *R v Sidley* (1663) 1 Sid 168; 82 ER 1036 (gb).

Sidley found himself prosecuted for shewing' himself naked on a balcony at Convert Garden, from where he had proceeded to throw bottles containing urine, to the scandal and disgrace of the Government of the day.⁹⁰⁵ Therefore, the public display of the naked person, or any other act of open and disreputable lewdness, became a criminal offence.⁹⁰⁶ Since *R v Curl*⁹⁰⁷ in 1712 the English Courts have held that lewd and obscene publications are indeed a common law offence.⁹⁰⁸ The Court in *Curl* stated that:⁹⁰⁹

This is an offence at common law, as it tends to corrupt the morals of the King's subjects, and is against the peace of the King. Peace includes good order and government, and that peace may be broken in many instances without actual force.

The Lord Chief Justice of England, Lord Cockburn, established the benchmark upon which obscenity or indecencies were to be tried in *R v Hicklin*.⁹¹⁰ This case established the *Hicklin* test⁹¹¹ and laid down the common law precedent for all commonwealth jurisdictions, including New Zealand.⁹¹² It was recognised and acknowledged by the English Court that this category of material must be judged on whether it had a tendency to deprave and corrupt those whose minds are open to immoral influences and into whose hands the publication might fall.⁹¹³ Furthermore, the *Hicklin* case also endorsed the principle that where any portion of a publication is deemed to be obscene, the entire publication may be prohibited.⁹¹⁴

These common law standards were enforceable in New Zealand until the enactment by Parliament of the Indecent Publications Amendment Act 1954.⁹¹⁵ This Act, and

⁹⁰⁵ *R v Sidley*, above n 878.

⁹⁰⁶ *R v Sidley*, above n 878.

⁹⁰⁷ *R v Curl* (1772) 2 Stra 788; 93 ER 849 (gb).

⁹⁰⁸ At [789].

⁹⁰⁹ At [789].

⁹¹⁰ *R v Hicklin* (1886) LR 3 QB 360 (gb).

⁹¹¹ For an illustration of the application of the *Hicklin* test in the New Zealand Courts see *Clarkson v McCarthy* [1917] NZLR 624 (nz SC); *Sumpter v Stevenson* [1939] NZLR 446 (nz SC).

⁹¹² The *Hicklin* test became ineffectual with regard to New Zealand's censorship regime with the enactment of the Indecent Publications Act 1963.

⁹¹³ *R v Hicklin*, above n 884, at 371.

⁹¹⁴ See *R v Hicklin*, above n 884.

⁹¹⁵ Indecent Publications Amendment Act 1954.

various other enactments of Parliament, replaced the common law in New Zealand.⁹¹⁶ Consolidation of New Zealand's censorship legislation has thus culminated in the enactment of one statute that deals with all forms of censorship and is overseen by one Government Department.⁹¹⁷ This Act is the Films, Videos, and Publications Classification Act 1993⁹¹⁸ which is administered by the Ministry of Justice.⁹¹⁹ The purpose of New Zealand's present classification system is to protect the public from content and material that is considered to be injurious to the public good.⁹²⁰ The Office of Film and Literature Classification is the government body responsible for classifying publications that may need to be restricted or banned to prevent this injury or harm to the public good.⁹²¹

1.12 The Films, Videos, and Publications Classification Act 1993 and Freedom of Expression

1.12.1 The Films, Videos, and Publications Classification Act 1993

The implementation of the Films, Videos, and Publications Classification Act 1993 is the direct result of the Ministerial Committee of Inquiry into Pornography in 1987 ('Ministerial Committee of Inquiry').⁹²² The Ministerial Committee of Inquiry recommended, among other things, the consolidation of a variety of laws governing the classification of films, printed publications and videos into one statute.⁹²³ This Act and its subsequent Amendments contain the primary statutory powers that enable the prosecution of offenders within New Zealand's jurisdiction for offences involving the downloading and distribution of child pornography via the Internet.

⁹¹⁶ See Indecent Publications Act 1910; Customs Act 1913; Indecent Publications Amendment Act 1954; Indecent Publications Act 1958; Video Recording Act 1987.

⁹¹⁷ Christoffel, above n 867, at 39.

⁹¹⁸ Films, Videos, and Publications Classification Act 1993.

⁹¹⁹ Ministry of Justice "Film and Literature Classification, Office of" (28 June 2015)

<<http://www.justice.govt.nz/publications/global-publications/d/directory-of-official-information-archive/directory-of-official-information-december-2011/alphabetical-list-of-entries-1/f/film-and-literature-classification-office-of>>.

⁹²⁰ Office of Film and Literature Classification, Colmar Brunton's Social Research Agency *Understanding the Classification System New Zealanders' Views* (2011) at 10.

⁹²¹ At 10.

⁹²² David Wilson "Censorship in New Zealand: The Policy Challenges of New Technology" (2002) 19 Soc Policy J N Z 1 at 1.

⁹²³ At 1.

The intended purpose of the Act was clarified in a report by the Internal Affairs and Local Government Committee on the Films, Videos, and Publications Classification Bill. The report confirmed that the intention of the then Government was that the Act would bring together a unified regime for the censorship and classification of films, videos and publications within New Zealand.⁹²⁴

New Zealand's previous tripartite system for the classification of publications has been replaced by a streamlined, comprehensive classification system.⁹²⁵ As previously mentioned, this classification system is administered and enforced by the Office of Film and Literature Classification⁹²⁶ under the empowering legislative umbrella of the Films, Videos, and Publications Classification Act 1993.⁹²⁷ This Act has replaced the Indecent Publications Act 1963, the Films Act 1983, and the Video Recording Act 1987.⁹²⁸ These repealed statutes contained their own individual examination criteria and statutory appointments for the purpose of conducting examinations of objectionable material which have now been incorporated into the new Act.⁹²⁹ Furthermore, in its report published in 1989 the Ministerial Committee of Inquiry recommended the enactment of a new statute to provide a unified classification regime for films, videos and publications.⁹³⁰ This can be seen in the following recommendations:⁹³¹

1. That the Indecent Publications Act 1963, the Films Act 1983, and the Video Recording Act 1987 be repealed and replaced by one comprehensive statute

⁹²⁴ Internal Affairs and Local Government Committee “Report of the Internal Affairs and Local Government Committee on the Films, Videos, and Publications Classification Bill” (1991) XXIII 1 Appendix to the Journals of the House of Representatives 1. 7A at 3.

⁹²⁵ Philip Joseph and Jason McHerron *LexisNexis®: Document - Criminal Offences* (LexisNexis, 2012) at [203].

⁹²⁶ In New Zealand the classification of publications is administered by the Office of Film and Literature Classification. The main function of this office is to classify any publication that can be considered to be ‘objectionable’ under the Act as such.

⁹²⁷ Joseph and McHerron, above n 899, at [203].

⁹²⁸ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) (2000) 3 NZLR 570 (NZ Court of Appeal) at [3].

⁹²⁹ Internal Affairs and Local Government Committee, above n 898, at 3.

⁹³⁰ At 3.

⁹³¹ New Zealand Ministerial Committee of Inquiry into Pornography *Pornography: Report of the Ministerial Committee of Inquiry into Pornography* (The Committee, Wellington, NZ, 1989) at 165.

dealing with the classification and rating of the works to which those Acts currently apply.

2. That the preamble to that comprehensive statute make plain the purpose and limitations of classification in a modern democratic society.

These recommendations were incorporated into the Bill, which was enacted by the House of Representatives in 1993. The Long Title of the Act addresses these recommendations and specifies the overall objective of the Act, which is to consolidate and amend the law relating to the censoring of films, videos, books, and other publications.⁹³² This Act and its subsequent Amendments govern the classification of publications both in the print form and modern media such as digitalised film. The Act also contains the statutory prohibition against the possession and distribution of child pornography over the Internet within New Zealand.

The passing of this Bill into law by Parliament indicates legislative recognition of the dangers to New Zealand and, more importantly, to New Zealand's children that are associated with child pornography.⁹³³ Labour Party MP Lianne Dalziel discussed this issue during the introduction of the Bill into Parliament and stated:⁹³⁴

The Bill will empower the Police to take action in cases in which in the past they would have been prevented from doing so. The link between child pornography and the practice of child sexual abuse is well documented. People who possess child pornography use it not only for personal stimulation but also to convince children that what is not normal is normal. Children believe so much of what they see on television that the ability to coerce them into sexual acts is greatly increased by showing them pornography that involves children.

⁹³² Films, Videos, and Publications Classification Act 1993, Long Title.

⁹³³ Hansard (17 August 1993) 537 New Zealand Parliamentary Debates 17491; Hansard (22 June 1993) 536 15985; Hansard, above n 532; Hansard (2 December 1992) 532 12757.

⁹³⁴ Hansard, above n 907, at 12766.

These sentiments were shared by the then Minister of Women's Affairs Jenny Shipley during the debate.⁹³⁵ The key issue of concern in this debate was the implementation of the new enforcement provisions for possession of child pornography.⁹³⁶ This debate also raised serious concerns about the lack of possession provisions in the former classification regime.⁹³⁷ Shipley's comments during the Second Reading of the Bill, draw attention to this point:⁹³⁸

As long as people suffer no penalty at all for the possession of material that is objectionable, they will always have both an economic and a personal reason for running the risk of being caught.

In recent months I have been enraged to learn that Police, having raided houses and found huge stashes of material that clearly covers the area of child pornography, and clearly suspecting the people living in those houses of being paedophiles, have not been able to charge those individuals with an offence. In that case the only people who lose are children. We have to face up to that matter if we wish to make a difference.

The enactment of the Act can also be seen as the Government acknowledging that the previous tripartite system of classification was inefficient and incapable of dealing with hardened child pornographers. The invention of new media such as the Internet resulted in New Zealand's legislation requiring a new and more dynamic approach to classifying publications in the new digital era of publishing.

1.12.2 New Zealand's Approach to Publications in the Digital Environment

1.12.2.1 The Definition of a Publication

Section 2 of the Films, Videos, and Publications Classification Act 1993 contains the definition of what constitutes a publication under New Zealand's censorship legislation. This Section asserts that:⁹³⁹

⁹³⁵ Hansard, above n 907, at 17057.

⁹³⁶ Hansard, above n 532, at 17057.

⁹³⁷ Hansard, above n 907, at 17057.

⁹³⁸ Hansard, above n 532, at 17057.

⁹³⁹ Films, Videos, and Publications Classification Act 1993 s 2.

Publication means—

(a)

Any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide:

(b)

Any print or writing:

[(c)

a paper or other thing that has printed or impressed upon it, or otherwise shown upon it, 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words:]

[(d)

a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words:]

This definition of what constitutes a publication under the Act clearly indicates that material which is sourced from the Internet and found to be stored on any electronic device within New Zealand comes within the scope of this statute.⁹⁴⁰ However, prior to the introduction of the Amendment Act, which amended the definition of a publication, the Courts had to decide whether electronic devices and media constituted a publication as defined within the Act. Although this may seem straightforward because the Internet and digital media are common-place today, this was not the case when the Act came into existence. Serious concerns were raised as to whether the Internet and the digitalised images came within the definition of a publication within the Act.

⁹⁴⁰ Refer to the Films, Videos, and Publications Classification Act 1993, s 2(d).

This point of contention was clarified in the case of *Goodwin v Department of Internal Affairs*.⁹⁴¹ The Appellant in this case had been found in possession⁹⁴² of electronic pictures which were stored as jpegs on his computer's hard drive.⁹⁴³ Whether or not this hard drive and the jpegs came within the definition of a publication for the purposes of the Act was included within the notice of appeal as one of several grounds for appeal.⁹⁴⁴ In the Gisborne District Court Judge Adeane had found that the Appellant Mr Goodwin had approximately 1600 images stored on his computer that were sexualised in nature and 200–250 of those were objectionable by reason of the involvement of children.⁹⁴⁵ Consequently Mr Goodwin was found guilty and convicted on 44 charges of possession of an objectionable publication under Section 131(1) of the Act.⁹⁴⁶

In the High Court Justice O'Regan was of the view that a computer's hard drive could be considered a publication under the definition of a publication contained within the Act.⁹⁴⁷ To support this multiple publication suggestion the Judge referred to the definition of a book within the Act.⁹⁴⁸ This did not appear to rule out the possibility that a publication could be a combination of other publications.⁹⁴⁹ A book in terms of the definition contained within the Act includes a magazine⁹⁵⁰ and a book or magazine could contain a number of pictures or photographs, each of which is itself a publication.⁹⁵¹

The Court found a previous decision by the Courts that supported the proposition that a jpg file comes within the definition of a publication in the case of *S v Auckland District Court and New Zealand Police*.⁹⁵² It was held by Justice O'Regan that the

⁹⁴¹ *Goodin v Department of Internal Affairs* High Court Gisborne AP 11/01, 24 July 2002.

⁹⁴² For a discussion on what constitutes possession under the Act refer to *Batty v Choven* HC, Auckland CRI-2005–404–313, 2 May 2006 at [6,7,8].

⁹⁴³ *Goodin v Department of Internal Affairs*, above n 915, at [2].

⁹⁴⁴ At [9].

⁹⁴⁵ At [5].

⁹⁴⁶ At [1].

⁹⁴⁷ At [30].

⁹⁴⁸ David Harvey *internet.law.nz* (LexisNexis, Wellington, 2005) at 315.

⁹⁴⁹ *Goodin v Department of Internal Affairs*, above n 915, at [30].

⁹⁵⁰ At [30].

⁹⁵¹ At [30].

⁹⁵² *Goodin v Department of Internal Affairs*, above n 915.

inference that can be drawn from this decision is that a jpg file is a publication capable of classification by the Classification Office.⁹⁵³ Justice O'Regan referred to several other cases where charges against the accused were similar to those applicable in this appeal. The first case considered was *Department of Internal Affairs v Merry*⁹⁵⁴ where the Court proceeded on the basis that each computer image was an objectionable file.⁹⁵⁵ Moreover, in *R v Millard*⁹⁵⁶ Judge Hobbs found that the individual computer files known as jpgs were publications because they were similar to still photographs.⁹⁵⁷ This decision also held that mpgs⁹⁵⁸ were publications and described them as akin to movie clips.⁹⁵⁹ Justice O'Regan noted that there was no argument to the contrary in the findings of both of these cases and there were also no objections to the interpretation of what constitutes a publication employed by both respective Judges.⁹⁶⁰

The Court then turned to cases from foreign jurisdictions and to the Oxford Dictionary to determine whether a jpg file on a computer should be classified as a photograph or a picture. It was held that a jpg file should be classified as a picture. The definition of 'picture' in the Oxford Dictionary supports this finding and includes 'a visible image produced by an optical or electronic system; esp. the image on a radar or television screen'.⁹⁶¹ Justice O'Regan stated that:⁹⁶²

..there is no reason why data stored in a computer file or folder or on a computer disk which, by the use of a computer or other machine can be displayed in the form of an image, should not come within the ambit of a "picture" for the purposes of the definition of publication.

⁹⁵³ At [28].

⁹⁵⁴ *Department of Internal Affairs v Merry* (2000) 2000 DCR 733 (NZ District Court).

⁹⁵⁵ *Goodin v Department of Internal Affairs*, above n 915, at [29].

⁹⁵⁶ *R v Millard* (2000) DCR 2000 633 (NZ).

⁹⁵⁷ At 635.

⁹⁵⁸ An mpg is a compressed audio or video recording.

⁹⁵⁹ *R v Millard*, above n 930, at 635.

⁹⁶⁰ *Goodin v Department of Internal Affairs*, above n 915, at [29].

⁹⁶¹ At [37].

⁹⁶² At [38].

Such an interpretation is consistent with the requirements set out in Section 5(1) of the Interpretation Act 1999,⁹⁶³ as it is consistent with the purpose of the Classification Act 1993 which is to provide a uniform regime for the control of objectionable material.⁹⁶⁴ The Court concluded that data in the form of an image stored in a computer file is a ‘picture’ and therefore a ‘publication’ for the purposes of the Act.⁹⁶⁵ The main point of the Court’s determination is that any type of image on a computer comes within the ambit of the law and the law is designed to regulate access to such images. Therefore, the definition of publication within New Zealand’s legislation and the common law is comprehensive and includes all tangible forms of recorded material including digitalised images and film sourced from the Internet.⁹⁶⁶

1.12.2.2 Defining Objectionable Content and Child Pornography in New Zealand

Under the Act the previously used censorship terms of ‘indecent’ and ‘obscene’ have been replaced by the term ‘objectionable’.⁹⁶⁷ The term objectionable was given preference as it covers more adequately the prohibition of material on grounds other than sexual content, such as crime, cruelty and violence.⁹⁶⁸ Another aspect in favour of this term was that it had existing precedent in Australian Federal Legislation prior to the drafting of the Bill and the enactment of the subsequent Act.⁹⁶⁹

⁹⁶³ Interpretation Act 1999.

⁹⁶⁴ *Goodin v Department of Internal Affairs*, above n 915, at [38].

⁹⁶⁵ At [39].

⁹⁶⁶ Ministry of Justice “Child Pornography” (2002) Ministry of Justice
<<http://www.justice.govt.nz/publications/publications-archived/2002/protecting-our-innocence/child-pornography>>.

⁹⁶⁷ Greig, above n 866, at [8].

⁹⁶⁸ Internal Affairs and Local Government Select Committee *Films, Videos, And Publications Classification Bill Report of The Department of Justice* (Official Information Act 1982 Release 1993) at 7.

⁹⁶⁹ At 7.

1.12.2.3 Section 3

Section 3 of the Act contains the definition of an objectionable publication and it is this definition which is central to the operation of the entire Act.⁹⁷⁰ The utilisation of the term ‘objectionable’ within the Act ensures that the enforcement provisions within the Act can be applied to a broad spectrum of publications, including those which are not of a sexual nature.⁹⁷¹ Furthermore, it is these same provisions that have ensured that New Zealand’s child pornography laws are broader than those in many other countries and enable a wide variety of material that promotes or supports child sexual abuse to be classified as objectionable.⁹⁷² An example of this type of material are pseudo-images of, for example, Homer Simpson having sex with his daughter Lisa Simpson. These images would be classified as objectionable and it would therefore, be illegal to possess, consume or distribute them in New Zealand. However, in Thailand, it is not illegal to possess this type of material; it is only illegal to distribute it.⁹⁷³ Moreover, the Departmental Report of 24 May 1993 by the former Department of Justice⁹⁷⁴ on the Bill provides valuable background knowledge for the reasons behind the current structure of Section 3 of the Act.⁹⁷⁵ This Report reveals that:⁹⁷⁶

Attempts have been made in the past to “draw the line” on what is prohibited and what is not by way of rigid lists of prohibited subject-matter. This approach was put aside in 1963 because one of the results was to prohibit publications on the basis of subject-matter alone with little regard to the character of the publication,

⁹⁷⁰ *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*, above n 902, at [9].

⁹⁷¹ New Indecent Publications Tribunal *Submission of the Indecent Publications Tribunal to the Select Committee on Internal Affairs and Local Government on the Films, Videos and Publications Classification Bill* (Department of Justice, Tribunals Division, Wellington, NZ, 1993) at 6.

⁹⁷² Wilson, above n 646, at 71.

⁹⁷³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 18.

⁹⁷⁴ The Department of Justice is now the Ministry of Justice.

⁹⁷⁵ Government Administration Select Committee *Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993 and Related Issues* (2001) at 2.

⁹⁷⁶ Department of Justice *Report on the Films, Videos, and Publications Classification Bill to the Internal Affairs and Local Government Committee* (1993) at 4–5.

its likely effect, and the context in which the subject-matter was dealt with. There are dangers in being over-specific.

They include the problem of exhaustive definition of prohibited material, the loss of flexibility in applying “balancing” criteria, and undue restriction on the capacity of the law to develop with the passage of time. The formulation of the criteria in clause 3 (now Section 3) takes account of these difficulties.

The term ‘objectionable’ is a generic term that is given to publications in New Zealand that are considered injurious to the public good.⁹⁷⁷ Therefore the essential consideration in classifying a publication as objectionable is whether there is likely to be injury to the public good.⁹⁷⁸ Section 3 of the Act provides that:⁹⁷⁹

3 Meaning of “objectionable”

(1)

For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

(1A)

Without limiting subsection (1), a publication deals with a matter such as sex for the purposes of that subsection if—

(a) the publication is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and

(b) those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.]

(1B)

⁹⁷⁷ New Zealand Government *Initial Report on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (2014) at 12.

⁹⁷⁸ Philip Joseph and Jason McHerron *LexisNexis®: Document - (6) Determination of Classification* (LexisNexis, 2012) at [33].

⁹⁷⁹ Films, Videos, and Publications Classification Act 1993 s 3.

Subsection (1A) is for the avoidance of doubt.]

(2)

A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,—

(a) The exploitation of children, or young persons, or both, for sexual purposes; or

(b) The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or

(c) Sexual conduct with or upon the body of a dead person; or

(d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or

(e) Bestiality; or

(f) Acts of torture or the infliction of extreme violence or extreme cruelty.

(3)

In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should [in accordance with section 23(2)] be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication—

(a) Describes, depicts, or otherwise deals with—

(i) Acts of torture, the infliction of serious physical harm, or acts of significant cruelty:

(ii) Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:

(iii) Other sexual or physical conduct of a degrading or dehumanising or demeaning nature:

(iv) Sexual conduct with or by children, or young persons, or both:

(v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:

(b) Exploits the nudity of children, or young persons, or both:

(c) Degrades or dehumanises or demeans any person:

(d) Promotes or encourages criminal acts or acts of terrorism:

(e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

(4)

In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should [in accordance with section 23(2)] be given a classification other than objectionable, the following matters shall also be considered:

(a) The dominant effect of the publication as a whole:

(b) The impact of the medium in which the publication is presented:

(c) The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:

(d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:

(e) The purpose for which the publication is intended to be used:

(f) Any other relevant circumstances relating to the intended or likely use of the publication.

The intention of Section 3 is to provide a classification regime that has a contemporary focus on the type of representation of most concern to the public.⁹⁸⁰ It is also the first tier in a two-tier system of classification that Parliament has determined should prohibit all forms of objectionable material.⁹⁸¹ This methodology endorses the assessment of the Indecent Publications Tribunal in 1993. The Tribunal was of the opinion that the prohibition of such images could be achieved by the use of policy guidelines, which are more flexible and sensitive to public opinion.⁹⁸² The Department of Justice considered that a workable censorship regime must be capable of responding to social change and must provide censors with clear guidelines for the application of the legislation.⁹⁸³ Unlike an Act of Parliament, policy guidelines can be readily changed to reflect changes in society's standards and levels of tolerance.⁹⁸⁴ Accordingly, Section 3 does not attempt to provide comprehensive and precise definitions of all that is objectionable.⁹⁸⁵ However, the importance of Section 3(2) is that it sets the tone of the legislation, and in combination with Section 3(3) makes Parliament's intention clear.⁹⁸⁶ This feature of the Act is clearly evident in the judgement of Justice Hammond in the Court of Appeal case of *R v Spark*.⁹⁸⁷ It was held in this case that:⁹⁸⁸

It will be observed that the concern which Parliament plainly had in contemplation was that publications falling within the meaning of the word "objectionable", even those made unknowingly, could attract criminal liability. That, of course, was for Parliament to prescribe. But Parliament also wished to cast its net very widely, much as in the way it has prescribed drug offending. Mr Hamlin, with respect correctly, noted that there are some analogies between the structure of this legislation and the structure of the New Zealand drug legislation

⁹⁸⁰ Department of Justice, above n 950, at 4.

⁹⁸¹ Hansard, above n 907, at 17491.

⁹⁸² Indecent Publications Tribunal, above n 945, at 4.

⁹⁸³ Department of Justice, above n 950, at 4.

⁹⁸⁴ Indecent Publications Tribunal, above n 945, at 4.

⁹⁸⁵ At 14.

⁹⁸⁶ At 14.

⁹⁸⁷ *R v Spark* (2009) 3 NZLR 625 (NZ CA).

⁹⁸⁸ At [19].

Although Section 3 of the Act does not define ‘young person’, decisions by the Film and Literature Board of Review and the Office of Film and Literature Classification⁹⁸⁹ seem to interpret it⁹⁹⁰ as meaning people less than 18 years of age.⁹⁹¹ The omission of an express definition within the Act is deliberate⁹⁹² as an inquiry conducted under Section 3 of the Act does not require the ascertainment of the precise age of the person photographed.⁹⁹³ The Act is predominantly concerned with the vulnerability of young people and with the corrosive injury to the public good of depicting persons perceived to be children or young people as subjects for exploitation.⁹⁹⁴ A report by the Government Administration Committee on the Films, Videos, and Publications Classification Amendment Bill in 2004 endorsed this view.⁹⁹⁵ The report confirmed that the Act’s classification provisions in Section 3 relating to images of children and young persons are concerned with the nature and character of the publication.⁹⁹⁶ Therefore these provisions do not hinge on whether the publication is portraying a child or young person.⁹⁹⁷ This Report further asserts that.⁹⁹⁸

We agree with the view reached by the select committee that considered the Bill that became the Act in 1993. That is, such definitions were deliberately omitted to avoid the situation where the Classification Office is caught up in technical arguments about the age of both real and fictional persons portrayed in publications. The criteria should focus on the character of the portrayal, context, and the publication.

⁹⁸⁹ For more information on the definition of young persons see the discussion in *Hartley v New Zealand Film and Literature Board of Review* (2011) 3 NZFLBR (NZ New Zealand Film and Literature Board of Review).

⁹⁹⁰ The Deputy Chief Censor of the Classification Office Nic McCully confirmed that the Classification Office refers to New Zealand’s family law legislation which mandates that anyone under the age of 18 must be considered a child.

⁹⁹¹ Ministry of Justice, above n 940.

⁹⁹² *Moonen v Film and Literature Board of Review* (2002) 2 NZLR 754 (NZ Court of Appeal) at [37].

⁹⁹³ At [40].

⁹⁹⁴ At [40].

⁹⁹⁵ Phil Goff *Films, Videos, and Publications Classification Amendment Bill* (Occasional Paper 92–2, 2005).

⁹⁹⁶ At 7.

⁹⁹⁷ At 7.

⁹⁹⁸ At 7.

It may seem surprising that what constitutes a child should even need defining, but this concept is very elusive.⁹⁹⁹ In the Butterworths New Zealand Law Dictionary a child is defined as ‘a person under a certain age which varies according to the statutory context’.¹⁰⁰⁰ This definition recognises that any classification of a child is part of a social construction that is subject to a continuous process of reinvention and redefinition.¹⁰⁰¹ Moreover, this process proceeds according to society’s perceptions and understandings at a given point in time which is reflected in the agenda of that society’s statutory framework.¹⁰⁰² Accordingly, there has been no universally agreed single definition of a child, which is a significant indication of the vagueness of the concept.¹⁰⁰³

Increasingly any reference to a definition of a child has been directed toward the stages of development such as infancy, childhood and adolescence.¹⁰⁰⁴ Many legal systems, including that of New Zealand, adopt a similar approach in that not all of a child’s rights are necessarily exercisable only at the time of majority.¹⁰⁰⁵ Instead minors progressively assume rights, obligations and duties as they progress through childhood.¹⁰⁰⁶ This is particularly evident in New Zealand’s criminal legislation. The Crimes Act 1961¹⁰⁰⁷ contains a separate provision that recognises and distinguishes the mental development of a child under 10 and that of a child between 10 and 14.¹⁰⁰⁸ However, this creates a dilemma where there is no comprehensive definition of a child within the criminal legislation. This is at odds with New Zealand’s family law legislation which ensures that there is an unequivocal definition of a child within each respective enactment of legislation.

⁹⁹⁹ Alisdair A Gillespie “Defining Child Pornography: Challenges For The Law” (2010) 22 Child & Fam L Q 200 at 201.

¹⁰⁰⁰ Peter Spiller *Butterworths New Zealand Law Dictionary* (6th ed ed, LexisNexis NZ, Wellington, [NZ], 2005) at 47.

¹⁰⁰¹ Yvonne Jewkes “Much Ado About Nothing? Representations and Realities of Online Soliciting of Children” (2010) 16 Journal of Sexual Aggression 5 at 8.

¹⁰⁰² Margaret L King “Concepts of Childhood: What We Know and Where We Might Go” (2007) 60 Renaissance Quarterly 371 at 402.

¹⁰⁰³ Gillespie, above n 436, at 13.

¹⁰⁰⁴ Gillespie, above n 973, at 201.

¹⁰⁰⁵ At 202.

¹⁰⁰⁶ At 202.

¹⁰⁰⁷ Crimes Act 1961 (NZ).

¹⁰⁰⁸ Crimes Act 1961, s 21 and 22.

Other statutes in New Zealand such as the Children, Young Persons and Their Families Act 1989,¹⁰⁰⁹ and the Care of the Children Act 2004¹⁰¹⁰ (COCA), all contain definitions which detail the precise age of an individual that is considered to be a child. The overriding purpose of COCA can be stated simply as intending to promote the best interests and welfare of New Zealand's children.¹⁰¹¹ This is achieved by ensuring that the Act provides statutory recognition of these rights to New Zealand's children as rights holders.¹⁰¹² It is also contended that the protections for children within the Classification Act 1993 are recognition by the State that children are rights holders before the law. This acknowledgement is reinforced by the interaction of New Zealand's classification authorities with the State's family law legislation to determine the parameters of who can be considered a child in accordance with Section 3. The significance of this interaction is that it transposes some of the fundamental obligations under COCA which require children to be recognised before the law.¹⁰¹³ COCA and its definitions, including the definition of a child, were the result of a social construction. This social construction intended to create legislation that is more consistent with society's perceptions of the responsibilities that parents have towards their children.¹⁰¹⁴ Furthermore, this same social construction ensured that COCA placed substantial emphasis on the rights of all children which is reflected in the definition of a child under the Act.¹⁰¹⁵ COCA asserts that:¹⁰¹⁶

In this Act, unless the context otherwise requires,—

child means a person under the age of 18 years.

¹⁰⁰⁹ Children, Young Persons, and Their Families Act 1989 (NZ).

¹⁰¹⁰ Care of Children Act 2004 (NZ).

¹⁰¹¹ Care of Children Act 2004, s 3(1)(a).

¹⁰¹² Care of Children Act 2004, s 3(1)(b).

¹⁰¹³ Care of Children Act 2004, s 3(1)(b).

¹⁰¹⁴ Ministry of Justice "Introduction to the Care of Children Act — Ministry of Justice, New Zealand" (28 June 2015) [justice.govt.nz <http://www.justice.govt.nz/courts/family-court/what-family-court-does/care-of-children/introduction>](http://www.justice.govt.nz/courts/family-court/what-family-court-does/care-of-children/introduction).

¹⁰¹⁵ Ministry of Justice, above n 988.

¹⁰¹⁶ Care of Children Act 2004, s 8.

However, COCA can be distinguished from New Zealand's censorship legislation as COCA has been implemented with the sole intention of providing recognition of the welfare and best interests of the child.¹⁰¹⁷ The primary focus of COCA is on the legal regulation of the parent-child relationship,¹⁰¹⁸ whereas the principal emphasis of New Zealand's censorship legalisation, as has already been stated, is on the censorship of material that is likely to cause injury to the public good.¹⁰¹⁹ The difficulty of defining a child has a direct impact on the ability of the legal system to create laws that directly impact upon child pornography.¹⁰²⁰ This is clearly evident in the decision not to provide precise definitions of a child within the Films, Videos, and Publications Classification Act 1993. The Act has centralised the classification of all publications within New Zealand and also consolidated the previous censorship regime.¹⁰²¹ It has created a streamlined censorship system intended to limit any technical arguments and focuses on the nature of the publication which makes it subject to regulation.¹⁰²² This issue was emphasised in Department of Justice's Departmental Report of 24 May 1993. This Report affirms that:¹⁰²³

The Bill proceeds on the footing that it is not sound policy in this area of law to attempt a comprehensive and precise definitions of all that is objectionable. Censorship is not a fact finding process where apples are neatly separated from oranges and placed in different baskets. This has been recognised by the creation of specialist bodies and tribunals charged with the difficult task of applying statutory criteria to the wide range of material that comes before them.

The classification of what can be considered to be objectionable and the construction of Section 3 in its statutory context were discussed by the Court of

¹⁰¹⁷ Mark Henaghan *Care of Children* (LexisNexis, Wellington, NZ, 2005) at 3.

¹⁰¹⁸ At 4.

¹⁰¹⁹ Greig, above n 866, at [33].

¹⁰²⁰ Alisdair Gillespie "Legal Definitions of Child Pornography" (2010) 16 *Journal of Sexual Aggression* 19 at 20.

¹⁰²¹ Greig, above n 866, at [5].

¹⁰²² Goff, above n 969, at 7.

¹⁰²³ Internal Affairs and Local Government Select Committee, above n 942, at 4.

Appeal in *Moonen v Film and Literature Board of Review*.¹⁰²⁴ The Court stated in paragraphs 4 and 5 that:¹⁰²⁵

[4] The structure of s 3 should be noted. Subsection (1) provides the general test for when a publication is objectionable. Various subject-matters are described and the publication is regarded as objectionable if the subject-matter is dealt with in such a manner that the availability of the publication is likely to be injurious to the public good. Central concepts are the manner in which the subject-matter is expressed or dealt with, the availability of the publication, and likelihood of injury to the public good. Subsection (2) deems a publication to be objectionable if it promotes or supports, or tends to promote or support, one or more of the six things listed in paras (a) to (f). The exploitation of children or young persons or both for sexual purposes is what is at issue in this present case.

[5] For deemed objectionability the key concept is that the publication must promote or support, or tend to promote or support, the prohibited subject-matter. Parliament has said that if the criteria in subs (2) are fulfilled, the publication is to be regarded as objectionable; there is no alternative. Publications which fall foul of subs (2) are by legislative direction treated as dealing with a qualifying subject-matter in such a manner that the availability of the publication is likely to be injurious to the public good in terms of subs (1). A publication which is not deemed to be objectionable under subs (2) may nevertheless be classified as objectionable, or given a restricted classification under subs (3), after consideration of the matters referred to in that subsection, and in subs (4).

These statements by the Court indicate that the general test for Section 3 is not a factual analysis of the material but how it will be perceived. Section 3(1) of the Act also details the general test for determining a publication to be objectionable by providing the gateway through which publications must pass before qualifying as ‘objectionable’, unless they are deemed to be so in terms of Section 3(2).¹⁰²⁶ The Court of Appeal in the later decision of *Living Word Distributors Ltd v Human*

¹⁰²⁴ *Moonen v Film and Literature Board of Review* (2000) 2 NZLR 9 (NZ Court of Appeal Wellington).

¹⁰²⁵ At [4 and 5].

¹⁰²⁶ Government Administration Select Committee, above n 949, at 2.

*Rights Action Group Inc*¹⁰²⁷ created considerable debate when the Court's definition of what constituted an objectionable publication placed limits on the definition of objectionable.¹⁰²⁸

This case was appealed from the High Court concerning the classification of a number of videos that opposed awarding equal rights to gay people and blamed homosexuality for the spread of HIV and AIDS.¹⁰²⁹ These videos were originally classified as R18 and by the Office Film and Literature Classification and then as objectionable by the Film and Literature Board of Review (Board of Review).¹⁰³⁰ Moreover, the Board of Review held that while the videos did not, strictly speaking, depict sex, horror, crime, cruelty or violence, they could be brought into the Act's definition of objectionable and made subject to the Board of Review's¹⁰³¹ jurisdiction by the words 'such as' contained within Section 3(1) of the Act.¹⁰³²

The Court of Appeal held that Section 3(1) of the Act has been designed to serve two important purposes which have been highlighted in paragraph 4 of the *Moonen* case. The first is to define the reach of censorship in terms of the subject-matter of the publication.¹⁰³³ The second is to set the test of 'injurious to the public good' as the yardstick for determining whether a publication, which has qualified in terms of subject-matter, can be classified as objectionable.¹⁰³⁴ The Court determined that:¹⁰³⁵

[27] The words "matters such as" in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression "such as" is narrower than "includes", which was the term used in defining "indecent" in the repealed Indecent

¹⁰²⁷ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington), above n 902.

¹⁰²⁸ Wilson, above n 646, at 72.

¹⁰²⁹ At 72.

¹⁰³⁰ At 72.

¹⁰³¹ The Courts in this section of the thesis refer to the Review Board. However, this will now be referred to as the Board of Review to assist comprehension of the classification processes.

¹⁰³² Wilson, above n 646, at 72.

¹⁰³³ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington), above n 902, at [25].

¹⁰³⁴ At [25].

¹⁰³⁵ At [27 and 28].

Publications Act 1963. Given the similarity of the content description in the successive statutes, “such as” was a deliberate departure from the unrestricting “includes”.

[28] The words used in s 3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words “sex, horror, crime, cruelty, or violence”, as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.

The Court of Appeal came to a unanimous decision and considered that the subject matter provision of the Act was intended to limit the reach of New Zealand’s censorship legislation.¹⁰³⁶ Accordingly, the Court held that a publication could not be deemed objectionable unless it dealt with one of the matters set out in Section 3(1) of the Act, namely sex, horror, crime, cruelty, or violence, in such a manner as was likely to be injurious to the public interest.¹⁰³⁷ This is a direct result of the Bill and the subsequent Act being informed to a significant extent by the above-mentioned report of the Ministerial Committee of Inquiry in 1989.¹⁰³⁸ This Ministerial Committee of Inquiry focused on ways to administer material of a primarily sexual or violent nature.¹⁰³⁹ Consequently, both the Bill and the successive Act followed a similar approach to that recommended by Ministerial Committee of Inquiry.¹⁰⁴⁰

The Court of Appeal also affirmed that the Classification Office only has jurisdiction over publications that fit through one of the five subject-matter gateways which are cited within Section 3(1) of the Act.¹⁰⁴¹ For example, matters such as sex have to show sexual activity rather than just a sexualised pose.¹⁰⁴²

¹⁰³⁶ Wilson, above n 646, at 72.

¹⁰³⁷ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington), above n 902, at 570.

¹⁰³⁸ Government Administration Committee *Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993 and Related Issues* (2001) at 2.

¹⁰³⁹ At 2.

¹⁰⁴⁰ At 2.

¹⁰⁴¹ Office of Film and Literature Classification “A Breif History of Censorship in New Zealand” (2012) <<http://www.censorship.govt.nz/about-censorship/a-brief-history-of-censorship-in-new-zealand.html#anchor20>>.

¹⁰⁴² Office of Film and Literature Classification, above n 1015.

Moreover, the publications could only be objectionable to the extent to which they dealt with sexual activity and dealt with it in such a manner that the availability of the publication was likely to be injurious to the public good.¹⁰⁴³

The judgement by the Court of Appeal in *Living Word* was in stark contrast to the line of authority laid down by the common law under the now repealed Indecent Publications Act 1963.¹⁰⁴⁴ This Act had provided that injury to the public good may arise if the effect of the publication is to treat women or any other segment of the population as inferior or unequal, or to reinforce such an attitude in men or any other segment of society.¹⁰⁴⁵ The *Living Word* decision cast doubt on the ability of censorship authorities to classify types of material that did not depict activity but were likely to be injurious to the public good.¹⁰⁴⁶ The Chief Censor informed the Government's Administration Committee that the Court of Appeal's narrow interpretation of Section 3 meant that the censorship of other matters, for example child nudity, offensive language, invasion of privacy and mental illness, is unclear.¹⁰⁴⁷ The Administration Committee stated that:¹⁰⁴⁸

Computer image files and photographs of naked people, particularly children and young persons, are another area that the *Living World* decision has adversely affected. We find it disturbing that although these photos are taken in a way that sexualises the subjects, and these are usually children, the censors cannot classify them as objectionable as they do not show a particular sexual activity. This is despite such material clearly showing the opinion of the photographer that the subjects are sexually desirable.

The effect of this decision was to limit the scope of 'such matters as sex' so it did not cover sexual orientation, the sexual transmission of HIV, or the 'hate speech'

¹⁰⁴³ *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*, above n 902, at 570.

¹⁰⁴⁴ Indecent Publications Act 1963.

¹⁰⁴⁵ See *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd* (1993) 2 NZLR 709 (NZ High Court); *Re "People"* [1993] NZAR 543 (NZ Indecent Publications Tribunal).

¹⁰⁴⁶ Wilson, above n 646, at 72.

¹⁰⁴⁷ Report of the Government Administration Committee, above n 267, at 16.

¹⁰⁴⁸ At 16.

related to them.¹⁰⁴⁹ Consequently, Section 3(1) of the Act could not be used to censor publications simply on the basis that they contain discriminatory or derogatory opinions about particular groups within the community.¹⁰⁵⁰ The Court of Appeal restricted the application of Section 3(1) of the Act to those publications that dealt with *activity* of a sexual, violent or criminal nature, but not to publications that were attempting to convey an *attitude* or an *opinion*.¹⁰⁵¹ Justice Thomas emphasised this point and notes that:¹⁰⁵²

I do not wish it thought, therefore, that in holding that the board exceeded its jurisdiction I condone the contents of the videos or endorse the view that the publication of the videos is in the public good. Nor, on the other hand, do I wish it thought that I accept the submissions of those who perceive the videos to be blatant bigotry or hate propaganda. In truth, my views are beside the point. What is in point is the question whether videos of this kind fall within the scope and intent of legislation directed at the censorship of unacceptable portrayals of pornographic sex and violence. I am not prepared to accept that this is the case.

The concern arising from the Court of Appeal's interpretation of Section 3(1) was whether this interpretation adequately carried out the intention of the Act.¹⁰⁵³ In order to address this and other concerns about the types of harmful material not covered by the Act following the *Living Word* decision, the Select Committee recommended an amendment to the Act which would allow the Classification Office to restrict, but not ban, specific material to prevent harm to children and young people.¹⁰⁵⁴ As a result, in 2005 Parliament amended the Act to permit the Classification Office to restrict some publications which did not fit within the gateway defined by the Court of Appeal in the *Living Word* decision.¹⁰⁵⁵ The Films, Videos, and Publications Classification Amendment Act 2005 expanded Section 3(1) of the Act so that material such as the sexualised visual images of children and

¹⁰⁴⁹ At 16.

¹⁰⁵⁰ At 16.

¹⁰⁵¹ At 15.

¹⁰⁵² *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*, above n 902, at [68].

¹⁰⁵³ Government Administration Committee, above n 1012, at 2.

¹⁰⁵⁴ Wilson, above n 646, at 73.

¹⁰⁵⁵ Office of Film and Literature Classification, above n 1015.

young persons who were fully or partially nude could be redefined and come within the scope of the Act.¹⁰⁵⁶

1.13 Freedom of Expression

1.13.1 The International Protections

International treaties and conventions guarantee the protection of freedom of expression. These international instruments must be taken into consideration when implementing any restriction on freedom of expression such as a nationwide filtering system to restrict Internet content.¹⁰⁵⁷ Any such restriction on the right to freedom of expression must also meet the rigorous criteria set out under international human rights law.¹⁰⁵⁸ The International Covenant on Civil and Political Rights 1976¹⁰⁵⁹ is a binding international treaty which New Zealand ratified on 28 December 1978.¹⁰⁶⁰ It has also been adopted by 168 other parties¹⁰⁶¹ and contains criteria relevant to restricting freedom of expression and filtering of the Internet.¹⁰⁶² Article 19 affirms that:¹⁰⁶³

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

¹⁰⁵⁶ Office of Film and Literature Classification, above n 1015.

¹⁰⁵⁷ See Frank La Rue *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (A/HRC/17/27 2001).

¹⁰⁵⁸ At [28].

¹⁰⁵⁹ International Covenant on Civil and Political Rights 1966 (un.org).

¹⁰⁶⁰ Ministry of Justice “International Covenant on Civil and Political Rights” (6 July 2014)

Ministry of Justice <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/international-covenant-on-civil-and-political-rights>>.

¹⁰⁶¹ United Nations “United Nations Treaty Collection -Chapter IV Human Rights” (6 July 2014) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

¹⁰⁶² International Covenant on Civil and Political Rights 1966, s 19.

¹⁰⁶³ International Covenant on Civil and Political Rights 1966, s 19.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 19 of the International Covenant on Civil and Political Rights 1976 contains a *substantive* dimension that relates to the protection and restriction of content on the Internet which, due to the transnational nature of the Internet, differs from country to country.¹⁰⁶⁴ These protections also have important *procedural* dimensions that require the implementation of sensitive tools to distinguish between protected and unprotected speech.¹⁰⁶⁵

1.13.2 Freedom of Expression and Censorship in New Zealand

The right to freedom of expression and other fundamental rights of the individual are expressly defined and affirmed in the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act 1990').¹⁰⁶⁶ This right is contained within Section 14 which states that:¹⁰⁶⁷

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

¹⁰⁶⁴ See Ronald J Krotoszynski *The First Amendment in Cross-cultural Perspective* (NYU Press, New York, 2006); Robert A Sedler "An Essay on Freedom of Speech: The United States versus the Rest of the World" (2006) 2006 Mich St L Rev 377; Stephanie Farrior "The Historical and Theoretical Foundations of International Law Concerning Hate Speech" (1996) 14 Berkeley Journal of International Law 1.

¹⁰⁶⁵ *Bantam Books, Inc v Sullivan*, 372 58, 66 (us 1963).

¹⁰⁶⁶ Philip Joseph and Jason McHerron *LexisNexis®: Document - New Zealand Bill of Rights Act 1990* (LexisNexis, 2012) at [192].

¹⁰⁶⁷ New Zealand Bill of Rights Act 1990 (NZ), s 14.

The justification for censorship laws, against a general starting point of freedom of expression, is that there is enough perceived harm or potential for harm in the material in question to outweigh the general right of freedom of expression.¹⁰⁶⁸ However, this right may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁰⁶⁹ The limitations on the right of freedom of expression contained in the Classification Act 1993 are not inconsistent with this fundamental human right and can, therefore, be justified in a free and democratic society such as New Zealand.¹⁰⁷⁰

Accordingly, Section 3(2) of the Act aims to prohibit the most extreme forms of objectionable material while leaving other material to be evaluated using a contextual approach.¹⁰⁷¹ This approach recognises that the context or manner in which something is depicted is crucially important to issues involving censorship.¹⁰⁷² This was one of the criticisms of the Bill when it was introduced to Parliament. The Indecent Publications Tribunal in 1993 detailed in its submissions to the Select Committee on Internal Affairs and Local Government that:¹⁰⁷³

The Bill does not emphasise context enough. It creates a rigid list of activities which are automatically banned without considering the context in which the activities take place. This could result in a ban on serious discussions of unpalatable topics. For example, the suppression of discussion of child abuse led to a serious problem being swept under the carpet for years. What people have to say may be disagreeable, even offensive, but they should be allowed to say it. The banning of expression of unpopular or offensive ideas is not desirable in a free and democratic society.

¹⁰⁶⁸ *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd*, above n 1019, at 727.

¹⁰⁶⁹ New Zealand Bill of Rights Act 1990, s 5.

¹⁰⁷⁰ See *Moonen v Film and Literature Board of Review*, above n 998; *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*, above n 902.

¹⁰⁷¹ Report of the Government Administration Committee, above n 267, at 13.

¹⁰⁷² Indecent Publications Tribunal, above n 945, at 4.

¹⁰⁷³ At 4.

The Bill of Rights Act 1990 applies to the legislative, executive and judicial branches of the Government of New Zealand,¹⁰⁷⁴ or any other person or body authorised by law to perform a public function.¹⁰⁷⁵ Therefore, the Classification Office, as part of an executive branch of Government must ensure that any censorship decision is consistent with the Bill of Rights Act 1990. This is mandated in Section 6 of the Bill of Rights Act 1990 which provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights Act 1990, that meaning shall be preferred to any other meaning.¹⁰⁷⁶ Thus, decisions made over what is deemed objectionable under the Act should always consider the right to freedom of expression contained with Section 14 of the Bill of Rights Act 1990.¹⁰⁷⁷

The Court of Appeal case of *Moonen* affirmed that the Classification Office must always fully consider the freedom of expression set out in the Bill of Rights Act 1990 whenever it restricts, cuts or bans a publication.¹⁰⁷⁸ This case concerned an appeal against the findings of the Classification Office and the Board of Review that the material involving sexual activity with boys was objectionable¹⁰⁷⁹ as defined under Section 3 of the Act.¹⁰⁸⁰ This is clarified in the judgment of the Court which was delivered by Justice Tipping:¹⁰⁸¹

This appeal concerns the relationship between freedom of expression and censorship of objectionable publications. The appellant (Mr Moonen) appealed to the High Court from the decision of the Film and Literature Review Board (the board) (Decision 4/97, Wellington, 24 and 25 July 1997) determining that a book called *The Seventh Acolyte Reader* (the book) and various photographs were objectionable in terms of s 3 of the Films, Videos, and Publications Classification

¹⁰⁷⁴ New Zealand Bill of Rights Act 1990, s 3(a).

¹⁰⁷⁵ New Zealand Bill of Rights Act 1990, s 3(b).

¹⁰⁷⁶ New Zealand Bill of Rights Act 1990, s 6.

¹⁰⁷⁷ Report of the Government Administration Committee, above n 267, at 25.

¹⁰⁷⁸ Office of Film and Literature Classification, above n 1015.

¹⁰⁷⁹ The material referred to in this case consisted of a book, a postcard and 296 photographs. This material was classified as objectionable under Sections 3(2)(a) and 3(3)(b) of the Act and the Board of Review held that the book and 74 photographs were objectionable.

¹⁰⁸⁰ Report of the Government Administration Committee, above n 267, at 25.

¹⁰⁸¹ *Moonen v Film and Literature Board of Review*, above n 998, at [1].

Act 1993 (the Act). Appeals from the board to the High Court (under s 58) and from the High Court to this Court (under s 70) are restricted to questions of law. Gendall J held that the board had made no error of law in coming to its decision, and dismissed the appeal [see [1999] NZAR 324]. Mr Moonen appeals to this Court contending that Gendall J's decision is erroneous in law.

The principal submission before the Court of Appeal in this case was that the Board of Review and the High Court had been led astray by erroneous observations¹⁰⁸² and the contention that, in certain respects, the decision of the High Court in *News Media Ltd v Film and Literature Board of Review*¹⁰⁸³ was unsound.¹⁰⁸⁴ These points concern the impact of the Bill of Rights Act 1990 on the correct interpretation and application of Section 3 of the Act.¹⁰⁸⁵

The Court of Appeal engaged in a detailed discussion of the rights contained within the Bill of Rights Act 1990 and the five-stage process¹⁰⁸⁶ that should be considered when applying Sections 4, 5 and 6 of this Act to Section 3 of the Classification Act 1993.¹⁰⁸⁷ The Court held that:¹⁰⁸⁸

In this case it is the value to society of freedom of expression, against the value society places on protecting children and young persons from exploitation for sexual purposes, and on protecting society generally, or sections of it, from being exposed to the various kinds of conduct referred to in s 3 of the Act. Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

¹⁰⁸² At [14].

¹⁰⁸³ *News Media Ltd v Film and Literature Board of Review* (1997) 4 HRNZ 410 (nz HC).

¹⁰⁸⁴ *Moonen v Film and Literature Board of Review*, above n 998, at [13].

¹⁰⁸⁵ At [14].

¹⁰⁸⁶ This five-stage process is set out by the Court in paragraphs [17–19].

¹⁰⁸⁷ *Moonen v Film and Literature Board of Review*, above n 998, at [15–17].

¹⁰⁸⁸ At [18].

The Court of Appeal argued that it is inevitable in a censorship context that some limit will be placed on freedom of expression.¹⁰⁸⁹ Nevertheless, the combined effect of Sections 5 and 6 of the Bill of Rights Act 1990 results in a need to put on the words ‘promotes and supports’ a meaning, if possible, that impinges as little as possible on freedom of expression.¹⁰⁹⁰ Furthermore, the concepts of promotion and support are concerned with the effect of the publication, not with the purpose or intent of the person who creates or possesses it.¹⁰⁹¹ The Court found that these concepts denote an effect which advocates or encourages the prohibited activity.¹⁰⁹² Thus, there must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.¹⁰⁹³ The Court held that a description or depiction (being the words used in Section 3(3)(a) of the Act) of a prohibited activity do not of themselves necessarily amount to the promotion of or support for that activity.¹⁰⁹⁴

With this reasoning the Court of Appeal held that the High Court erred in its approach to the role of the Bill of Rights Act 1990 in the interpretation and application of the provisions of Section 3(2) of the Act.¹⁰⁹⁵ This error was in not giving consideration to the relevant provisions of the Bill of Rights Act 1990 in interpreting Section 3(2) and applying it to the publications concerned.¹⁰⁹⁶ The appeal was accordingly upheld and the Court directed the decision back to the Board of Review due to the fact that it had given no reasons for its decisions, which is contrary to Section 55(1) of the Classification Act 1990.

The significance of the *Moonen* decision is that the Court of Appeal (which was at the time of this decision New Zealand’s highest Appellate Court) confirmed that

¹⁰⁸⁹ At [27].

¹⁰⁹⁰ At [27].

¹⁰⁹¹ At [29].

¹⁰⁹² At [29].

¹⁰⁹³ At [29].

¹⁰⁹⁴ At [29].

¹⁰⁹⁵ At [40].

¹⁰⁹⁶ At [40].

the freedom of expression provisions contained within the Bill of Rights Act 1990 are a relevant consideration that must be given due weight when interpreting Section 3 of the Act. The *Moonen* decision is therefore significant, as publications deemed by Section 3(2) of the Act to promote or support the exploitation of children for sexual purposes would now fall within the scope of the freedom of expression provisions contained within Section 14 of the Bill of Rights Act.¹⁰⁹⁷

The Court of Appeal interpreted the test in Section 5 of the Bill of Rights to mean that the restriction on free speech must be proportionate to the objective sought to be achieved.¹⁰⁹⁸ This restriction must be rationally connected to the objective and the restriction must impair the right to freedom of expression to the least possible extent.¹⁰⁹⁹ The Court emphasised this point by asserting that, ‘a sledge hammer should not be used to crack a nut’.¹¹⁰⁰ This created some concern and raised issues as to whether Section 3(2) of the Act should state that the definition of objectionable is a justifiable limitation on freedom of expression, particularly where child pornography is concerned.¹¹⁰¹

1.13.2.1 The Impact of the *Moonen* case

The *Moonen* case raised serious concerns as to whether this decision had complicated the classification process and perhaps negated the intent of Parliament to deem such publications, like those involved in this case, objectionable.¹¹⁰² As a result, the Government Administration Committee received submissions on this subject as part of the Report on the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill 2001.¹¹⁰³ Furthermore, the Inquiry into the Operation of the Films, Videos, and Publications Classification Act

¹⁰⁹⁷ Report of the Government Administration Committee, above n 267, at 25.

¹⁰⁹⁸ Human Rights Commission “Human Rights in New Zealand Today: Chapter 8 The Right to Freedom of Opinion and Expression” (2013) <<http://www.hrc.co.nz/report/chapters/chapter08/expression01.html>>.

¹⁰⁹⁹ Human Rights Commission, above n 1072.

¹¹⁰⁰ *Moonen v Film and Literature Board of Review*, above n 998, at [18].

¹¹⁰¹ Report of the Government Administration Committee, above n 267, at 26.

¹¹⁰² At 25.

¹¹⁰³ Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill 2001.

1993 and Related Issues also received submissions on this issue in 2003. A number of these submissions considered that the Bill of Rights Act 1990 should be ousted by Section 3(2) of the Act and that the Act should state that the definition of objectionable is a justifiable limitation on freedom of expression, particularly where child pornography is concerned.¹¹⁰⁴ The 2001 Administration Committee noted that:¹¹⁰⁵

The submissions that we received voiced near universal opposition to child pornography. Submitters generally consider the broad aim of the bill, to make child pornography less freely available, is commendable. Many submitters believe that the Chief Censor should have the right to disregard the right to freedom of expression under the Bill of Rights Act when classifying an item deemed to depict, support or promote child pornography.

These same submissions proposed that the general test utilised to classify any publication as objectionable needed to be repealed and replaced.¹¹⁰⁶ This general test should be replaced with a test that is more targeted and specific, thereby ensuring that material such as that involved in the *Moonen* case is deemed to be objectionable.¹¹⁰⁷ Moreover, this debate gave rise to the introduction of a private members Bill known as the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill 2000¹¹⁰⁸ ('Prohibition of Child Pornography Amendment Bill') by National Party Member of Parliament (MP) and then Women's Affairs spokesperson, Anne Tolley.¹¹⁰⁹ Labour Party MP Tim Barnett asserted that:¹¹¹⁰

¹¹⁰⁴ Report of the Government Administration Committee, above n 267, at 26.

¹¹⁰⁵ Report of the Government Administration Committee "Report on the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill" (2001) VIII Appendix to the Journals of the House of Representatives 565 at 566.

¹¹⁰⁶ Report of the Government Administration Committee, above n 267, at 26.

¹¹⁰⁷ At 26.

¹¹⁰⁸ Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill 2000.

¹¹⁰⁹ Report of the Government Administration Committee, above n 267, at 26.

¹¹¹⁰ Hansard "Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill - Second Reading" (2001) 590 New Zealand Parliamentary Debates 8224 at 8229.

The Bill is a particular response to a court decision that was something of a surprise. That decision emerged from the grey areas that the legislation continues to occupy – grey areas because the legislation exists in a dynamic and complex area.

The main purpose of the Prohibition of Child Pornography Amendment Bill was to address the issues raised in the *Moonen* case by restoring the fullest protection for children under New Zealand’s censorship legislation.¹¹¹¹ This would be achieved by ensuring that child pornography was less freely available.¹¹¹² The proposed effect of the Bill was that child pornography would constitute an exception to the freedoms prescribed by the Bill of Rights Act.¹¹¹³ Anne Tolley specified the purpose of the Bill in its second reading before Parliament and acknowledged that:¹¹¹⁴

... the *Moonen* case, has opened a legal loophole, and this Bill seeks to close that. To put this simply, this Bill makes protecting children from pornography more important than an adult’s right to freedom of expression as granted by the New Zealand Bill of Rights Act.

According to its explanatory note, the Prohibition of Child Pornography Amendment Bill addressed the perceived problems in the *Moonen* case so that where children are involved and the Classification Office and Board of Review judge material to be pornographic, no further inquiry under the Bill of Rights Act 1990 will be required.¹¹¹⁵ The Child Pornography Amendment Bill sought to achieve this by amending Section 3 of the Act with the deletion of the reference to the need for the material to promote or support, or tend to promote or support, the

¹¹¹¹ Report of the Government Administration Committee, above n 267, at 26.

¹¹¹² At 26.

¹¹¹³ Report of the Government Administration Committee, above n 1079, at 566.

¹¹¹⁴ Hansard, above n 1084, at 8225.

¹¹¹⁵ House of Representatives “Report of the Attorney - General Under the New Zealand Bill of Rights Act 1990 on the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill” (2000) 260 Standing Order at 2.

behaviour depicted.¹¹¹⁶ It also sought to exempt the Section 3 definition of an objectionable publication from any Bill of Rights Act 1990 considerations.¹¹¹⁷

However, the Attorney General concluded that clause 4 (which provided an alternative definition of an objectionable publication) appeared to be inconsistent with Section 14 of the Bill of Rights Act, and did not appear to be justified in terms of Section 5 of the Bill of Rights Act.¹¹¹⁸ The Attorney General stated that:¹¹¹⁹

I wish to stress that, although clause 4 of the Bill expressly excludes consideration of the Bill of Rights Act in the classification of objectionable material under new subsection (1A), it is not this exclusion that raises the most significant issue in assessing the rationality and proportionality of the Bill's restriction on freedom of expression. Rather, it is the broad coverage of new subsection (1A) and the range of material that would be found to be objectionable under this subsection that leads me to conclude that the Bill fails to meet the "reasonable limits" imposed by Section 5 of the Bill of Rights Act.

The Attorney General was of the view that if Subsection (1A) were to be enacted then this prohibition might mean that some forms of commercial advertising, such as advertisements for nappies¹¹²⁰ and academic works that discuss the sexual conduct of children and young persons would be deemed to be objectionable under Subsection (1A).¹¹²¹ According to the Attorney General, the proposed application of the Act's definition that an objectionable publication is exempt from any Bill of Rights Act 1990 considerations was found to be an overreaction that may have unintended results.¹¹²² The views of the Attorney General were supported by numerous submissions from the public and prominent community organisations. Labour Party MP Tim Barnett confirmed this and emphasised the support by asserting before Parliament that:¹¹²³

¹¹¹⁶ Report of the Government Administration Committee, above n 267, at 26.

¹¹¹⁷ At 26.

¹¹¹⁸ House of Representatives, above n 1089, at 4.

¹¹¹⁹ At 4.

¹¹²⁰ At 2.

¹¹²¹ At 2.

¹¹²² Report of the Government Administration Committee, above n 267, at 27.

¹¹²³ Hansard, above n 1084, at 8230.

I can list the organisations that proceeded to share the concern of the Attorney-General: the New Zealand AIDS Foundation, the Wellington Women Lawyers Association, the National Council of Women, Ecpat New Zealand, the Society for Promotion of Community Standards, the National Network of Stopping Violence Services, and the Children's Television Foundation. Those worthy, mainstream, even conservative organisations all shared the concerns of the Attorney-General that the bill as drafted created more dangers than the problems it solved.

Consequently, the Prohibition of Child Pornography Amendment Bill failed to gain the support required to be enacted. This decision affirmed the Court of Appeal's decision in *Moonen*. The Court and the consideration of the Attorney General confirmed that the Bill of Rights Act 1990 is relevant to the interpretation of the Act.¹¹²⁴ Additionally, the combined effect of Sections 5 and 6 of the Bill of Rights Act 1990 is that Section 3(2) of the Act should be given a meaning that prohibits child pornography while infringing upon freedom of expression as little as possible.¹¹²⁵ These sentiments were shared by the Government and the then Minister of Justice. It was stated by the Minister in the latter reading of the Films, Videos, and Publications Classification Amendment Bill that:¹¹²⁶

Hate speech is not included, because I do not regard that as an appropriate topic to be addressed by the censor. Given the fundamental importance of freedom of speech in our society, it is a subject that needs to be approached with real caution and in a way consistent with the New Zealand Bill of Rights Act.

Therefore, the Court of Appeal's decision in the *Moonen* case provides important clarification of the relationship between the right to freedom of expression contained within the Bill of Rights Act 1990 and the obligation of the State to suppress any publication that is deemed to be objectionable under the Act.¹¹²⁷ This decision does not undermine the restrictions provided in the Act, but rather it distils the elements which are relevant and which must be considered when deciding

¹¹²⁴ Report of the Government Administration Committee, above n 267, at 11.

¹¹²⁵ House of Representatives, above n 1089, at 2.

¹¹²⁶ Hansard (16 February 2005) 623 New Zealand Parliamentary Debates 18704 at 18705.

¹¹²⁷ Government Administration Committee, above n 1012, at 5.

whether specific material should be censored.¹¹²⁸ This judgement by the Court of Appeal has asserted that in a free and democratic society such as New Zealand, one of these relevant and vital considerations is the right to freedom of expression as protected by the Bill of Rights Act.¹¹²⁹ Furthermore, this decision recognises that wherever possible the Act should be interpreted consistently with the freedom of expression provisions contained within Section 14 of the Bill of Rights Act.¹¹³⁰ Only where such an interpretation is impossible will the Act prevail over the protection contained within the Bill of Rights Act.¹¹³¹

Further support and recognition of this stance can be ascertained from the commentaries of the Office of Film and Literature Classification. In 2012, Dr Andrew Jack, the Chief Censor of the Office, indicated in the Annual Report of the Office of Film and Literature Classification¹¹³² that the vision of the Classification Office is to ensure that New Zealand's society is protected from the harm caused by the unrestricted availability of restricted and objectionable publications.¹¹³³ Moreover, it is the objective of the Office to achieve this by balancing the values inherent in freedom of expression with the need to protect society from injury.¹¹³⁴

An example of this approach to the conflicting issues of freedom of expression and censorship can be seen in the decision to classify the DVD *Too Big For Teens 6* as an objectionable publication. This publication is a sexually explicit presentation of adult performers engaged in a role-play involving middle-aged men and young women, some of whom were presented as young or under-aged persons.¹¹³⁵ Several sequences in the DVD implied that young persons are acceptable sexual partners for adult men and legitimate subjects for adult sexual fantasies.¹¹³⁶ The underlying

¹¹²⁸ At 5.

¹¹²⁹ At 5.

¹¹³⁰ At 5.

¹¹³¹ At 5.

¹¹³² Andrew R Jack, Office of Film and Literature Classification *Annual Report of the Office of Film and Literature Classification 2012* (2012).

¹¹³³ At 4.

¹¹³⁴ At 4.

¹¹³⁵ At 13.

¹¹³⁶ At 13.

theme of these sequences tends to promote and support the exploitation of young persons for sexual purposes.¹¹³⁷ Thus, the Classification Office classified this publication as an objectionable publication and specified that:¹¹³⁸

This classification limits the right to freedom of expression set out in the New Zealand Bill of Rights Act 1990. However, this is an outcome that is consistent with Parliament's intention that publications falling under s 3(2) of the Films, Videos, and Publications Classification Act 1993 are deemed to be objectionable. The classification is a reasonable limitation on the right to freedom of expression and reflects the concern of a free and democratic society to protect its young and vulnerable members from sexual exploitation.

1.14 The Amendment Act 2005

In response to the Court of Appeal's determinations in the *Living Word* case and other identified deficiencies in the Act, in 2001 a Government Administration Committee ('Administration Committee') commenced an inquiry into the effectiveness of the Act.¹¹³⁹ The outcome of this inquiry was a report¹¹⁴⁰ in which the Administration Committee made a total of 34 recommendations.¹¹⁴¹ The release of this report and its recommendations coincided with an announcement by the then Minister of Justice, Phil Goff in 2003, that a review of the level of penalties, including some substantial increases for offences against the Act, had taken place and that amending legislation could be expected in the near future.¹¹⁴² The recommendations contained within the Administration Committee's Report and the Government's determination to significantly increase the penalties for offences involving child pornography offences gave rise to an Amendment Bill that would address these issues.¹¹⁴³ This amending legislation became the Films, Videos, and Publications Classification Amendment Act 2005. The reasoning behind and the

¹¹³⁷ At 13.

¹¹³⁸ At 13.

¹¹³⁹ Keith Manch and David Wilson *Objectionable Material on the Internet: Developments in Enforcement* (2003) at 6.

¹¹⁴⁰ The Committee Report referred to is the Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and Related Issues 2003.

¹¹⁴¹ Manch and Wilson, above n 1113, at 7.

¹¹⁴² Harvey, above n 922, at 316.

¹¹⁴³ Manch and Wilson, above n 1113, at 7.

significance of the new provisions to the Government's stance of child pornography can be ascertained from the following statement by the then Minister of Justice:¹¹⁴⁴

The key feature of this legislation is that it implements tough sanctions against the production, trading and possession of child pornography, and objectionable material of a nature simply unacceptable to the overwhelming majority of New Zealanders. Electronic Technology has made the transfer of images of this nature around the world much easier, and the volume of this material has multiplied over the last decade. Every image represents the actual abuse of a child, and every trader and consumer of such images creates a market that encourages more such abuse.

Child pornography and extreme images such as sexual torture and snuff movies are unacceptable in our society. The sanctions against it should reflect our abhorrence and intolerance of such material and should act as a deterrent against it. Consequently, this legislation dramatically increases penalties for the production of, trade in, and possession of such objectionable material.

Subsequently, the Amendment Act 2005 introduced a number of significant changes to the enforcement provisions of the principal Act in relation to objectionable publications and other such material.¹¹⁴⁵ These included expanding the meaning of objectionable to ensure nude pictures of children and young persons are included within Section 3 of the Act.¹¹⁴⁶ Furthermore, the Amendment Act 2005 substantially increased the penalties for possession and distribution of objectionable publications.¹¹⁴⁷ These, and the other applicable amendment provisions that affect the downloading and distributing of child pornography, along with the enforcement provisions of the Act, will now be explained in detail.

¹¹⁴⁴ Hansard, above n 1100, at 18704.

¹¹⁴⁵ The Department of Internal Affairs, above n 857.

¹¹⁴⁶ Office of Film and Literature Classification, above n 1015.

¹¹⁴⁷ Office of Film and Literature Classification, above n 1015.

1.15 The Classification of an Objectionable Publication in New Zealand

1.15.1 Introduction

This section examines how a publication is classified within New Zealand. It provides an overview of the key aspects of the classification process that determine whether a publication that contains child pornography should be deemed to be objectionable. It is significant to this thesis because it provides the foundations upon which greater protection from harm might be accorded to children both in New Zealand and internationally.

1.15.2 The Office of Film and Literature Classification

1.15.2.1 The Establishment of the Classification Office

The Office of Film and Literature Classification was established under Section 76 of the Films, Videos, and Publications Classification Act 1993.¹¹⁴⁸ The Classification Office replaced the Chief Censor of Films, the Indecent Publications Tribunal and the Video Recordings Authority.¹¹⁴⁹ These three former offices had sought to bring some sanity to New Zealand's censorship legislation.¹¹⁵⁰ However, this was unfeasible as they operated within different criteria.¹¹⁵¹ The former Minister of Internal Affairs, Graeme Lee, referred to this issue in Parliament and clearly illustrates the Government's reasoning for the establishment of the Classification Office under Section 76 of the Act. The Minister stated that:¹¹⁵²

The Bill gives a new structure to censorship – I understand that this is the first time anywhere in the world that video, film, and publications have been brought together in the one piece of legislation. That will give the Classification Office a uniformity and commonality of purpose that had not been present in the past.

¹¹⁴⁸ Films, Videos, and Publications Classification Act 1993 s 76.

¹¹⁴⁹ Jack, Office of Film and Literature Classification, above n 1106, at 5.

¹¹⁵⁰ Hansard, above n 907, at 15992.

¹¹⁵¹ At 15992.

¹¹⁵² At 15991.

The role of the Classification Office is, firstly, to examine and classify publications, and secondly, to provide information about the classification system.¹¹⁵³ Thus, the Classification Office provides advice and resources to the public in order to aid compliance with the law.¹¹⁵⁴ In accordance with Section 76(2) of the Act as inserted by Section 200 of the Crown Entities Act 2004,¹¹⁵⁵ it is established that the Office is also a recognised Crown entity.¹¹⁵⁶ Furthermore, the Classification Office has its own Board in the form of the Chief Censor and the Deputy Chief Censor.¹¹⁵⁷ The Department of Internal Affairs also oversees the activity of the Classification Office, as the Minister of Internal Affairs is ultimately responsible for the operation of the Office.¹¹⁵⁸

The formation of the Classification Office and its subsequent establishment under Section 76 of the Act is the Government's response to the recommendations within the report of the Ministerial Committee of Inquiry in 1989.¹¹⁵⁹ The Committee released a report in February of that same year which was based on extensive consultation and investigation.¹¹⁶⁰ This consultation process revealed some of the alarming effects that the availability of hard-core pornography has on New Zealand's children. One of the main recommendations contained within the report was for the censorship of publications to be dealt with by one piece of legislation and administered by one Government Department.¹¹⁶¹ The implementation of the Classification Office under Section 76 of the Act is clearly designed to address these types of concerns raised by the Ministerial Committee of Inquiry.¹¹⁶² The then

¹¹⁵³ Office of Film and Literature Classification "Censorship Enforcement, Offences And Penalties" (2013) <<http://www.censorship.govt.nz/about-censorship/censorship-enforcement-offences-and-penalties.html#anchor01>>.

¹¹⁵⁴ Office of Film and Literature Classification, above n 1127.

¹¹⁵⁵ Crown Entities Act 2004 (NZ).

¹¹⁵⁶ Films, Videos, and Publications Classification Act 1993 s 76(2).

¹¹⁵⁷ Interview with Lloyd Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand (2 July 2014) at 3.

¹¹⁵⁸ At 3.

¹¹⁵⁹ See New Zealand Ministerial Committee of Inquiry into Pornography, above n 905.

¹¹⁶⁰ Christoffel, above n 867, at 39.

¹¹⁶¹ At 39.

¹¹⁶² Hansard, above n 907, at 12758.

Minister of Social Welfare, Jenny Shipley referred to the concerns in Parliament and stated:¹¹⁶³

In 1988 the committee of inquiry into pornography reported that clear, coherent and purposeful legislation was required to rationalise the approach to classification of visual and printed matter, to revise and reform the criteria of classification, and to facilitate public access to the classification system. In 1991, I and other Ministers called for further submissions from the public. The Bill is the result of both extensive consultation and careful deliberation.

The pre-existing system of classification and censorship was seen to be overly complex.¹¹⁶⁴ This complexity had allowed some pornographic material to escape classification¹¹⁶⁵ while other issues such as inconsistencies in decisions also gave weight to the argument for the establishment of a single Classification Office.¹¹⁶⁶ Accordingly, these issues and the recommendations of the Ministerial Committee of Inquiry ensured that the Government became resolute in its determination to ensure that the new system of classification would not be open to any form of manipulation.¹¹⁶⁷

The then Minister of Justice Doug Graham explained the importance of the establishment of the new Crown entity, namely the Office of Film and Literature Classification during a debate in Parliament.¹¹⁶⁸ The former Attorney General stated:¹¹⁶⁹

I now turn to speak about the Classification Office and the Board of Review. I want to say a few words about the constitution of the new censorship structure. The Classification Office is taking over the responsibilities that existing bodies have at present. It is also to be responsible for the classification of publications that under the present system go to the Courts for ruling. The Office is the linchpin

¹¹⁶³ At 12758.

¹¹⁶⁴ At 12758.

¹¹⁶⁵ At 12758.

¹¹⁶⁶ Christoffel, above n 867, at 39.

¹¹⁶⁷ Hansard, above n 907, at 12758.

¹¹⁶⁸ Hansard, above n 532, at 17052.

¹¹⁶⁹ At 17052.

of the new classification structure. It is to have very high responsibilities in a very high profile area of law. The public should have confidence that the Office will carry out its duties without fear or favour. Accordingly, the Classification Office is to be established as a separate Crown entity, clearly independent of other Government agencies.

1.15.2.2 The Functions and Statutory Authority of the Office

The functions and statutory authority of the Office are contained within Section 77 of the Act. Section 77(1)(a) of the Act states that the function of the Classification Office is to determine the classification of any publication submitted to it under the Act.¹¹⁷⁰ Furthermore, prior to the enactment of the Act, the then Minister of Social Welfare, Jenny Shipley, informed Parliament that the main feature of the Bill was the establishment of a new Office of Film and Literature Classification.¹¹⁷¹ This Classification Office would be responsible for the legal classification of all material covered in the Bill.¹¹⁷² She further specified that:¹¹⁷³

The system will be more straightforward and accessible to the public. The Classification Office will consist of a Chief Censor, a Deputy Chief Censor, and a pool of classification officers. The Classification Office will have the sole jurisdiction to determine the legal status of all publications. When material is the subject of Court proceedings, any question about the classification of the material must be referred to the Classification Office. The responsibility for the exercise of the functions of the Office and its powers rests squarely with the Chief Censor and the Deputy Chief Censor. The general rule is that a classification decision cannot be issued without the authority of both the Chief Censor and the Deputy Chief Censor.

This statement by the Minister and an evaluation of the subject matter within Section 77 of the Act gives a clear indication of the Government's intended purpose for the Classification Office. The primary purpose of the Classification Office is to

¹¹⁷⁰ Films, Videos, and Publications Classification Act 1993 s 77(1)(a).

¹¹⁷¹ Hansard, above n 907, at 12758.

¹¹⁷² At 12758.

¹¹⁷³ At 12758.

regulate the classification of any publication submitted to it for determination.¹¹⁷⁴ Furthermore, these publications may be submitted to the Classification Office by the Film and Video Labelling Body, the Secretary for Internal Affairs, the Comptroller of Customs, the Commissioner of Police, the Courts, commercial applicants and members of the public.¹¹⁷⁵

1.15.2.3 The Reasons for Establishing the Classification Office

As previously explained, the issue of determining what was or was not an illegal or objectionable publication was the responsibility of the Courts.¹¹⁷⁶ Judges did not interact with illegal publication cases on a regular basis, so they were often left struggling with a very technical area of law.¹¹⁷⁷ Dr Andrew Jack, the Chief Censor of the Classification Office states that cases involving the determination of a publication were not at all common.¹¹⁷⁸ Consequently, the Courts did not have the expertise necessary to adequately deal with the relevant issues.¹¹⁷⁹ Dr Jack is also adamant that the publications classification process requires a high level of competency to understand it.¹¹⁸⁰ Nic McCully, Deputy Chief Censor of the Classification Office agrees and acknowledges that the reason why Parliament has decided that only the Classification Office can determine whether a publication is objectionable is that the Office is expected to be the expert authority on publications.¹¹⁸¹

Another issue of concern was that the different attitudes of the Judges around the country also resulted in diverse decisions from the Courts.¹¹⁸² Consequently, there

¹¹⁷⁴ Jack, Office of Film and Literature Classification, above n 1106, at 5.

¹¹⁷⁵ At 5.

¹¹⁷⁶ See: *R v Sidley*, above n 878; *R v Curl*, above n 881; *R v Hicklin*, above n 884; *Clarkson v McCarthy*, above n 885.

¹¹⁷⁷ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 3.

¹¹⁷⁸ At 3.

¹¹⁷⁹ At 3.

¹¹⁸⁰ At 3.

¹¹⁸¹ Interview with Nic McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand (5 June 2014) at 2.

¹¹⁸² Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 3.

were contradictory responses to what was defined as objectionable from one part of the country to another.¹¹⁸³ Dr Jack considers these differences in decisions to be inherently unfair for all who are concerned and believes that there is a definite need for some form of standardisation.¹¹⁸⁴ Moreover, the content of any child pornography publications is by its very nature extremely challenging.¹¹⁸⁵ There is also the view that Judges and Juries do not want to visually interact with this material.¹¹⁸⁶ Dr Jack considers this notion to be understandable and states:¹¹⁸⁷

To a degree Judges and Juries should not have to look at it, as it may add to the injury to the public good that society is attempting to avoid. So having a specialist body that has experts that spend all day, every day consistently applying the prescriptive legislative rule produces a more even handed and fairer result in these cases.

However, the Court of Appeal in *R v D*¹¹⁸⁸ has suggested that Judges should view child pornography publications that have been enclosed with applications for production orders sought by crown prosecutors.¹¹⁸⁹ This recommendation is recognition by the Court of Appeal that Parliament has determined that a suspect's right to privacy is of fundamental importance.¹¹⁹⁰ Consequently, any departure from this proposal will give rise to a real risk that a search warrant is unlawful and evidence gathered from it is inadmissible in a Court of law.¹¹⁹¹

1.15.2.4 The Additional Statutory Provisions that Govern the Operation and Management of the Office

Section 90 and Schedule 1 of the Act contain the additional statutory provisions that govern the operation and management of the Office.¹¹⁹² The Office is mandated

¹¹⁸³ At 3.

¹¹⁸⁴ At 3.

¹¹⁸⁵ At 3.

¹¹⁸⁶ At 3.

¹¹⁸⁷ At 3.

¹¹⁸⁸ *R v D* Court of Appeal, Wellington CA287/2010, 20 September 2010.

¹¹⁸⁹ At [84–85].

¹¹⁹⁰ At [68–69].

¹¹⁹¹ At [84].

¹¹⁹² Greig, above n 866, at 8.

under Section 77(2) as inserted by Section 200 of the Crown Entities Act 2004 to act independently in performing its statutory functions and duties, and in exercising its statutory powers, except as expressly provided otherwise in this or another statute.¹¹⁹³

1.15.3 The Purpose of the Classification System in New Zealand

1.15.3.1 The Overall Purpose of the Classification System in New Zealand

Nic McCully believes that within the Act itself the overall purpose of the classification system in New Zealand is to protect the public good.¹¹⁹⁴ The classification system enables the Classification Office to restrict a publication that is deemed to require an age restriction.¹¹⁹⁵ Furthermore, and most importantly, the classification system also permits the Office to place an outright ban on objectionable publications such as child pornography.¹¹⁹⁶ McCully further states:¹¹⁹⁷

It is about protecting the public good and limiting the availability of objectionable publications, to keep them away from children.

1.15.3.2 The Importance of a Robust Process

‘Mr Black’,¹¹⁹⁸ a former member of the Film and Literature Board of Review agrees with McCully¹¹⁹⁹ and confirms that the classification system reflects the changing attitudes of New Zealand’s society.¹²⁰⁰ Mr Black is resolute in his belief that the classification system has to be very careful to ensure that anything to do with the denigration of children is totally banned.¹²⁰¹ Furthermore, the positive aspect of

¹¹⁹³ Films, Videos, and Publications Classification Act 1993 s 77(2).

¹¹⁹⁴ McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 2.

¹¹⁹⁵ At 2.

¹¹⁹⁶ At 2.

¹¹⁹⁷ At 2.

¹¹⁹⁸ Mr Black is a nom de plume.

¹¹⁹⁹ Interview with Mr Black, Former Member of the Film and Literature Board of Review, New Zealand (30 May 2014) at 4.

¹²⁰⁰ At 4.

¹²⁰¹ At 3.

New Zealand's classification system is that it completely outlaws child pornography.¹²⁰² He is adamant that the classification system in New Zealand is exemplary and a very robust system.¹²⁰³ This powerful classification system, in Mr Black's view, due to the highly commendable performance that is undertaken by the Classification Office.¹²⁰⁴

The classification system must also be mindful of changing public attitudes.¹²⁰⁵ Mr Black considers that the way children are sexualized by society is a significant factor in the dilemma of child pornography.¹²⁰⁶ Individuals in our society are filming children in a sexual context and this is an issue that New Zealand's classification system must adequately address.¹²⁰⁷ In essence, New Zealand has decided to give a specialist group of experts control of this matter.

1.15.3.3 The Examination and Determination of Classifications in New Zealand

The Classification Office is required, under Section 23(1) of the Act, to examine and determine the classification of a publication, once that publication has been submitted to the Office for determination under the Act.¹²⁰⁸ Once the examination has been concluded, the Office must classify the publication¹²⁰⁹ as unrestricted,¹²¹⁰ objectionable,¹²¹¹ or restricted.¹²¹²

Section 3 of the Act details what is considered to be an objectionable publication within New Zealand. A publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty or violence in such a manner that the availability of the publication is likely to be

¹²⁰² At 3.

¹²⁰³ At 4.

¹²⁰⁴ At 4.

¹²⁰⁵ At 4.

¹²⁰⁶ At 4.

¹²⁰⁷ At 4.

¹²⁰⁸ Films, Videos, and Publications Classification Act 1993 s 23(1).

¹²⁰⁹ Films, Videos, and Publications Classification Act 1993, s 23(2).

¹²¹⁰ Films, Videos, and Publications Classification Act 1993, s 23(2)(a).

¹²¹¹ Films, Videos, and Publications Classification Act 1993, s 23(2)(b).

¹²¹² Films, Videos, and Publications Classification Act 1993, s 23(c).

injurious to the public good.¹²¹³ However, these five stated subject matters are not exclusive.¹²¹⁴ Consequently, they are not the only subject matters to have been considered by the Courts in New Zealand to be objectionable.¹²¹⁵

A restricted publication is any publication which is not deemed objectionable and the availability of which the Classification Office has determined should be restricted.¹²¹⁶ These restrictions may detail that the publication is restricted to persons who have attained a specified age, and this age must not exceed 18 years of age.¹²¹⁷ Furthermore, this publication may be restricted to specified persons or classes of persons¹²¹⁸ or restricted to one or more specified purposes.¹²¹⁹ These specified persons or purposes under the Act include educational, professional, scientific, literary, artistic or technical purposes.¹²²⁰ The conditions regarding the public display of a publication must also be considered by the Office when determining whether a publication is a restricted publication under Sections 27 and 28 of the Act.¹²²¹

Section 3A, as amended by Section 5 of the Amendment Act 2005, affirms that a publication may be age-restricted if it contains highly offensive language that is likely to cause serious harm.¹²²² This serious harm must be applicable to persons who have not attained a specified age and may subsequently cause serious harm to persons under that age.¹²²³ An age restriction may also be placed on a publication if it contains material likely to be injurious to the public good for the specified

¹²¹³ Films, Videos, and Publications Classification Act 1993, s 3(1).

¹²¹⁴ See Dr Andrew Jack's discussion on the Examination of a Publication by the Classification Office later in this subchapter.

¹²¹⁵ For an example of the Court's perspective on what is considered to be objectionable in New Zealand, refer to *Moonen v Film and Literature Board of Review*, above n 998; *Moonen v Film and Literature Board of Review*, above n 431; *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*, above n 902.

¹²¹⁶ Films, Videos, and Publications Classification Act 1993, s 23(2)(c).

¹²¹⁷ Films, Videos, and Publications Classification Act 1993, s 23(2)(c)(i).

¹²¹⁸ Films, Videos, and Publications Classification Act 1993, s 23(2)(c)(ii).

¹²¹⁹ Films, Videos, and Publications Classification Act 1993, s 23(2)(c)(iii).

¹²²⁰ Films, Videos, and Publications Classification Act 1993, s 23(3).

¹²²¹ Films, Videos, and Publications Classification Act 1993, s 27 and 28.

¹²²² Films, Videos, and Publications Classification Act 1993, s 3A.

¹²²³ Films, Videos, and Publications Classification Act 1993, s 3A(2).

reasons within Section 3B of the Act, as inserted by Section 5 of the Amendment Act 2005.¹²²⁴

1.15.3.4 The Essential Considerations for the Publication to be Classified as Objectionable

The crucial consideration that the Classification Office must consider when classifying a publication as objectionable is whether the availability of the publication is likely to be injurious to the public good.¹²²⁵ It has been held by Justice McCarthy, the then President of the Court of Appeal in *Police v News Media Ownership Ltd*¹²²⁶ that there must be discernible injury to the public good.¹²²⁷ This interpretation of what constitutes injury to the public good has resulted in publications which, for example, treat certain segments of society such as women as inferior or unequal to men being classified as objectionable.¹²²⁸

Section 3 of the Act affirms that a publication is to be deemed to be objectionable if it endorses or supports the availability of a publication that is likely to be injurious to the public good.¹²²⁹ This includes: the exploitation of children and young persons, or both, for sexual purposes such as the production of child pornography;¹²³⁰ the use of violence or coercion to compel any person to participate in sexual conduct;¹²³¹ sexual conduct with or upon the corpse of a dead person;¹²³² the use of urine or excrement in association with degrading or dehumanising

¹²²⁴ Films, Videos, and Publications Classification Act 1993, s 3B.

¹²²⁵ Films, Videos, and Publications Classification Act 1993, s 3(1).

¹²²⁶ *Police v News Media Ownership Ltd* (1975) 1 NZLR 610 (NZ NZCA). Also see *Collector of Customs v Lawrence Publishing Co Ltd* (1986) 1 NZLR 404 (NZ Court of Appeal).

¹²²⁷ *Police v News Media Ownership Ltd*, above n 1200, at 615.

¹²²⁸ *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd*, above n 1019; *Re "People"*, above n 1019.

¹²²⁹ Films, Videos, and Publications Classification Act 1993, s 3(1).

¹²³⁰ Films, Videos, and Publications Classification Act 1993, s 3(2)(a).

¹²³¹ Films, Videos, and Publications Classification Act 1993, s 3(2)(b).

¹²³² Films, Videos, and Publications Classification Act 1993, s 3(2)(c).

conduct or sexual conduct;¹²³³ bestiality;¹²³⁴ and finally acts of torture or the infliction of extreme violence or cruelty.¹²³⁵

1.15.3.5 Matters of Concern in a Classification Decision

In determining the classification of a publication which has not been considered by the Act to be objectionable, particular weight must be given to the extent, degree and the manner in which the publication describes, depicts, or otherwise deals with certain methods of behaviour and conduct.¹²³⁶ Additionally, the Court of Appeal in *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review*¹²³⁷ held that the Board of Review must give detailed reasons for its decision to classify a publication as being objectionable.¹²³⁸ The reasons must satisfy the standard required by Section 55(1)(c), which states that after examining any publication submitted to it for review, the Board shall give written notice and the reasons of its decision.¹²³⁹

The methods of behaviour and conduct that must be given particular weight are detailed within Section 3(3) of the Act and include: acts of torture, the infliction of serious physical harm, or acts of significant cruelty;¹²⁴⁰ sexual violence or sexual coercion, or violence or coercion in association with sexual conduct;¹²⁴¹ other sexual or physical conduct of a degrading or dehumanising or demeaning nature;¹²⁴² sexual conduct with or by children, or young persons, or both;¹²⁴³ physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain.¹²⁴⁴

¹²³³ Films, Videos, and Publications Classification Act 1993, s 3(2)(d).

¹²³⁴ Films, Videos, and Publications Classification Act 1993, s 3(2)(e).

¹²³⁵ Films, Videos, and Publications Classification Act 1993, s 3(2)(f).

¹²³⁶ Films, Videos, and Publications Classification Act 1993, s 3(3)(a).

¹²³⁷ *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* (2005) 3 NZLR 403 (NZ Court of Appeal).

¹²³⁸ At [8].

¹²³⁹ Films, Videos, and Publications Classification Act 1993, s 55(1)(c).

¹²⁴⁰ Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(i).

¹²⁴¹ Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(ii).

¹²⁴² Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(iii).

¹²⁴³ Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(iv).

¹²⁴⁴ Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(v).

Particular weight must also be given to the extent, degree and the manner in which: the publication exploits the nudity of children, or young persons, or both;¹²⁴⁵ degrades or dehumanises or demeans any person;¹²⁴⁶ promotes or encourages criminal acts or acts of terrorism;¹²⁴⁷ represents (whether directly or by implication) that members of any particular class of society are inherently inferior, which is a prohibited ground of discrimination specified in Section 21(1) of the Human Rights Act 1993.¹²⁴⁸ Moreover, the Courts in New Zealand have recognised and affirmed that degrading or demeaning behaviour may arise where a publication attempts to influence the attitude of society and thereby reinforce the idea that certain members of society are undeserving of equal rights before the law.¹²⁴⁹

1.15.3.6 Specified Matters of General Concern in a Classification Decision

Due consideration must also be given to the specified matters of general concern within Section 3(4) of the Act when determining whether or not any publication is objectionable or should receive a classification other than objectionable.¹²⁵⁰ These matters of general concern include the dominant effect of the publication as a whole¹²⁵¹ and the impact of the medium in which the publication is presented.¹²⁵² The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific or other matters must also receive due scrutiny.¹²⁵³ Moreover, there is an obligation to undertake due consideration in terms of the classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available.¹²⁵⁴ The purpose for which the publication is intended to be utilised¹²⁵⁵ and any other

¹²⁴⁵ Films, Videos, and Publications Classification Act 1993, s 3(3)(b).

¹²⁴⁶ Films, Videos, and Publications Classification Act 1993, s 3(3)(c).

¹²⁴⁷ Films, Videos, and Publications Classification Act 1993, s 3(3)(d).

¹²⁴⁸ Films, Videos, and Publications Classification Act 1993, s 3(3)(e).

¹²⁴⁹ See *Re "People"*, above n 1019; *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd*, above n 1019.

¹²⁵⁰ Films, Videos, and Publications Classification Act 1993, s 3(4).

¹²⁵¹ Films, Videos, and Publications Classification Act 1993, s 3(4)(a).

¹²⁵² Films, Videos, and Publications Classification Act 1993, s 3(4)(b).

¹²⁵³ Films, Videos, and Publications Classification Act 1993, s 3(4)(c).

¹²⁵⁴ Films, Videos, and Publications Classification Act 1993, s 3(4)(d).

¹²⁵⁵ Films, Videos, and Publications Classification Act 1993, s 3(4)(e).

relevant circumstances relating to the intended or likely use of the publication are also to be considered.¹²⁵⁶

Accordingly, Section 3(4)(f) of the Act means that these provisions within Section 3(4) are by no way comprehensive.¹²⁵⁷ This interpretation has been confirmed in the Supreme Court case of *Robson v Hicks Smith and Sons Limited*¹²⁵⁸ and the Court of Appeal in *Police v News Media Ownership Ltd*. These cases concerned whether or not the definition of indecent under the repealed Indecent Publications Act 1963¹²⁵⁹ was all-encompassing or limited in nature. The then President of the Court of Appeal, Justice McCarthy confirmed that the definition of indecent was all-encompassing in *Police v News Media Ownership Ltd*. Justice McCarthy stated that:¹²⁶⁰

The word “includes” in a definition section is in these times generally used to widen the scope of a word to include stated matters which its ordinary meaning may or may not comprise, but sometimes the word has been read as confining the word to the limits of the definition itself. However, in this particular case it must be read in an enlarging sense for two reasons at least. First, because the word indecent can in normal use be applied to subjects other than sex, horror, crime, cruelty or violence. To confine it to these particular subjects would need the plainest language. Second, and perhaps what is more striking, is the fact that the draftsman has been careful to use the word “means” in all the other definitions contained in s 2. It is in respect of indecent alone that “includes” is used. That cannot be other than deliberate. Therefore, in my view the word “indecent” must be treated for the purposes of this Act as being capable of embracing all that comes within the normal meaning of the word as well as matters of sex, horror, crime, cruelty or violence.

Therefore, the dominant characteristic of a publication is to be ascertained by the application of both qualitative and quantitative analysis of the content of the

¹²⁵⁶ Films, Videos, and Publications Classification Act 1993, s 3(4)(f).

¹²⁵⁷ Films, Videos, and Publications Classification Act 1993, s 3(4)(f).

¹²⁵⁸ *Robson v Hicks Smith and Sons Limited* NZLR 1113 (nz SC).

¹²⁵⁹ Indecent Publications Act 1963.

¹²⁶⁰ *Police v News Media Ownership Ltd*, above n 1200, at 613.

publication.¹²⁶¹ Consideration must be given to the intensity and frequency of the demeaning content, as well as to the concentration and regularity of the relatively non-demeaning content.¹²⁶² Where the Classification Office has deemed a publication to be objectionable, the characteristic which has been determined to be objectionable must prevail over all the other characteristics.¹²⁶³ This prevailing characteristic must be the characteristic which has a commanding influence on both the content and nature of the publication.¹²⁶⁴

It has been further acknowledged by Justice Woodhouse in the Supreme Court case of *Robson v Hicks Smith and Sons Limited*¹²⁶⁵ that difficulties in enforcing a censorship issue are not a matter for the consideration of the Classification Office¹²⁶⁶ or the Courts, but a matter for the legislature to determine.¹²⁶⁷ Consequently, any difficulties associated with administering a classification decision must not impede the decision of the Classification Office, as it has been determined by Parliament that the Act should enable the regulation of any publication.¹²⁶⁸ Moreover, the Courts and the Classification Office are under no obligation to treat any one of these considerations as decisive, or to regard the absence of proof concerning anyone of them as being influential in any classification decision.¹²⁶⁹ Humorous content that acts as a guide to the intention of a publication can also be considered in any classification decision.¹²⁷⁰

1.15.3.7 Expert Judgement and the Determination of an Objectionable Publication

Section 4(1) of the Act as inserted by Section 7 of the Amendment Act 2005 declares that the question of whether or not a publication is objectionable or should

¹²⁶¹ *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd*, above n 1019, at 713.

¹²⁶² At 713.

¹²⁶³ At 713.

¹²⁶⁴ At 713.

¹²⁶⁵ *Robson v Hicks Smith and Sons Limited*, above n 1232.

¹²⁶⁶ See *Secretary for Justice and Others v Taylor* (1978) 1 NZLR 252 (nz CA).

¹²⁶⁷ *Robson v Hicks Smith and Sons Limited*, above n 1232, at 1125.

¹²⁶⁸ At 1125.

¹²⁶⁹ *Police v News Media Ownership Ltd*, above n 1200, at 615.

¹²⁷⁰ *Kerr-Hislop v Walton* [1952] NZLR 267 (NZ SC) at 268.

in accordance with Section 23(2) be given a classification other than objectionable is a matter for the expert judgment.¹²⁷¹ This expert judgement must be determined by a person or body authorised by the Act to make such a determination.¹²⁷² Evidence or proof of any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination.¹²⁷³ Justice Tipping in the Court of Appeal case of *Moonen*¹²⁷⁴ considered this issue and indicated that:¹²⁷⁵

In truth there is no question of onus or standard of proof arising in the classification process, whether in terms of s 4 or otherwise. The question which the Office or Board has to determine can be characterised as one of assessment, judgment or opinion. It is not one of objective fact. Such a question arising in a classification context is not sensibly amenable to a standard or onus of proof. Indeed s 4 itself makes it plain that evidence or proof is not required.

Justice Tipping's comments indicate that the Classification Office and Board of Review are required to *evaluate* a pornographic publication which implies that it is their *subjective opinion* which is most significant. It is contended that this observation by Justice Tipping is correct and that this evaluation is intended to provide the classification process with the ability to respond to the shifting attitudes of society. Nevertheless, Section 4(2) of the Act states that where evidence or proof of any such matters or particulars is available to the body or person concerned, that evidence or proof must be taken into consideration.¹²⁷⁶

1.15.3.8 The Ambit of a Classification Decision

Section 26 of the Act affirms that the classification given to a publication under Sections 23, 55 and 56 of the Act shall apply to every copy of that publication that is identical in content with it.¹²⁷⁷ The strict application of the requirements of

¹²⁷¹ Films, Videos, and Publications Classification Act 1993 s 4(1).

¹²⁷² Films, Videos, and Publications Classification Act 1993, s 4(1).

¹²⁷³ Films, Videos, and Publications Classification Act 1993, s 4(2).

¹²⁷⁴ *Moonen v Film and Literature Board of Review*, above n 998.

¹²⁷⁵ At [34].

¹²⁷⁶ Films, Videos, and Publications Classification Act 1993, s 4(2).

¹²⁷⁷ Films, Videos, and Publications Classification Act 1993, s 26.

Section 26 has been confirmed by the Court of Appeal in *Re Baise-Moi*.¹²⁷⁸ It was held by the Court that Section 26 is clear in its terms, and the Film and Literature Board of Review is not permitted to classify any publication differently when both publications are in the same format.¹²⁷⁹ In addition, where the Classification Office classifies any film on the premise that alterations have been made to that film, that classification shall apply only if those excisions or alterations are in fact made.¹²⁸⁰

Any subsisting classification decision by the Classification Office or the Board of Review must be considered to be conclusive evidence in respect of any proceedings concerning that publication as required by Section 41(1) of the Act.¹²⁸¹ This decision is enforceable until it is subject to reconsideration by way of review by the Board of Review, re-examination by the Classification Office, or re-evaluation.¹²⁸² This revaluation must be referred by the Courts to the Board of Review or the Classification Office, or an Appeal to the High Court or the Court of Appeal.¹²⁸³

1.15.4 The Classification Process

1.15.4.1 The Submission of a Publication for Classification

The classification of an objectionable publication in New Zealand normally begins when law enforcement agencies submit a publication for classification to the Classification Office.¹²⁸⁴ This submission of a publication for classification is authorised by Section 13(1)(a)–(b) of the Act as amended by Section 9 of the Amendment Act 2005 and Schedule 5, along with Section 289(1) of the Customs Excise Act 1996. These provisions enable the Chief Executive of the New Zealand Customs Service,¹²⁸⁵ the Commissioner of Police¹²⁸⁶ or the Secretary of Internal

¹²⁷⁸ *Re Baise-Moi* [2005] NZAR 214 (NZ CA).

¹²⁷⁹ At [44].

¹²⁸⁰ Films, Videos, and Publications Classification Act 1993, s 34(a).

¹²⁸¹ Films, Videos, and Publications Classification Act 1993, s 41(1).

¹²⁸² See the Films, Videos, and Publications Classification Act 1993, ss 41(1), 42, 47 and 56.

¹²⁸³ See the Films, Videos, and Publications Classification Act 1993, ss 41(1), 42, 47 and 56.

¹²⁸⁴ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

¹²⁸⁵ Customs Excise Act 1996 (NZ), s 289(1).

¹²⁸⁶ Films, Videos, and Publications Classification Act 1993, s 13(1)(a).

Affairs¹²⁸⁷ to submit any publication to the Classification Office for examination and classification.¹²⁸⁸ However, the duty of the Court to refer objectionable and restricted material to the Classification Office for classification is contained within Section 29 of the Act.¹²⁸⁹

In accordance with Section 29 of the Act, the Courts have a statutory obligation to refer a publication to the Office for classification where an issue arises in any civil or criminal proceedings as to whether or not a publication is objectionable¹²⁹⁰ or restricted.¹²⁹¹ The Classification Office has exclusive jurisdiction to determine the nature of a publication when the Court refers a publication for determination.¹²⁹² However, in any civil or criminal proceedings the Court may dispense with the requirement to refer a publication to the Office where the defendant admits that a publication is objectionable or is restricted.¹²⁹³ The Court has the discretion to accept the admission of the defendant and thereby dispense with a reference to the Classification Office.¹²⁹⁴

1.15.4.2 The Interaction of the Courts with the Classification Office

The High Court case of *S v Auckland District Court and New Zealand Police*¹²⁹⁵ provides an illustration of the interaction between the Courts and the Classification Office. This case concerned a Judicial Review of a decision in the District Court, where Mr S and his counsel applied to have charges under the Act dropped on the basis that an essential element of the charges could not be proved by the Crown.¹²⁹⁶

¹²⁸⁷ Films, Videos, and Publications Classification Act 1993, s 13(1)(b).

¹²⁸⁸ Films, Videos, and Publications Classification Act 1993, s 13(1)(a)–(b).

¹²⁸⁹ Films, Videos, and Publications Classification Act 1993, s 29.

¹²⁹⁰ Films, Videos, and Publications Classification Act 1993, s 29(1)(a).

¹²⁹¹ Films, Videos, and Publications Classification Act 1993, s 29(1)(b)(i) and (ii).

¹²⁹² Films, Videos, and Publications Classification Act 1993, s 29(1).

¹²⁹³ Films, Videos, and Publications Classification Act 1993, s 29(2)(a).

¹²⁹⁴ Films, Videos, and Publications Classification Act 1993, s 29(2)(b).

¹²⁹⁵ *S v Auckland District Court and New Zealand Police* High Court, Auckland M310/SW99, 11 March 1999.

¹²⁹⁶ At 2.

Mr S had previously been suspected of committing various offences against the Act.¹²⁹⁷ These offences included possessing and distributing child pornography.¹²⁹⁸ Subsequently, the Police searched the home of Mr S and seized his computer and various other electronic devices that were found to contain child pornography contrary to Sections 123, 124 and 131 of the Act.¹²⁹⁹ These charges were in very general terms and consequently did not comply with the provisions¹³⁰⁰ of Section 17 of the Summary Proceedings Act 1954.¹³⁰¹

The position that arose in these prosecutions was unusual, because for each charge it was necessary that one of the essential elements be determined by the Classification Office and not by the Court.¹³⁰² Furthermore, the Court establishes that in any criminal proceedings before the Courts where the question arises as to whether any publication is objectionable, the Court must refer that question to the Classification Office for its decision.¹³⁰³ This statement by the Court also confirmed that the Classification Office has exclusive jurisdiction to determine the question.¹³⁰⁴

The Classification Office was sent eight CD ROMs and was advised by the Crown Solicitor that this was the mode by which the examination of classification could take place.¹³⁰⁵ This is where the issue in this case arose. The Classification Office classified each of the CD ROMs or source documents as an individual publication which was subsequently deemed to be objectionable.¹³⁰⁶ However, the proceeding brought before the Court by the Police relied on particular images being deemed to be objectionable.¹³⁰⁷ Consequently, the Classification Office had not made any

¹²⁹⁷ At 2.

¹²⁹⁸ At 2.

¹²⁹⁹ At 2.

¹³⁰⁰ At 2.

¹³⁰¹ Summary Proceedings Act 1954.

¹³⁰² *S v Auckland District Court and New Zealand Police*, above n 1269, at 2.

¹³⁰³ At 2.

¹³⁰⁴ At 2.

¹³⁰⁵ At 4.

¹³⁰⁶ At 5.

¹³⁰⁷ At 11.

determination as to whether any of the publications that were the subject of the information were indeed objectionable.¹³⁰⁸ Justice Paterson stated:¹³⁰⁹

It is difficult to see how the Police, relying upon particular images, can satisfy the requirement that those images, i.e. publications, have been determined objectionable by the Classification Office, when the Office has determined only that the original source containing, in some cases, hundreds of documents, is objectionable. The Classification Office under s 29(1) of the Act has the exclusive jurisdiction to determine the question.

It was held by the Court that there cannot be a conviction unless the Classification Office has determined that a particular publication is objectionable.¹³¹⁰ Therefore, as Justice Paterson confirmed in his decision, it is for the Classification Office to determine whether a particular image is objectionable and not for the Court to draw inferences.¹³¹¹ Accordingly, the proceedings before the Court could not proceed until further determinations were received from the Classification Office.¹³¹²

Where the Classification Office or the Board of Review has classified a publication under this Act, that finding is sufficient proof of the theme of the publication in any Court of decision.¹³¹³ The Court must also dispense with any reference to the Classification Office where conclusive proof¹³¹⁴ of the classification of that publication under Section 41 of this Act is provided.¹³¹⁵

1.15.4.3 The Examination of a Publication by the Classification Office

The Classification Office assigns a publication to one of its personnel, who examines the publication and applies the criteria set down in Section 3 of the

¹³⁰⁸ At 11.

¹³⁰⁹ At 11.

¹³¹⁰ At 12.

¹³¹¹ At 12.

¹³¹² At 14.

¹³¹³ Films, Videos, and Publications Classification Act 1993 s 29(3).

¹³¹⁴ Proof in this instance will require a certified and valid certificate of the decision from the Classification Office which has been entered into the Register of Classification Decisions.

¹³¹⁵ Films, Videos, and Publications Classification Act 1993, s 29(3).

Classification Act 1993.¹³¹⁶ The staff of the Classification Office must include any previous observations or comments made by the Courts in the interpretation of Section 3 within its analysis.¹³¹⁷ Dr Jack also states that part of this analysis compares the publication and any previous observations or comments against the Freedom of Expression provision contained within Section 14 New Zealand Bill of Rights Act 1990.¹³¹⁸ The designated staff member then thoroughly examines the publication¹³¹⁹ and this involves that staff member specifically addressing three broad questions.¹³²⁰

Firstly, whether the publication involves sex, crime, cruelty or violence,¹³²¹ and these are what Dr Jack refers to as¹³²² the ‘gateway criteria’.¹³²³ Typically, with child abuse images the gateway criteria entails sex.¹³²⁴ Section 3 of the Classification Act 1993 requires the Classification Office to confirm that there is indeed some element of sex, crime or cruelty within the publication.¹³²⁵ Dr Jack reveals that the second question that must be determined is whether the publication comes within one of the categories that the Act presumes to be objectionable as detailed by Section 3(2).¹³²⁶ These categories include sex with children,¹³²⁷ animals,¹³²⁸ dead people,¹³²⁹ urine, excrement¹³³⁰ or violence.¹³³¹ Where one of these categories is found to be present in the publication, the publication must be

¹³¹⁶ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

¹³¹⁷ At 4.

¹³¹⁸ At 4.

¹³¹⁹ At 4.

¹³²⁰ At 4.

¹³²¹ Films, Videos, and Publications Classification Act 1993 s 3(1).

¹³²² Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

¹³²³ For further information on the gateway criteria see Films, Videos, and Publications Classification Act 1993, s 3(1); *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*, above n 902.

¹³²⁴ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

¹³²⁵ At 4.

¹³²⁶ At 4.

¹³²⁷ Films, Videos, and Publications Classification Act 1993, s 3(2)(a).

¹³²⁸ Films, Videos, and Publications Classification Act 1993, s 3(2)(e).

¹³²⁹ Films, Videos, and Publications Classification Act 1993, s 3(2)(c).

¹³³⁰ Films, Videos, and Publications Classification Act 1993, s 3(2)(d).

¹³³¹ Films, Videos, and Publications Classification Act 1993, ss 3(2)(b), 3(2)(f).

presumed to be objectionable as required by Section 3(2) of the Classification Act 1993.¹³³²

Dr Andrew Jack acknowledges that where the Classification Office cannot establish that a publication promotes or supports one of the categories of offences that are recognised to be objectionable, it is then required to go on to consider the presence of other factors under Section 3(3) of the legislation.¹³³³ This Section deals broadly with the extent, manner or degree that the sex or violence is depicted or dealt with in terms of the publication.¹³³⁴ Dr Jack confirms that the Classification Office is then required to look at the wider context of the publication, like who is the intended audience, and what is the artistic merit of the publication.¹³³⁵ This context and a range of other factors that the Classification Office must consider are contained within Section 3(4) of the Act.¹³³⁶

Dr Andrew Jack is also insistent that any determination of a publication is to be considered by the Classification Office as consistently as possible with the Freedom of Expression provisions contained in Section 14 of the New Zealand Bill of Rights Act 1990.¹³³⁷ The importance of this procedure is that where a provision within Section 3 of the Act is difficult to adequately apply, the Classification Office will employ the decision that is the most liberal.¹³³⁸ Moreover, Section 14 of the New Zealand Bill of Rights Act 1990 is revisited again at the conclusion of the classifications procedure to once again ascertain how the decision impacts on the right to Freedom of Expression.¹³³⁹ This second visitation to the Freedom of

¹³³² Films, Videos, and Publications Classification Act 1993, s 3(2).

¹³³³ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

¹³³⁴ Films, Videos, and Publications Classification Act 1993, s 3(3).

¹³³⁵ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

¹³³⁶ Films, Videos, and Publications Classification Act 1993, s 3(4).

¹³³⁷ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.

¹³³⁸ At 4.

¹³³⁹ At 5.

Expression provisions highlights the importance placed on this notion by the Classification Office.

Where the Classification Office is unsure whether a publication should be banned or just restricted it is then required to adopt a restriction¹³⁴⁰ as opposed to completely banning the publication.¹³⁴¹ Dr Jack also discloses that where a publication has been submitted by the Courts to the Classification Office, the Office will provide a detailed and lengthy report on its examination even though this is not mandatory under the legislation.¹³⁴² The Classification Office then issues a notice on the decision pursuant to Section 38(1) of the Classification Act 1993.¹³⁴³ This classification decision is then entered into the Classification Office's Register in accordance with Section 39(2) of the Act.¹³⁴⁴ Once this decision is entered into the Register, the Classification Office then notifies the submitting agency by sending them a copy of the notice and a copy of the entry placed in the register as required by Section 38(1) of the Act.¹³⁴⁵

Dr Andrew Jack confirms that once these procedures have been concluded, the decision by the Classification Office represents conclusive evidence as to whether or not a publication is objectionable.¹³⁴⁶ Furthermore, in any criminal proceedings, the Court can simply assume that the publication is objectionable.¹³⁴⁷ The Court's proceedings are then only required to ascertain whether the defendant was in possession of the objectionable publication, or whatever the case might be.¹³⁴⁸

¹³⁴⁰ Films, Videos, and Publications Classification Act 1993, ss 3A, 3B.

¹³⁴¹ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.

¹³⁴² At 5.

¹³⁴³ At 5.

¹³⁴⁴ At 5.

¹³⁴⁵ At 5.

¹³⁴⁶ At 5.

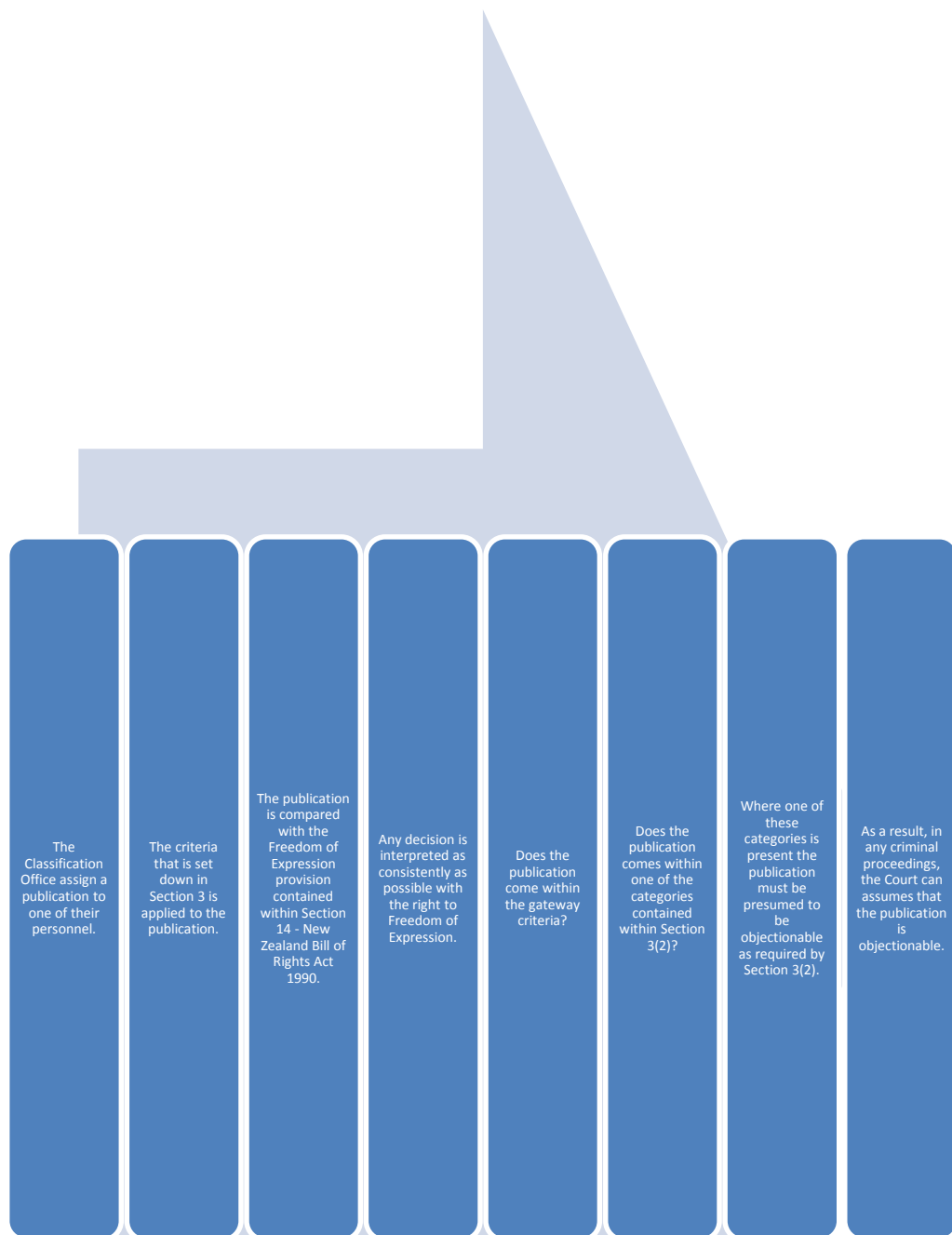
¹³⁴⁷ At 5.

¹³⁴⁸ At 5.

1.15.4.4 Diagram of the Examination Process

The following diagram is a simplified version of the classification process to determine whether a publication is objectionable:

Examination Process 1



1.15.5 The Review of a Classification Decision

1.15.5.1 Review of an Existing Classification Decision

The Classification Act 1993 allows for a review of an existing Classification Office classification decision in accordance with Section 42 of the Act.¹³⁴⁹ This review is undertaken by the Film and Literature Board of Review (Board of Review), which, as Dr Jack confirms, is a completely separate body from the Classification Office that conducts several reviews a year.¹³⁵⁰

1.15.5.2 The Film and Literature Board of Review

The Film and Literature Board of Review is established under Section 91 of the Act.¹³⁵¹ The formation of the Board of Review is in recognition of the need to enable the public to seek an independent review of any determination imposed by the Classification Office.¹³⁵² Parliament intended that the Board of Review would hear applications for a review of any decision and would replace the jurisdiction of the High Court to hear appeals.¹³⁵³ The former Minister of Social Welfare Jenny Shipley confirmed in Parliament that:¹³⁵⁴

The Film and Literature Board of Review will be established to hear applications to the Classification Office. An appeal from the Board of Review on a point of law will be available to the High Court, and from there to the Court of Appeal.

As the Act passed through Parliament, amendments were made to strengthen the functions and constitution of the Board of Review.¹³⁵⁵ These amendments were in recognition of the fact that the Board of Review would need to address arguments that the Classification Office had erred on a matter of law.¹³⁵⁶ Consequently, under

¹³⁴⁹ Films, Videos, and Publications Classification Act 1993 s 42.

¹³⁵⁰ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.

¹³⁵¹ Films, Videos, and Publications Classification Act 1993, s 91.

¹³⁵² Hansard, above n 907, at 12759.

¹³⁵³ Hansard, above n 907, at 17493.

¹³⁵⁴ Hansard, above n 907, at 12759.

¹³⁵⁵ Hansard, above n 532, at 17053.

¹³⁵⁶ Internal Affairs and Local Government Committee, above n 898, at 6.

Section 93(4) the President of the Board of Review must now be a barrister or solicitor who has held a practising certificate for at least seven years.¹³⁵⁷ Membership of the Board must include persons with knowledge of, or experience in, the different aspects of matters likely to come before the Board.¹³⁵⁸ The then Minister of Justice referred to these Amendments and stated in Parliament:¹³⁵⁹

The President of the Board of Review is to be a qualified lawyer of at least 7 years' experience. The membership of the Board is to include persons with knowledge or experience of matters that are likely to come before it. These are sensible changes that help to ensure the Board has a good mix of specialist expertise and community representation.

Mr Black, as stated above, a former member of the Film and Literature Board of Review, states that the Board of Review is often made up of ordinary people who share reasonable views on how society is progressing.¹³⁶⁰ Furthermore, Mr Black is certain that in terms of the integrity of the appointments to the Board of Review there is a genuine attempt to provide representatives that reflect the entire community.¹³⁶¹ Mr Black also agrees that a combination of community representation is important.¹³⁶² This combination provides a more balanced view that adequately represents the attitudes of the community, particularly where a decision may be controversial.¹³⁶³ However, there has been some criticism of the membership of the Board of Review.¹³⁶⁴ Mr Black believes that some of the appointments can be too legally focused.¹³⁶⁵ These appointments can also be very political which results in the perception that an appointment to the Board of Review

¹³⁵⁷ Films, Videos, and Publications Classification Act 1993 s 93(4).

¹³⁵⁸ Films, Videos, and Publications Classification Act 1993, s 93(5).

¹³⁵⁹ Hansard, above n 532, at 17053.

¹³⁶⁰ Mr Black, Former Member of the Film and Literature Board of Review, New Zealand, above n 1173, at 1.

¹³⁶¹ At 4.

¹³⁶² At 1.

¹³⁶³ At 1.

¹³⁶⁴ At 4.

¹³⁶⁵ At 4.

is often a ‘job for one of the boys.’¹³⁶⁶ Mr Black further reveals that there is certainly concern from the public and states:¹³⁶⁷

It was very interesting because when I was first appointed to the Board I did get several letters from people in the community who were involved with community standards saying ‘I notice you have been appointed to the Board and I hope that you are going to uphold good community values’.

Mr Black also considers that the most memorable aspect of being a member of the Board of Review was the notion of solidarity against child pornography in any reviews that came before the review authority.¹³⁶⁸ Furthermore, Mr Black is resolute in his belief that his role as a member of the Board of Review is critically important because the right to appeal any official decision is an important function in any democracy, including New Zealand.¹³⁶⁹

1.15.5.3 The Function of the Board of Review

The function of the Board of Review is contained within Section 92 of the Act.¹³⁷⁰ Its purpose is to review the classification of any publication referred to it under Section 41(3) of the Act or submitted to it in accordance with Part 4 of the Act.¹³⁷¹ Therefore, the Board of Review must review the classification of any publication referred to it by the right of review or the Courts.¹³⁷² The Board of Review must also review any publication submitted to it following the classification of the publication by the Classification Office.¹³⁷³ Therefore, the function of the Board of Review is to undertake reviews of decisions made by the Classification Office

¹³⁶⁶ At 4.

¹³⁶⁷ At 1.

¹³⁶⁸ At 3.

¹³⁶⁹ At 1.

¹³⁷⁰ Films, Videos, and Publications Classification Act 1993 s 92.

¹³⁷¹ Films, Videos, and Publications Classification Act 1993, s 92.

¹³⁷² The Department of Internal Affairs “The Film and Literature Board of Review” (2013) The Department of Internal Affairs <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Film-and-Literature-Board-of-Review-Index?OpenDocument>.

¹³⁷³ The Department of Internal Affairs, above n 1346.

where there is dissatisfaction with a classification decision and where the applicant for review meets the criteria set out in the Act.¹³⁷⁴

Mr Black confirms that the role of the Board of Review is to reconsider classification decisions that have been appealed by their producers, the Police or other agencies.¹³⁷⁵ The Board of Review must ascertain whether these Classification Office decisions are appropriate for the kind of material that is presented for classification.¹³⁷⁶ Mr Black also reveals that during its tenure the Board of Review has been required to reassess a vast range of published material.¹³⁷⁷

It ranged from a book on suicide to some videos that someone had taken of his family that had sexualised the children, to violent video games that denigrated women.

Mr Black noted that a number of the publications involved child pornography.¹³⁷⁸ The Board of Review during this tenure also observed videos where a man felt that he was documenting family life.¹³⁷⁹ Mr Black is adamant that the videos were pornographic.¹³⁸⁰

If that was my family's life, it wouldn't have been documented like that.

The issue that this type of review raises for the Board of Review is the impact of the emotional harm that this category of publication has on children.¹³⁸¹ Mr Black is certain that emotional and physical harm to children is the principal issue that confronts the Board of Review and states:¹³⁸²

¹³⁷⁴ Internal Affairs and Local Government Committee, above n 898, at 5.

¹³⁷⁵ Mr Black, Former Member of the Film and Literature Board of Review, New Zealand, above n 1173, at 2.

¹³⁷⁶ At 2.

¹³⁷⁷ At 2.

¹³⁷⁸ At 3.

¹³⁷⁹ At 3.

¹³⁸⁰ At 3.

¹³⁸¹ At 3.

¹³⁸² At 3.

If you are harmed in that way as a child what happens when you grow up – it's the ongoing effect to society. It is very sickening seeing the fear that children have when they are not safe in their own homes because they have these predators living in their own homes.

Mr Black confirms that the decisions regarding child pornography were relatively easy to make as the Act and the gateway process enabled the Board of Review to adequately address this issue.¹³⁸³ This statement by Mr Black indicates that it is not difficult to draw the line against prevailing standards of what is acceptable to the community and society.

1.15.5.4 The Process of Reviewing a Classification Decision by the Film and Literature Board of Review

The Board of Review undertakes all reviews afresh.¹³⁸⁴ The Act also requires that every review must be conducted as soon as possible¹³⁸⁵ and without regard to the decision of the Classification Office.¹³⁸⁶ However, the Board of Review must also be mindful of all the considerations that have been contemplated and taken into account by the Classification Office in determining whether a classification should be restricted or simply outlawed for being objectionable.¹³⁸⁷ Dr Jack confirms that the reviews start from the beginning of the classification procedure and follow the basic process utilised by the Classification Office.¹³⁸⁸ Moreover, Mr Black also asserts that the classification procedure begins afresh and that the law is completely reapplied by the Board of Review using the Act as a guide to the classification of the publication under review.¹³⁸⁹

¹³⁸³ At 5.

¹³⁸⁴ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.

¹³⁸⁵ Films, Videos, and Publications Classification Act 1993 s 52(1).

¹³⁸⁶ Films, Videos, and Publications Classification Act 1993, s 52(2).

¹³⁸⁷ Films, Videos, and Publications Classification Act 1993, ss 3–3D.

¹³⁸⁸ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.

¹³⁸⁹ Mr Black, Former Member of the Film and Literature Board of Review, New Zealand, above n 1173, at 4.

When the Board of Review comes to the same conclusion as the Classification Office, the Board of Review will then issue its own decision pursuant to Section 55 of the Act.¹³⁹⁰ However, where the Board of Review disagrees with the decision of the Classification Office, it will issue a decision¹³⁹¹ that it believes is the correct.¹³⁹² Dr Jack verifies that the decision of the Board of Review supplants the Classification Office's decision¹³⁹³ and becomes the decision in respect of the classification of that particular publication.¹³⁹⁴ Once the Board of Review has concluded its review it will instruct the Classification Office to enter the decision into the Classification Office's Register.¹³⁹⁵ The Board of Review will then publish that decision which is available to the public in accordance with Section 40 as directed by Section 55(1)(e)(ii) of the Act.¹³⁹⁶ Nevertheless, the Deputy Chief Censor Nic McCully explains that the Board of Review often comes to the same conclusion as the Classification Office.¹³⁹⁷ The Deputy Chief Censor states:¹³⁹⁸

When it comes to child abuse material, I don't think that they have ever overturned a decision, they tend to ban it as well.

However, where an individual or an organisation is dissatisfied with the decision of the Board of Review, Mr Black reveals that there is also recourse to the High Court.¹³⁹⁹

¹³⁹⁰ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.

¹³⁹¹ Films, Videos, and Publications Classification Act 1993, s 55.

¹³⁹² Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.

¹³⁹³ Films, Videos, and Publications Classification Act 1993, s 55(3).

¹³⁹⁴ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.

¹³⁹⁵ Films, Videos, and Publications Classification Act 1993, s 55(1)(e)(i).

¹³⁹⁶ Films, Videos, and Publications Classification Act 1993, s 55(1)(e)(ii).

¹³⁹⁷ McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 3.

¹³⁹⁸ At 3.

¹³⁹⁹ Mr Black, Former Member of the Film and Literature Board of Review, New Zealand, above n 1173, at 1.

1.15.6 The Right of Appeal to the Courts

1.15.6.1 The Right to Appeal to the Courts on a Question of Law

Where the High Court establishes that the Board of Review has made an error in its application of the law the High Court can overturn the Board of Review's decision.¹⁴⁰⁰ Mr Black states that the High Court can only overturn a decision of the Board of Review on an error in the processes utilised during the determination of the publication.¹⁴⁰¹ An appeal to the High Court against a decision of the Board of Review on a question of law is permitted by Section 58 of the Act.¹⁴⁰² Accordingly, Section 58(3) of the Act specifies that every appeal under Section 58 must be dealt with in accordance with the rules of the Court.¹⁴⁰³

1.15.6.2 The Powers of the High Court

The power of the High Court to obtain and make orders concerning the documentation in any appeal against a determination of the Board of Review is contained within Section 63 of the Act.¹⁴⁰⁴ Furthermore, when an appeal against a determination of the Board of Review is brought before the High Court, the Court may, on its own motion or on the application of any party to the appeal, make all or any of the following orders:¹⁴⁰⁵ Firstly, the High Court may make an order directing the Secretary to lodge with the Registrar of the High Court in Wellington any document or other written material or any exhibit in the possession or custody of the Secretary.¹⁴⁰⁶ Secondly, the High Court may order the Secretary of Internal Affairs to lodge a report with the Register of the High Court.¹⁴⁰⁷ This report must record any documentation that the High Court specifies must be included within that report.¹⁴⁰⁸ The High Court may order the Secretary of Internal Affairs to lodge

¹⁴⁰⁰ At 1.

¹⁴⁰¹ At 1.

¹⁴⁰² Films, Videos, and Publications Classification Act 1993 s 58.

¹⁴⁰³ Films, Videos, and Publications Classification Act 1993, s 58(3).

¹⁴⁰⁴ Films, Videos, and Publications Classification Act 1993, s 63.

¹⁴⁰⁵ Films, Videos, and Publications Classification Act 1993, s 63(1).

¹⁴⁰⁶ Films, Videos, and Publications Classification Act 1993, s 63(1)(a).

¹⁴⁰⁷ Films, Videos, and Publications Classification Act 1993, s 63(1)(b).

¹⁴⁰⁸ Films, Videos, and Publications Classification Act 1993, s 63(1)(b).

with the Registrar a report setting out any issue that the Court may specify, such as the considerations the Board of Review had regard to but that are not set out in its determination.¹⁴⁰⁹ The High Court may make such an order only where it is satisfied that a proper determination of the point of law in issue so requires.¹⁴¹⁰ This order is also subject to such conditions as the High Court considers to be appropriate.¹⁴¹¹

An application under Section 63(1) of the Act must be made by the appellant, within 20 working days after the date of the lodging of the notice of appeal.¹⁴¹² In the case of any other party to the appeal, the application must be made within 20 working days after the date that party received a copy of the notice of appeal.¹⁴¹³

1.15.6.3 The Right to Appeal to the Court of Appeal

Section 70 of the Act contains the statutory authority for an individual or a party to appeal to the Court of Appeal where they are dissatisfied with any decision by the High Court.¹⁴¹⁴ Therefore, where any party to the proceedings before the High Court under this Act is dissatisfied with any final determination of the Court in respect of the appeal being erroneous in point of law, that party may appeal to the Court of Appeal for the opinion of that Court on that question of law.¹⁴¹⁵ Moreover, every such appeal must be heard and determined in accordance with the rules of the Court.¹⁴¹⁶

1.16 Overall Conclusion for Chapter 3

The Films, Videos, and Publications Classification Act 1993 completely outlaws all forms of child pornography. The ability to adequately censor content is complicated by the fundamental right to freedom of expression. However, New Zealand's classification system contains various statutory provisions which

¹⁴⁰⁹ Films, Videos, and Publications Classification Act 1993, s 63(1)(c).

¹⁴¹⁰ Films, Videos, and Publications Classification Act 1993, s 63(3).

¹⁴¹¹ Films, Videos, and Publications Classification Act 1993, s 63(3).

¹⁴¹² Films, Videos, and Publications Classification Act 1993, s 63(2)(a).

¹⁴¹³ Films, Videos, and Publications Classification Act 1993, s 63(2)(a).

¹⁴¹⁴ Films, Videos, and Publications Classification Act 1993, s 70.

¹⁴¹⁵ Films, Videos, and Publications Classification Act 1993, s 70(1).

¹⁴¹⁶ Films, Videos, and Publications Classification Act 1993, s 70(2).

guarantee that any intrusion upon the right to freedom of expression can be appealed. This appeal process requires that the law's provisions be reapplied to the images utilising the Classification Act 1993 as a guide to the reclassification of the images.¹⁴¹⁷ These processes confirm that New Zealand's classification system contains the necessary safeguards required by a democracy to protect the right to freedom of expression and also to prohibit harmful content such as child pornography.¹⁴¹⁸ It is evident that the classification system in New Zealand is exemplary and robust. It also reflects the changing attitudes of our times and New Zealand's society. However, this legislation must be continually critiqued to ensure that its provisions reflect current situations and that they continue to enable law enforcement agencies to effectively censor child pornography sourced from the Internet. The importance of this classification system is that it provides law enforcement agencies with the legislative authority to adequately suppress all forms of child pornography and to introduce proactive initiatives. These proactive initiatives include the filtering of Internet content by New Zealand's Digital Child Exploitation Filtering System.

¹⁴¹⁷ Mr Black, Former Member of the Film and Literature Board of Review, New Zealand, above n 1173, at 2.

¹⁴¹⁸ At 2.

Chapter 4

Filtering the Internet

1.17 Overall Introduction

The classification of objectionable material and prosecution of child pornographers after the fact does not effectively prevent the flow of content across the Internet. One solution to this concern is to filter child pornography on the Internet. This chapter examines New Zealand's Digital Child Exploitation Filtering System which is designed to prevent the public from accidentally and deliberately accessing child pornography.¹⁴¹⁹ Detective Senior Sergeant John Michael of the New Zealand Police and Officer in charge of the Online Child Exploitation across New Zealand Unit (OCEANZ) believes that this Filtering System is beneficial because of its ability to block access to illegal content.¹⁴²⁰ This chapter examines New Zealand's Filtering System and attempts to determine whether it is effective and operating as intended. It also scrutinises the implementation of filtering software in Australia and the United Kingdom and compares them to the system adopted in New Zealand. The chapter highlights concerns about Internet filtering and provides recommendations intended to assist with the suppression of child pornography on the Internet.

1.18 The Optional Protocol and Filtering of the Internet

The Optional Protocol requires that all signatory States must introduce measures to protect children¹⁴²¹ and to prohibit material advertising child pornography.¹⁴²²

¹⁴¹⁹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.

¹⁴²⁰ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 8.

¹⁴²¹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 9(1).

¹⁴²² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 9(5).

Therefore, although Article 9 does not specifically mention Internet filtering, it is argued that Article 9(5) of the Optional Protocol obligates States to implement an administrative procedure to prevent the advertising of child pornography on the Internet.¹⁴²³

1.19 Filtering of the Internet

1.19.1 Filtering Software and Technological Solutions to Child Pornography

Filtering software for the Internet is designed to provide a real time solution for the purpose of online child protection.¹⁴²⁴ Filtering is simply a way of preventing the viewing and distribution of child pornography.¹⁴²⁵ This prevention strategy involves Internet Service Providers ('ISPs') using blocking software to prevent access to known websites that accommodate child pornography.¹⁴²⁶ This software has been developed in response to the jurisdictional and policing issues discussed in this thesis.¹⁴²⁷ These concerns have given added motivation to the search for better technological solutions to reduce the dissemination of child pornography across the Internet.¹⁴²⁸ Technological solutions such as filtering need to be able to cope with highly complex issues, such as the continually evolving threats to children online, and the open nature of the Internet itself.¹⁴²⁹

In New Zealand, the Department of Internal Affairs maintains a large database of sites known to harbour child pornography.¹⁴³⁰ If a request is made to access a known website currently on the list, that request is blocked by filtering software.¹⁴³¹

¹⁴²³ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 9(5).

¹⁴²⁴ Awais Rashid and others "Technological Solutions to Offending" in Ethel Quayle and Kurt M Ribisl (eds) *Understanding and Preventing Online Sexual Exploitation of Children* (Routledge, Abingdon, Oxon ; New York, 2012) at 231.

¹⁴²⁵ John Carr and Zoe Hilton "Combating Child Abuse Images on the Internet" in Julia Davidson and Petter Gottschalk (eds) *Internet Child Abuse: Current Research and Policy* (Routledge-Cavendish, New York, 2011) at 67.

¹⁴²⁶ At 67.

¹⁴²⁷ At 67.

¹⁴²⁸ At 67.

¹⁴²⁹ Rashid and others, above n 1398, at 230.

¹⁴³⁰ The Department of Internal Affairs "Digital Child Exploitation Filtering System Code of Practice March 2013" (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Code-of-Practice-March-2013>>.

¹⁴³¹ The Department of Internal Affairs, above n 1404.

Anyone attempting to view or download material from an illegal website will be unable to do so through that particular ISP.¹⁴³² Nevertheless, there is no way to identify an individual who has attempted to access a banned website nor have they committed a criminal offence as they have only attempted to access the site.¹⁴³³ The advantage of employing filtering software is that the geographical location of the illegal website becomes irrelevant, due to the fact that all of the decisive activity such as the filtering itself, takes place on the ISP's server.¹⁴³⁴ The development and nature of this system is discussed further below.

Filtering technology is not however, a substantial obstacle for Internet offenders who are both determined to access child pornography and have advanced technological knowledge.¹⁴³⁵ Internet-based offenders are able to frequently change their tactics in order to respond to any solution employed by law enforcement agencies, to protect children or prevent the downloading of child pornography.¹⁴³⁶ As a result, any child pornographer with a high degree of technological knowledge can simply join an overseas ISP or share images over a Peer-to-Peer server.¹⁴³⁷ Nevertheless, filtering does play a part in assisting to prevent the casual Internet consumer from stumbling across child pornography when browsing the Internet.¹⁴³⁸ It also prevents those with a sense of both general and specific curiosity related to pornography from gaining access to this illegal content.¹⁴³⁹ Furthermore, filtering reduces the volume of harmful content that is available to the public,¹⁴⁴⁰ and by doing so, helps counter the re-victimisation of the children who have been abused during the consumption of these images across the Internet.¹⁴⁴¹ There is also no way

¹⁴³² Carr and Hilton, above n 1399, at 67.

¹⁴³³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 20.

¹⁴³⁴ Carr and Hilton, above n 1399, at 67.

¹⁴³⁵ At 68.

¹⁴³⁶ Rashid and others, above n 1398, at 235.

¹⁴³⁷ Carr and Hilton, above n 1399, at 68.

¹⁴³⁸ At 68.

¹⁴³⁹ At 68.

¹⁴⁴⁰ At 68.

¹⁴⁴¹ At 68.

of ascertaining the volume of content that is no longer available to the public in New Zealand as law enforcement agencies are continually reassessing websites.¹⁴⁴²

1.19.2 Safeguarding the Protection of Legal Internet Content

Although there is considerable variation in the substantive protections required for Internet content, there is more common agreement regarding the procedures that are essential to safeguard the protection of legal Internet content.¹⁴⁴³ These procedural requirements were articulated by Special Rapporteur Frank La Rue in 2001.¹⁴⁴⁴ In the Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/17/27 the Special Rapporteur recognised that countries have some discretion to restrict Internet content such as child pornography.¹⁴⁴⁵ The Special Rapporteur's report explained that any limitation to the right to freedom of expression must pass the following three-part, cumulative test:¹⁴⁴⁶

- (a) It must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); and
- (b) It must pursue one of the purposes set out in article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and
- (c) It must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).

The Special Rapporteur's report also detailed that legislation restricting the right to freedom of expression on the Internet has to be applied by a body which is

¹⁴⁴² O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 20.

¹⁴⁴³ Dawn Nunziato "The Beginning of the End of Internet Freedom" (2014) 45 *Georgetown Journal of International Law* 383 at 396.

¹⁴⁴⁴ La Rue, above n 1031.

¹⁴⁴⁵ At [25].

¹⁴⁴⁶ At [24].

independent of unwarranted influences.¹⁴⁴⁷ Moreover, this must be done in a manner that is neither arbitrary nor discriminatory, and have adequate safeguards to prevent abuse, including the possibility of appeal and remedy against its abusive application.¹⁴⁴⁸

The Special Rapporteur stressed that there should be as little restriction as possible to the flow of information through the Internet, except in exceptional circumstances prescribed by international human rights law.¹⁴⁴⁹ Nevertheless, the Special Rapporteur notes that child pornography is one of the clear exceptions where filtering measures are justified.¹⁴⁵⁰ It is assumed that that this is because filtering falls within the exception of the protection of the rights of others. However, filtering is only acceptable where national legislation is sufficiently precise and there are satisfactory safeguards against abuse, including review by an independent regulatory body.¹⁴⁵¹ These safety measures are intended to prevent any scope creep.¹⁴⁵²

1.20 New Zealand's Filtering System

1.20.1 The Introduction of Filtering in New Zealand

As previously noted, when the Internet was developed, criminals and organised paedophile networks began utilising it as a means of producing, distributing and collecting child pornography.¹⁴⁵³ In response, Interpol put out a request between 2009 and 2010 for countries to consider filtering because they saw it as a means to protect the public.¹⁴⁵⁴ Interpol also believed that filtering would limit the number of child pornographic images available on the Internet.¹⁴⁵⁵ As a response to this

¹⁴⁴⁷ At [24].

¹⁴⁴⁸ At [24].

¹⁴⁴⁹ At [68].

¹⁴⁵⁰ At [71].

¹⁴⁵¹ At [71].

¹⁴⁵² At [71].

¹⁴⁵³ The Department of Internal Affairs "Explanatory Statement" (25 June 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Explanatory-Statement>>.

¹⁴⁵⁴ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 12.

¹⁴⁵⁵ At 12.

request, the Censorship Compliance Unit ('CCU') was charged with investigating the possibility of filtering¹⁴⁵⁶ by a number of agencies including Epact, Netsafe and the Department of Internal Affairs.¹⁴⁵⁷ This response also led to several years of trials with the co-operation of several ISPs.¹⁴⁵⁸ Several systems of filtering were trialled and the Department of Internal Affairs finally settled on a Swedish system known as NetClean WhiteBox.¹⁴⁵⁹ In 2009, the Department of Internal Affairs announced that a Filtering System to block websites that host child pornography would be made available to New Zealand's ISPs.¹⁴⁶⁰ Many ISPs were already considering introducing a similar initiative on their own networks, so the majority were willing to sign up.¹⁴⁶¹ The Department of Internal Affairs' Filtering System is now known as the Digital Child Exploitation Filtering System ('Filtering System').¹⁴⁶² This Filtering System is funded and operated by the Department of Internal Affairs in partnership with New Zealand's ISPs.¹⁴⁶³

1.20.2 The Rationale for Filtering in New Zealand

Part of the rationale for filtering is that if the dealers of child pornography cannot reach their customers because their websites are being blocked, the business will become less financially lucrative and they will move away from dealing in this material.¹⁴⁶⁴ Lloyd Bezett, Senior Policy Analyst, for the Department of Internal Affairs explains the reasoning behind and decision to employ the Filtering System:¹⁴⁶⁵

¹⁴⁵⁶ At 12.

¹⁴⁵⁷ At 21.

¹⁴⁵⁸ At 12.

¹⁴⁵⁹ At 12.

¹⁴⁶⁰ The Department of Internal Affairs, above n 4.

¹⁴⁶¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 12.

¹⁴⁶² The Department of Internal Affairs "Internet and Website Filter" (25 June 2014)

<<http://www.dia.govt.nz/Censorship-DCEFS>>.

¹⁴⁶³ The Department of Internal Affairs "Web Filter will Focus Solely on Child Abuse Images" (16 July 2009)

<<http://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/26bc0621775bbe47cc2575f50010a894>>.

¹⁴⁶⁴ Carr and Hilton, above n 1399, at 68.

¹⁴⁶⁵ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 8.

The Department's determination was seen as something that we could do within the bounds of the legislation and that would have a positive contribution in terms of reducing the market and the acceptability of child sexual abuse material. It also sends a clear message to the community around the seriousness of this type of offending.

Steve O'Brien, National Manager of the Censorship Compliance Unit of the Department of Internal Affairs agrees and further explains the reasoning behind the implementation of the Filtering System in New Zealand:¹⁴⁶⁶

We thought that we would offer a service to the ISPs and the public that would ensure that the worst of the worst material would be filtered, and filtered efficiently. There would be no downtime on Internet access, and it was both secure and voluntary. The Department of Internal Affairs would oversee the running of the system and there would be no cost to the ISPs.

New Zealand's Filtering System was successfully trialled on a voluntary basis¹⁴⁶⁷ with a number of ISPs including TelstraClear and Ihug, over a two-year period.¹⁴⁶⁸ The Filtering System filtered out over 7000 objectionable websites with no noticeable impact on the performance of the Internet.¹⁴⁶⁹ The Filtering System complements the activity undertaken by law enforcement agencies, including the CCU of the Department of Internal Affairs.¹⁴⁷⁰ This activity includes online investigations and the prosecution of offenders who trade and download objectionable images of children.¹⁴⁷¹ However, the Filtering System is not a detection tool.¹⁴⁷² When a person is blocked there is no recording of the IP address and the Department of Internal Affairs cannot undertake any detection activity as the person is only being filtered from that site.¹⁴⁷³ As previously stated, the

¹⁴⁶⁶ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.

¹⁴⁶⁷ At 12.

¹⁴⁶⁸ The Department of Internal Affairs, above n 1437.

¹⁴⁶⁹ The Department of Internal Affairs, above n 1437.

¹⁴⁷⁰ The Department of Internal Affairs, above n 1427.

¹⁴⁷¹ The Department of Internal Affairs, above n 1427.

¹⁴⁷² O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 16.

¹⁴⁷³ At 16.

individual has not actually committed an offence at this stage so there is no requirement that law enforcement agencies take any action against the person.¹⁴⁷⁴

1.20.3 The Purpose of the Filtering System

The Filtering System has one sole purpose, to block access to websites offering objectionable images of child pornography.¹⁴⁷⁵ It does not cover email, file-sharing or borderline material¹⁴⁷⁶ because the Department of Internal Affairs does not have the ability to filter at the Peer-to-Peer level.¹⁴⁷⁷ Steve O'Brien reveals why the Department of Internal Affairs decided to only filter child pornography:¹⁴⁷⁸

Child pornography is the area that Government needs to focus on. Other forms of objectionable material don't have the horrific nature that child sexual abuse does. There is the viewing of defecation and such like, you can do that in your own home and it is not an offence, but if you take a picture of it, it becomes an offence. I don't think that we would get the support of the public if we said we were going to filter that type of material. So I think you need to get the right balance of what the public of New Zealand demands. They demand that child sexual abuse material should be filtered.

Community stakeholder and former National Director of Ecpat Child Alert, Alan Bell believes that the decision to focus on child pornography has led to the closure of illegal websites as their viability is damaged by the Filtering System.¹⁴⁷⁹ Furthermore, the decision to only filter child pornography ensures that the public is protected from this particular kind of potentially harmful content.¹⁴⁸⁰ It restricts the trade of this material and means that fewer children are abused to support the

¹⁴⁷⁴ At 16.

¹⁴⁷⁵ The Department of Internal Affairs, above n 1436.

¹⁴⁷⁶ The Department of Internal Affairs, above n 1437.

¹⁴⁷⁷ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 14.

¹⁴⁷⁸ At 15.

¹⁴⁷⁹ Email from Alan Bell (National Director Ecpat Child Alert New Zealand) "Child Pornography Research Questions" (27 October 2011).

¹⁴⁸⁰ For a discussion on the potential types of harm that child pornography causes, see Quayle and Sinclair, above n 482, at 4.

market.¹⁴⁸¹ Thus, the Department of Internal Affairs believes its Filtering System makes a valuable contribution to preventing the sexual abuse of children.¹⁴⁸² In doing so, it restricts freedom of expression as little as possible to achieve its purported aim.¹⁴⁸³ The Minister of Internal Affairs, Peter Dunne agrees with this claim and states:¹⁴⁸⁴

I think it comes down to what is feasible and where does that accord to the rights of the individual in terms of freedom of expression. It always comes back to the level of regulation of various forms of behaviour under the legislation, but really, I don't think you can ever present a case, where the sexual exploitation of children is justified.

It is also contended that the decision to implement this Filtering System constitutes further recognition by the Government that children are rights holders before the law. This Filtering System is also an acknowledgement by the State that it has additional obligations to its children in accordance with Article 5 of the Convention on the Rights of the Child 1989. This assertion is supported by the decision to specifically block child pornography. Consequently, these additional obligations justify the introduction of the Filtering System and also assist New Zealand to comply with its obligations under Article 9 of the Optional Protocol.

It is also evident that the purpose and operation of New Zealand's Filtering System satisfies parts two and three of the Special Rapporteur, Frank La Rue's cumulative test.¹⁴⁸⁵ As stated above, this cumulative test is designed to ensure that freedom of expression on the Internet is transgressed as little as possible and in accordance with Article 19(3)(b) of the International Covenant on Civil and Political Rights 1976.¹⁴⁸⁶ New Zealand's Filtering System is simply a feasible solution to the

¹⁴⁸¹ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

¹⁴⁸² At 7.

¹⁴⁸³ La Rue, above n 1031, at [24].

¹⁴⁸⁴ Interview with Peter Dunne, Minister of The Department of Internal Affairs of New Zealand (3 July 2014) at 3.

¹⁴⁸⁵ La Rue, above n 1031, at [24].

¹⁴⁸⁶ At [24].

problem of child pornography on the Internet, which consecutively is protecting the wellbeing of society.¹⁴⁸⁷ The number of blocks to date clearly indicates that such a response is both justified and necessary.¹⁴⁸⁸ New Zealand's Filtering System is also working proportionally as it only blocks child pornography and no other content whatsoever.¹⁴⁸⁹ It is argued that the filtering initiative is a minimal system which prevents the public from accessing the worst of the worst content on the Internet. Thus, there is no realistic risk that the Filtering System will infringe upon freedom of expression and the right to access information online.

1.20.4 The Operation and Reality of the Filtering System

The Department of Internal Affairs has a list of 505 websites which host child pornography and are currently being blocked by the Filtering System.¹⁴⁹⁰ Using a secure link, the Department of Internal Affairs routes the routing information through to the ISPs.¹⁴⁹¹ When a user attempts to gain access to a website that matches this routing information, the request is sent to the Filtering System for examination.¹⁴⁹² If the website matches the routed information, the Filtering System will present a landing page that notifies the user that the request has been blocked.¹⁴⁹³ If the request does not match an item on the list, the user is presented with the requested page.¹⁴⁹⁴ The CCU maintains the Filtering System¹⁴⁹⁵ and seeks advice from New Zealand's specialist censorship organisation, the Classification Office, on its operation.¹⁴⁹⁶ Much of the guidance from the Classification Office relates directly to activity concerning the Filtering System such as whether an image

¹⁴⁸⁷ See Chapter One's discussion on the harm principle and the psychological effects of child pornography.

¹⁴⁸⁸ ECPAT Child Alert "Digital Filtering of Child Exploitation" (27 June 2014) <<http://www.ecpat.org.nz/Projects/Internet-Digital-Filtering.aspx>>.

¹⁴⁸⁹ The Department of Internal Affairs, above n 1436.

¹⁴⁹⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 19.

¹⁴⁹¹ ECPAT Child Alert, above n 1462.

¹⁴⁹² The Department of Internal Affairs "Public Information Pack" (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Public-Information-Pack>>.

¹⁴⁹³ ECPAT Child Alert, above n 1462.

¹⁴⁹⁴ The Department of Internal Affairs, above n 1466.

¹⁴⁹⁵ ECPAT Child Alert, above n 1462.

¹⁴⁹⁶ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 3.

is objectionable or not.¹⁴⁹⁷ Website filtering is not a ‘universal’ answer to the dissemination of child pornography on the Internet,¹⁴⁹⁸ but it is nevertheless another important tool in the fight against the sexual exploitation of children.¹⁴⁹⁹ As Nic McCully, Deputy Chief Censor, of the Classification Office reveals, the purpose of the Filtering System is to:¹⁵⁰⁰

Stop the curious people from logging onto the worst material. The filter does not stop the worst offenders. It is also a deterrent, as the worst offenders don’t use websites; they use Peer-to-Peer. The filter is designed to stop people from grazing, going in for a look and then getting hooked.

1.20.5 The Office of Film and Literature Classification and Filtering

As explained in Chapter 3 of this thesis, Section 76(2) of the Classification Act 1993 establishes the Classification Office as a recognised Crown entity¹⁵⁰¹ independent of any other Government agency.¹⁵⁰² Section 4(1) of the Classification Act 1993 declares that the question of whether or not a publication is objectionable is a matter for expert judgement.¹⁵⁰³ Only the Classification Office has the statutory authority, as New Zealand’s expert censorship authority under Section 77(1)(a), to determine the classification of any publication submitted to it under the Classification Act 1993.¹⁵⁰⁴ Lloyd Bezett explains the relationship between the Department of Internal Affairs and the Classification Office:¹⁵⁰⁵

The Office is an independent Crown Entity and it has its own board in the form of the Chief Censor and the Deputy Chief Censor. We have had a long working relationship with the Office and from an enforcement side we work very closely with them. They define what is objectionable and what we need to enforce. We

¹⁴⁹⁷ At 3.

¹⁴⁹⁸ The Department of Internal Affairs, above n 1437.

¹⁴⁹⁹ The Department of Internal Affairs, above n 1437.

¹⁵⁰⁰ McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 4.

¹⁵⁰¹ Films, Videos, and Publications Classification Act 1993 s 76(2).

¹⁵⁰² Hansard, above n 532, at 17052.

¹⁵⁰³ Films, Videos, and Publications Classification Act 1993, s 4(1).

¹⁵⁰⁴ Films, Videos, and Publications Classification Act 1993, s 77(1)(a).

¹⁵⁰⁵ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 3.

seek a lot of advice from them with things that are going on with the Filtering System such as whether something is objectionable because some of it is a line call.

However, it is the CCU that makes the final determination as to whether a particular website should be included on the list of banned sites.¹⁵⁰⁶ Each site is also independently assessed by an Inspector of Publications at the CCU before it is added to the list of banned websites.¹⁵⁰⁷

The Special Rapporteur's report necessitated that legislation restricting the right to freedom of expression on the Internet has to be applied by a body which is independent of unwarranted influences.¹⁵⁰⁸ As aforementioned, the Classification Office is, in accordance with Section 76(2) of the Classification Act 1993, a recognised Crown entity¹⁵⁰⁹ which is fully independent of other Government agencies.¹⁵¹⁰ Therefore, the Classification Office is independent of unwarranted influences as required by the Special Rapporteur, Frank La Rue.¹⁵¹¹ Any determination by the Classification Office with regard to the restriction of child pornography on the Internet also satisfies the requirements set out in the report of the Special Rapporteur relating to the restriction of freedom of expression.¹⁵¹²

1.20.6 The Legal Basis of the Filtering System

New Zealand's legislation contains no provision that specifically authorises the operation of the Filtering System or requires ISPs to utilise this software on their networks.¹⁵¹³ The Filtering System is not part of any Government policy and there is no reference to it in legislation because it is simply a decision made and

¹⁵⁰⁶ Email from Steve O'Brien (National Manager Censorship Compliance Unit) "Filtering of the Internet" (17 March 2015).

¹⁵⁰⁷ O'Brien, National Manager Censorship Compliance Unit, above n 1480.

¹⁵⁰⁸ La Rue, above n 1031, at [24].

¹⁵⁰⁹ Films, Videos, and Publications Classification Act 1993, s 76(2).

¹⁵¹⁰ Hansard, above n 532, at 17052.

¹⁵¹¹ La Rue, above n 1031, at [24].

¹⁵¹² At [24].

¹⁵¹³ The Department of Internal Affairs, above n 1427.

undertaken by the Department of Internal Affairs.¹⁵¹⁴ Moreover, the Filtering System is intended to be a measured response that sends a clear message to the public that accessing child pornography is totally unacceptable.¹⁵¹⁵ When this intention is combined with Section 3(2)(a) of the Classification Act 1993 which outlaws the exploitation of children for sexual purposes,¹⁵¹⁶ the Filtering System is clearly intended to prevent people from committing the crime of downloading child pornography from the Internet.¹⁵¹⁷ Section 3(3) of the Act also states that particular weight should be given to the outlawing of sexual conduct involving children¹⁵¹⁸ and also the sexual exploitation of children.¹⁵¹⁹ Steve O'Brien agrees and states that:¹⁵²⁰

We are not trying to take away people's civil liberties; we are simply trying to prevent them from committing a crime. It also needs to be remembered that most New Zealanders would find that behaviour abhorrent anyway.

It is therefore claimed that Section 3(2)(a) of the Films, Videos, and Publications Classification Act 1993 is sufficient to fulfil the first aspect of the abovementioned three-part test, set down by Special Rapporteur, Frank La Rue.¹⁵²¹ As stated above, the first feature of the Special Rapporteur's report states:¹⁵²²

(a) The filtering must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency);

As previously mentioned in this thesis, Section 3(2) is important as it sets the tone of the legislation and, in combination with Section 3(3), makes Parliament's

¹⁵¹⁴ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.

¹⁵¹⁵ At 7.

¹⁵¹⁶ Films, Videos, and Publications Classification Act 1993 s 3(2)(a).

¹⁵¹⁷ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.

¹⁵¹⁸ Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(iv).

¹⁵¹⁹ Films, Videos, and Publications Classification Act 1993, s 3(3)(b).

¹⁵²⁰ Email from Steve O'Brien (National Manager Censorship Compliance Unit) "Digital Child Exploitation Filtering System" (16 March 2010) at 16.

¹⁵²¹ La Rue, above n 1031.

¹⁵²² At [24].

intentions clear.¹⁵²³ This part of the Classification Act 1993 is transparent and accessible to everyone, as required by the Special Rapporteur.¹⁵²⁴ When these two notions within Section 3 are combined with the purpose of the Filtering System, it is claimed that this measure is a justifiable limitation on the right to freedom of expression. However, it has been suggested that a new provision should be introduced within the Act that specifically states that the Department of Internal Affairs has the right to filter classified content in accordance with the definition of objectionable content within the Act. This suggestion is rejected because, as previously indicated, the Department is already bound by the current provisions of the Act. These provisions state that only the Classification Office has the statutory authority to determine whether a publication is objectionable¹⁵²⁵ and this must be done within the defined limits of the Act.¹⁵²⁶ Therefore, there is no reason to introduce of a new provision as this would detail an already existing limitation on the right to filter child pornography on the Internet.

It is also contended that the decision to implement this Filtering System constitutes recognition by the Government that children are rights holders before the law. These rights holders require this particular form of protection to reduce their vulnerability and the potential for undergoing harm from child pornography offending. This Filtering System is also an acknowledgement by the State that it has additional obligations to its children in accordance with Article 5 of the Convention on the Rights of the Child 1989. This assertion is again supported by the decision to specifically block child pornography and no other forms of objectionable content. As a result, these additional obligations justify the introduction of this Filtering System and also assist New Zealand to comply with its obligations under Article 9 of the Optional Protocol.

¹⁵²³ Indecent Publications Tribunal, above n 945, at 14.

¹⁵²⁴ La Rue, above n 1031.

¹⁵²⁵ Films, Videos, and Publications Classification Act 1993 s 77(1)(a).

¹⁵²⁶ Films, Videos, and Publications Classification Act 1993, s 3.

1.20.7 The Voluntary Nature of Filtering in New Zealand

As previously explained, participation by ISPs in New Zealand's Filtering System is entirely voluntary.¹⁵²⁷ The Department of Internal Affairs enters into legal agreements with the ISPs on the running of the Filtering System.¹⁵²⁸ Therefore, if any ISP is subsequently unhappy it can withdraw.¹⁵²⁹ Keith Manch explains that "this is another way of ensuring that the Department gets the filter right."¹⁵³⁰ Steve O'Brien agrees and states:¹⁵³¹

I think that its success was about it being a voluntary system. Where countries such as Australia tried to bring about filtering by legislation it wasn't the right way to go. You really want the co-operation of the public and the service providers to have full confidence that the filter would be run correctly. They need to understand that the filter would only deal with child sexual abuse images and no other objectionable material.

Alan Bell shares this view. Bell believes that the ISPs' voluntary registration with the Filtering System is a significant gesture on their part.¹⁵³² Furthermore, Bell also confirmed that Ecpat assisted with the introduction of this software into New Zealand¹⁵³³ and that the present voluntary basis of registration for ISPs ensures that a good sense of co-operation is maintained between them and law enforcement agencies.¹⁵³⁴ Each ISP already has some form of filtering, because it needs to filter out viruses, malware and spam coming across its own systems.¹⁵³⁵ All the Department of Internal Affairs is seeking from the Internet industry is their

¹⁵²⁷ The Department of Internal Affairs, above n 1437.

¹⁵²⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 14.

¹⁵²⁹ The Department of Internal Affairs, above n 1437.

¹⁵³⁰ The Department of Internal Affairs, above n 1437.

¹⁵³¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 12.

¹⁵³² Bell, National Director Ecpat Child Alert New Zealand, above n 1453.

¹⁵³³ Bell, National Director Ecpat Child Alert New Zealand, above n 1453.

¹⁵³⁴ Bell, National Director Ecpat Child Alert New Zealand, above n 1453.

¹⁵³⁵ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 15.

voluntary support for the Filtering System to enable the protection of children and the public from harm.¹⁵³⁶

However, the voluntary nature of this undertaking only applies to the ISP and the Department of Internal Affairs. The arrangement does not extend to the customers of New Zealand's ISPs. Most customers in New Zealand are required to consent to their ISP using the Filtering System as part of their signup contract.¹⁵³⁷ Spark, one of New Zealand's largest ISPs states in its contracts with consumers:¹⁵³⁸

We will intercept communications for the purposes of the Department of Internal Affairs' Digital Child Exploitation Filtering System and in continuing to use your Spark Broadband Service, you acknowledge and consent to this.

This clause not only signals to the consumer that the Filtering System will be operating on Spark's network but also prevents the ISP from being contractually prevented from filtering child pornography. The terms of this clause also limit the content that can be filtered and prevent scope creep, as the Filtering System exclusively filters child pornography.

1.20.8 Scope Creep

It is the combination of the voluntary nature and the contractual reasons ensuring that the Filtering System can only be utilised to block child pornography that is seen as the main defence against scope creep.¹⁵³⁹ As part of their contractual agreements with the ISPs, the Department of Internal Affairs assures them that only child pornography will be filtered when any ISP signs up to the Filtering System.¹⁵⁴⁰ This

¹⁵³⁶ At 15.

¹⁵³⁷ Spark New Zealand "Business Broadband (update) - Terms and Conditions" (17 March 2015) Spark <<http://www.spark.co.nz/help/other/terms/broadband-from-17-march-2015/>>; Spark New Zealand "Broadband Terms and Conditions" (7 March 2015) Spark <<http://www.spark.co.nz/help/other/terms/broadband/>>; Spark New Zealand "Business Broadband - Terms and Conditions" (March 2015) Spark <<https://www.spark.co.nz/business/help/other/termsandconditions/broadband/>>.

¹⁵³⁸ Spark New Zealand, above n 1511; Spark New Zealand, above n 1511; Spark New Zealand, above n 1511.

¹⁵³⁹ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.

¹⁵⁴⁰ At 10.

undertaking is the basis of the ISP's voluntary involvement with the Filtering System¹⁵⁴¹ and Lloyd Bezett, a Senior Policy Analyst for the Department of Internal Affairs, states:¹⁵⁴²

We firmly believe that the voluntary nature of the filtering is one of the best defences against scope creep because ISPs are commercial entities and if they thought that their customers didn't want the filter then they wouldn't connect. They would simply walk away from it. If they thought we were doing something more than they had signed up for then they would simply walk away from it. So, one of the best defences for the public against scope creep is that it is voluntary.

The potential for scope creep is also reduced because of the Department of Internal Affairs' contract with the Swedish supplier¹⁵⁴³ of the Filtering System's software, NetClean WhiteBox.¹⁵⁴⁴ NetClean Technologies are very aware of the potential for technologies to be used to breach human rights.¹⁵⁴⁵ Consequently, there is a specific clause in their contract with the Department of Internal Affairs that relates to the international obligations concerning human rights.¹⁵⁴⁶ A summary of the relevant conditions of the Consumer Licence Agreement states:¹⁵⁴⁷

The primary goal of NetClean WhiteBox is to block access to child pornography.

In order to achieve the main objective, NetClean allow that even non-child pornography is filtered, as long as it is material which is illegal to possess under the country's law and that the main objective for the installation is to block access to child pornography.

The filter must not be used to restrict freedom of expression, nor to prevent the transmission of information which in itself is illegal to possess.

¹⁵⁴¹ At 10.

¹⁵⁴² At 8.

¹⁵⁴³ See NetClean Technologies "NetClean WhiteBox" (3 July 2014) <<https://www.netclean.com/en/whitebox/for-isp/overview/>>.

¹⁵⁴⁴ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.

¹⁵⁴⁵ At 10.

¹⁵⁴⁶ At 10.

¹⁵⁴⁷ The Department of Internal Affairs *The Digital Child Exploitation Filtering System* (Official Information Act 1982 Release 2012) at 7.

Furthermore, the instillation of NetClean WhiteBox must not violate Articles 18 and 19 of the Universal Declaration of Human Rights 1948.

As a result, the Department of Internal Affairs has to guarantee that it will not utilise the Filtering System for any other means than blocking child pornography.¹⁵⁴⁸ If the Department of Internal Affairs expanded the scope of the Filtering System, it would be in breach of its Consumer Licence Agreement with NetClean Technologies.¹⁵⁴⁹ This contract ensures that the issue of scope creep is not a relevant concern in New Zealand.¹⁵⁵⁰ Moreover, the terms of the Consumer Licence Agreement also fulfil the Special Rapporteur, Frank La Rue's demands for adequate safeguards against scope creep.¹⁵⁵¹ The recognition of the importance of Articles 18 and 19 of the Universal Declaration of Human Rights 1948¹⁵⁵² within this Agreement is consistent with the Special Rapporteur's requirements that any restriction of Internet content should be prescribed by international law.¹⁵⁵³

1.21 The Limitations of New Zealand's Filtering System

Filtering is only partially effective in combating the international trade in child pornography.¹⁵⁵⁴ The Filtering System employed in New Zealand is also effective only after the fact, and does not prevent the consumption of child pornography or the sexual exploitation of children.¹⁵⁵⁵ It cannot remove illegal content from the Internet or prosecute the intentional creators and consumers of this material.¹⁵⁵⁶ Furthermore, statistics released on the number of blocks made by the Filtering System indicate that searching for child pornography on the Internet is becoming normalised in New Zealand.¹⁵⁵⁷ In just over a year of operation, the Filtering System

¹⁵⁴⁸ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.

¹⁵⁴⁹ At 10.

¹⁵⁵⁰ At 10.

¹⁵⁵¹ La Rue, above n 1031, at [71].

¹⁵⁵² Universal Declaration of Human Rights 1948 (un.org).

¹⁵⁵³ La Rue, above n 1031, at [68].

¹⁵⁵⁴ The Department of Internal Affairs, above n 1427.

¹⁵⁵⁵ The Department of Internal Affairs, above n 1427.

¹⁵⁵⁶ The Department of Internal Affairs, above n 1427.

¹⁵⁵⁷ Brook Sabin "Search for Child Pornography Becoming 'Normalised'" *3news.co.nz* (13 November 2011) <<http://www.3news.co.nz/Search-for-child-pornography-becoming-normalised/tabid/423/articleID/232604/Default.aspx#.UpZuYjc3V8E>>.

blocked more than 13 million requests to access hard-core child pornography.¹⁵⁵⁸ In 2013 it was revealed that some 27 million requests¹⁵⁵⁹ to access illegal child pornographic websites had been blocked.¹⁵⁶⁰ These figures confirm what McCully has indicated, that people are intentionally browsing child pornography websites.¹⁵⁶¹ The Filtering System is preventing them from viewing child pornography¹⁵⁶² and thereby driving the market for new material.¹⁵⁶³ The general public do not understand that their browsing of child pornographic websites causes a spike in demand for this material.¹⁵⁶⁴ To meet this increase in demand, individuals are abusing children and making this material available to meet this same demand.¹⁵⁶⁵

New Zealand's Filtering System can be seen as a response from the Government and ISPs to address community expectations and concerns that they should be doing more to provide a safe environment for the community when the public is online.¹⁵⁶⁶ As already noted, anyone attempting to access websites offering child pornography will receive a screen message saying the site has been blocked because it is illegal.¹⁵⁶⁷ Nevertheless, anyone who believes that their access to a website has been wrongly blocked by the Filtering System is able to request anonymously for the filter to be checked.¹⁵⁶⁸ The Department of Internal Affairs has received complaints about the blocking of websites, and when they have checked these websites none

¹⁵⁵⁸ Sabin, above n 1531.

¹⁵⁵⁹ This high number of blockings is by no way limited to New Zealand. The Police in Norway estimate that the Norwegian filtering systems were preventing between 15,000 and 18,000 attempts per day to access child pornography. In Denmark approximately 2,500 users were blocked per day. British Telecom reported in 2004 that they had blocked 10,000 hits a day from people attempting to access known child pornography sites. For more information, see David Middleton "Internet Sex Offenders" in Anthony R Beech, Leam A Craig and Kevin D Browne (eds) *Assessment and Treatment of Sex Offenders* (John Wiley & Sons, Ltd, 2009) 199; Carr and Hilton, above n 1399.

¹⁵⁶⁰ ECPAT Child Alert, above n 1462.

¹⁵⁶¹ McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 4.

¹⁵⁶² At 4.

¹⁵⁶³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.

¹⁵⁶⁴ At 9.

¹⁵⁶⁵ At 9.

¹⁵⁶⁶ The Department of Internal Affairs, above n 1437.

¹⁵⁶⁷ The Department of Internal Affairs, above n 1437.

¹⁵⁶⁸ The Department of Internal Affairs, above n 1437.

of the complaints has been justified.¹⁵⁶⁹ Steve O'Brian explains the nature of some of the complaints:¹⁵⁷⁰

Some of them are pretty full on in what they say in those statements. They include, 'I know the child enjoys it', and 'if you don't unblock my site, I'll go out and physically harm a child'.

There is, however, no way to identify the individual who has made such a complaint as the dropdown box on the Filtering System's landing page is anonymous.¹⁵⁷¹

1.21.1 Filtering in Foreign Jurisdictions

1.21.1.1 Internet Censorship in Australia

Internet censorship in Australia comprises a regulatory regime under the supervision of the Australian Communications and Media Authority ('ACMA').¹⁵⁷² ACMA is the independent statutory authority tasked with ensuring that Australia's media and communications legislation operates effectively, and in the public interest.¹⁵⁷³ This supervisory organisation only has the authority to impose content restrictions on Internet content hosted within Australia.¹⁵⁷⁴ Although the regulation tools made available to ACMA have had an impact on Australian content,¹⁵⁷⁵ most complaints to ACMA concern content hosted overseas and therefore, outside the jurisdiction of the organisation.¹⁵⁷⁶ Moreover, the regulation of online content

¹⁵⁶⁹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 16.

¹⁵⁷⁰ At 16.

¹⁵⁷¹ At 21.

¹⁵⁷² The Australian Communications and Media Authority "The ACMA story" (2 June 2014) <<http://www.acma.gov.au/Home/theACMA/About/The%20ACMA%20story>>.

¹⁵⁷³ The Australian Communications and Media Authority "Introduction to the ACMA" (30 January 2014) <<http://www.acma.gov.au/theACMA/About/The-ACMA-story/Communicating/introduction-to-the-acma>>.

¹⁵⁷⁴ The Australian Communications and Media Authority "Prohibited Online Content" (22 May 2014) <<http://www.acma.gov.au/Industry/Internet/Internet-content/Internet-content-complaints/prohibited-online-content-internet-safety-i-acma>>.

¹⁵⁷⁵ Alan Davidson *The Law of Electronic Commerce* (Cambridge University Press, Cambridge, 2009) at 323.

¹⁵⁷⁶ The Australian Communications and Media Authority "Online content complaints, January 2011 - ACMA sphere 61" (4 April 2013) <<http://www.acma.gov.au/theACMA/online-content-complaints-january-2011-acmasphere-61>>.

within Australia operates under Schedules 5 and 7 of the Broadcasting Services Act 1992¹⁵⁷⁷ which focus primarily on illegal activities and the protection of children from unsuitable Internet content.¹⁵⁷⁸ The provisions of Schedule 7 require ACMA to instruct ISPs to either remove content or place it under specified access restrictions once the content has been investigated because of a complaint.¹⁵⁷⁹ Furthermore, under Schedule 7, child pornography and material containing excessive sexual violence are prohibited and classified RC or X18+.¹⁵⁸⁰

The Australian Government became a signatory to the Optional Protocol in 2001 and ratified this instrument in 2007.¹⁵⁸¹ In June of the same year, ACMA was instructed by the Government to investigate developments in Internet filtering technologies as a means to protect the Australian public from illegal content.¹⁵⁸² This filtering initiative was to be the first time a Western democracy would implement legislation requiring ISPs to block users from accessing materials online.¹⁵⁸³ However, this decision by the Government was heavily criticised in the press and likened to the firewalls operating in China and Iran.¹⁵⁸⁴ The initiative was openly referred to as the ‘Great Firewall of Australia’, an analogy with the Internet censorship in China dubbed the ‘Great Firewall of China’.¹⁵⁸⁵ Moreover, Internet companies such as Google and Yahoo were also very critical of the Government’s decision.¹⁵⁸⁶ Google wrote to the Australian Government with their concerns,

¹⁵⁷⁷ Broadcasting Services Act 1992 (Cth) (au).

¹⁵⁷⁸ Davidson, above n 1549, at 314.

¹⁵⁷⁹ Broadcasting Services Act 1992 (Cth), sch 7.

¹⁵⁸⁰ Broadcasting Services Act 1992 (Cth), sch 7.

¹⁵⁸¹ United Nations “United Nations Treaty Collection -Chapter IV Human Rights” (25 May 2015) <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en>.

¹⁵⁸² Australian Communications and Media Authority *Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety* (2008) at 7.

¹⁵⁸³ Derek E Bambauer “Filtering in Oz: Australia’s Foray into Internet Censorship” (2009) 31 U Pa J Int’l L 493 at 495.

¹⁵⁸⁴ The Telegraph “Australia Scraps Plan to ‘Filter’ Internet” *The Telegraph* (2012) <<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/9665983/Australia-scraps-plan-to-filter-internet.html>>; Marina Kamenev “First, China Next: the Great Firewall of Australia?” [2010] Time.

¹⁵⁸⁵ Paul Chapman “Australia Plans Chinese-style Internet Filtering” *The Telegraph* (2009) <<http://www.telegraph.co.uk/technology/news/6818010/Australia-plans-Chinese-style-internet-filtering.html>>.

¹⁵⁸⁶ The Telegraph, above n 1558.

stating that the scope of the filter was too broad and that there was a possibility that the filter could reduce search speed.¹⁵⁸⁷

The Australian Government subsequently attempted to introduce mandatory filtering for ISPs in 2012.¹⁵⁸⁸ This mandatory filtering initiative soon became a controversial topic involving political considerations that caused the planned implementation of filtering to be withdrawn.¹⁵⁸⁹ One of these objections that the introduction of filtering legislation could be the beginning of a Government attempt to suppress political dissent.¹⁵⁹⁰ These types of proposition were dismissed by the former Communications Minister Stephen Conroy as ‘conspiracy theories’ and the Minister urged Australians to have faith that their Government would pass appropriate legislation to filter the Internet.¹⁵⁹¹ However, this stance was contradicted by several earlier ministerial releases¹⁵⁹² to the press including an admission that a filter against child pornography would also have the ability to filter additional material.¹⁵⁹³ Opposition parties attacked the introduction of filtering legislation and stated it would create an infrastructure for Government censorship on a broader scale.¹⁵⁹⁴ Shadow Treasurer Joe Hockey also stated:¹⁵⁹⁵

Protecting liberty is about protecting freedoms against both known and future threats. Some may argue that we can surely trust a democratically-elected government in Australia to never try to introduce more wide-spread censorship. I am not so sure!

¹⁵⁸⁷ Kamenev, above n 1558.

¹⁵⁸⁸ Nunziato, above n 1417, at 385.

¹⁵⁸⁹ At 385.

¹⁵⁹⁰ Brett Winterford “Conroy Requests Faith in Net Filter Scheme” (2009) iTnews <<http://www.itnews.com.au/News/139822,conroy-requests-faith-in-net-filter-scheme.aspx>>.

¹⁵⁹¹ Winterford, above n 1564.

¹⁵⁹² Stephen Conroy *Minister Welcomes Advances in Internet Filtering Technology* (2008); Stephen Conroy *Labor’s Plan For Cyber Safety* (2007).

¹⁵⁹³ Stephen Conroy, above n 1566, at 1.

¹⁵⁹⁴ APC “Hockey Slams ‘Unworkable’ Internet Filter” (12 March 2012) APC <<http://apcmag.com/hockey-slams-unworkable-internet-filter.htm/>>.

¹⁵⁹⁵ APC, above n 1568.

As a result, the Australian Government announced in November 2012 that it had cancelled the introduction of filtering legislation.¹⁵⁹⁶ The Government decided that existing legislation was sufficient to force ISPs to filter websites known to contain child pornography.¹⁵⁹⁷ This legislative requirement is contained in Subsection 313(1) of the Telecommunications Act 1997.¹⁵⁹⁸ Subsection 313(1) places an obligation on Australian ISPs to ensure that they are actively preventing their services from being used in the commission of an offence such as the downloading of child pornography.¹⁵⁹⁹ The Government in 2012 instructed the Australian Federal Police to issue ISPs with notice requiring them to adhere to their obligations under Subsection 313(1).¹⁶⁰⁰ These actions by the Government have resulted in 90 percent of Australian Internet content being filtered to block known child pornography websites.¹⁶⁰¹

1.21.1.2 Internet Censorship in the United Kingdom

Internet censorship in the United Kingdom (UK) comprises legislation that criminalises certain types of publications, including child pornography. The downloading of child pornography is outlawed by Subsection 1(1) of the Protection of Children Act 1978¹⁶⁰² which states that it is an offence to take,¹⁶⁰³ distribute¹⁶⁰⁴ or have in your possession¹⁶⁰⁵ an indecent photograph of a child.¹⁶⁰⁶ The Obscene Publications Acts 1959¹⁶⁰⁷ and 1964¹⁶⁰⁸ also state that it is an offence to publish an obscene article¹⁶⁰⁹ and to possess this content with the intention to publish it for

¹⁵⁹⁶ Stephen Conroy *Child Abuse Material Blocked Online, Removing Need for Legislation* (2012) at 1.

¹⁵⁹⁷ At 1.

¹⁵⁹⁸ Telecommunications Act 1997 (au).

¹⁵⁹⁹ Telecommunications Act 1997, s 313(3).

¹⁶⁰⁰ Stephen Conroy, above n 1570, at 2.

¹⁶⁰¹ At 1.

¹⁶⁰² Protection of Children Act 1978 (gb).

¹⁶⁰³ Protection of Children Act 1978, s 1(1)(a).

¹⁶⁰⁴ Protection of Children Act 1978, s 1(1)(b).

¹⁶⁰⁵ Protection of Children Act 1978, s 1(1)(c).

¹⁶⁰⁶ Protection of Children Act 1978, s 1(1).

¹⁶⁰⁷ Obscene Publications Act 1959 (gb).

¹⁶⁰⁸ Obscene Publications Act 1964 (gb).

¹⁶⁰⁹ Obscene Publications Act 1959, s 2(1).

gain.¹⁶¹⁰ The UK also signed the Optional Protocol in 2000 and ratified this instrument in 2009.¹⁶¹¹ Furthermore, concerns with the proliferation of child pornography and terrorist activity online have seen a shift towards increased surveillance of Internet content.¹⁶¹² The implementation of new legislation such as the Terrorism Act 2000¹⁶¹³ has resulted in the State and ISPs introducing extensive surveillance and filtering measures.¹⁶¹⁴

In 2004, the UK's largest ISP British Telecom and the Internet Watch Foundation¹⁶¹⁵ entered into consultation with the Government¹⁶¹⁶ with regard to blocking known child pornography sites.¹⁶¹⁷ British Telecom subsequently agreed to filter a list of websites compiled by the Internet Watch Foundation¹⁶¹⁸ using default search filters.¹⁶¹⁹ Some smaller ISPs such as ICUK¹⁶²⁰ were reluctant to take part in filtering due to issues such as cost.¹⁶²¹ However, pressure from the Government and statements from the Prime Minister David Cameron that "all ISPs must filter content by default"¹⁶²² have ensured that most ISPs are now filtering the Internet.¹⁶²³

¹⁶¹⁰ Obscene Publications Act 1964, s 1(2).

¹⁶¹¹ United Nations, above n 1555.

¹⁶¹² OpenNet Initiative "United Kingdom" (19 March 2015) OpenNet Initiative <<https://opennet.net/research/profiles/united-kingdom>>.

¹⁶¹³ Terrorism Act 2000 (gb).

¹⁶¹⁴ OpenNet Initiative, above n 1586.

¹⁶¹⁵ The Internet Watch Foundation is a registered charity which is dedicated to the removal of all child pornography from the Internet.

¹⁶¹⁶ Martin Bright and Home Affairs Editor "BT puts Block on Child Porn Sites" *The Guardian* (2004) <<http://www.theguardian.com/technology/2004/jun/06/childrensservices.childprotection>>.

¹⁶¹⁷ Nart Villeneuve "Barriers to Cooperation - An Analysis of the Origins of International Efforts to Protect Children Online" in Ronald Deibert and others (eds) *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (MIT Press, United States of America, 2010) at 62.

¹⁶¹⁸ At 62.

¹⁶¹⁹ BBC "BT Default 'Porn Filter' Switched on" *BBC* (16 December 2013) <<http://www.bbc.co.uk/news/technology-25400009>>.

¹⁶²⁰ ICUK "ICUK.net" (19 March 2015) ICUK.net <<https://www.icuk.net/>>.

¹⁶²¹ Nicole Kobie "Smaller ISPs Refuse Cameron's Calls for Porn Filters" (22 July 2013) PC Pro <<http://www.pcpro.co.uk/news/broadband/383176/smaller-isps-refuse-camerons-calls-for-porn-filters>>.

¹⁶²² Kobie, above n 1595.

¹⁶²³ BBC "Sky Bocks Pornography 'by Default'" *BBC* (20 January 2015) <<http://www.bbc.co.uk/news/technology-30896813>>.

The voluntary nature of this filtering initiative removed the requirement for the Government to introduce¹⁶²⁴ the Communications Data Bill 2008¹⁶²⁵ and the Online Safety Bill 2014.¹⁶²⁶ The passing of these Bills into legislation would have compelled all ISPs to implement filtering on their networks.¹⁶²⁷ Clause 1 of the Online Safety Bill 2014 required ISPs to provide consumers with an opt-in system with respect to adult content on the Internet.¹⁶²⁸ Customers would be blocked from adult content but would have the option to opt-in to access such content,¹⁶²⁹ provided they could verify that they were over 18 years of age.¹⁶³⁰ Clause 3 required manufacturers of electronic devices to provide parents with a means of filtering Internet content for their children when an electronic device is purchased.¹⁶³¹ Moreover, Clause 14 of the Communications Data Bill 2008 contained wide-ranging powers such as the authority to filter and collect communications data for the Government.¹⁶³²

Filtering of the Internet in the UK has attracted much criticism in the press.¹⁶³³ The gay community stated in 2013 that default search filters have the potential to block important sites related to gay issues.¹⁶³⁴ Later that same year it was discovered that British Telecom had been filtering websites specifically designed to provide information on respecting gay and lesbian issues,¹⁶³⁵ which resulted in the ISP being

¹⁶²⁴ Villeneuve, above n 1591, at 62.

¹⁶²⁵ Communications Data Bill 2008 (gb).

¹⁶²⁶ Online Safety Bill 2014 (gb).

¹⁶²⁷ Communications Data Bill 2008, cla 14.

¹⁶²⁸ Online Safety Bill 2014, cla 1.

¹⁶²⁹ Online Safety Bill 2014, cla 1(1).

¹⁶³⁰ Online Safety Bill 2014, cla 1(3).

¹⁶³¹ Communications Data Bill 2008, cla 3.

¹⁶³² Communications Data Bill 2008, cla 14.

¹⁶³³ Mona Chalabi "Porn Filters - 12 Reasons Why They Won't Work (and 3 Reasons Why They Might)" *The Guardian* (8 August 2012) <<http://www.theguardian.com/politics/reality-check/2013/aug/08/porn-filters-evidence-for-against>>.

¹⁶³⁴ Charlie Cooper "David Cameron's Plan for Internet-Porn Filters 'Risks Hurting LGBT Community'" *The Independent* (21 August 2013) <<http://www.independent.co.uk/news/uk/politics/david-camerons-plan-for-internetporn-filters-risks-hurting-lgbt-community-8778956.html>>.

¹⁶³⁵ Martin Robbins "Cameron's Internet Filter goes far Beyond Porn - and that was Always the Plan" *NewStatesman* (23 December 2013) <<http://www.newstatesman.com/politics/2013/12/camerons-internet-filter-goes-far-beyond-porn-and-was-always-plan>>.

accused of supporting homophobia.¹⁶³⁶ Other sites which contained information on sex education and drug use were also blocked.¹⁶³⁷ Nearly one in five of the most popular websites on the Internet was also found to be blocked.¹⁶³⁸ The Government has been forced to respond to these criticisms by formulating a list of websites that have been inadvertently blocked and has subsequently requested ISPs to implement the unblocking of the list on their networks.¹⁶³⁹ Another issue of concern is that there is no public scrutiny of the filtering lists.¹⁶⁴⁰ Digital rights activists fear that the lists will be expanded to gradually stifle dissent.¹⁶⁴¹ These activists point to filtering systems in other countries such as China and Saudi Arabia¹⁶⁴² which have been subverted for political ends.¹⁶⁴³

1.22 The Department of Internal Affairs' Control Procedures

1.22.1 The Code of Practice

A Code of Practice has been implemented to govern the operation of the Filtering System and an Independent Reference Group has also been appointed.¹⁶⁴⁴ The Department of Internal Affairs invited public input on its draft Code of Practice for blocking objectionable websites that host child pornography.¹⁶⁴⁵ Keith Manch stated in 2009 that:¹⁶⁴⁶

¹⁶³⁶ Robbins, above n 1609.

¹⁶³⁷ Mark Ward "UK Government Tackles Wrongly-Blocked Sites" *BBC* (31 January 2014) <<http://www.bbc.co.uk/news/technology-25962555>>.

¹⁶³⁸ Juliette Garside "Internet Filters Blocking one in five Most-Popular Websites" *The Guardian* (2 July 2014) <<http://www.theguardian.com/technology/2014/jul/02/internet-filters-blocking-popular-websites-guido-jezebel>>.

¹⁶³⁹ Ward, above n 1611.

¹⁶⁴⁰ BBC "Q&A: UK Filters on Legal Pornography" *BBC* (22 July 2013) <<http://www.bbc.co.uk/news/technology-23403068>>.

¹⁶⁴¹ BBC, above n 1614.

¹⁶⁴² Reporters without Borders *Internet Enemies* (2009).

¹⁶⁴³ BBC, above n 1614.

¹⁶⁴⁴ The Department of Internal Affairs "Common Questions and Answers" (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Common-Questions>>.

¹⁶⁴⁵ The Department of Internal Affairs "Web Filter Code of Practice Available" (25 August 2009) <<http://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/a765e9d6dd4ecf37cc25761c0083957e!OpenDocument>>.

¹⁶⁴⁶ The Department of Internal Affairs, above n 1437.

The Department is developing a code of practice, which will be publicly available, to provide assurance that only website pages containing images of child sexual abuse will be filtered and the privacy of ISP customers is maintained.

The Code of Practice is an agreement between the Department of Internal Affairs and New Zealand's ISPs.¹⁶⁴⁷ Clause 1 of the Code of Practice contains the purpose of this agreement and states:¹⁶⁴⁸

1. Purpose

1.1 The Digital Child Exploitation Filtering System (DCEFS) will contribute to the international effort to combat the trade in child sexual abuse images. Reducing the market for such images will help ensure that fewer children are abused in support of that market.

1.2 The DCEFS will help reduce the number of New Zealanders who possess, distribute and make child sexual abuse images.

1.3 While the risk of inadvertent exposure to child sexual abuse images is low, the DCEFS will contribute to promoting a safer online environment for the New Zealand public.

This Code of Practice has since been made available¹⁶⁴⁹ for public comment and information about it is available on the Department of Internal Affairs' website.¹⁶⁵⁰ According to the agreement, and in accordance with Clause 3 of the Code of Practice, the Department of Internal Affairs cannot increase the scope of the Filtering System to include anything but child pornography.¹⁶⁵¹ Not only does the Code of Practice provide the public with an assurance that only websites containing

¹⁶⁴⁷ O'Brien, National Manager Censorship Compliance Unit, above n 1494, at 13.

¹⁶⁴⁸ The Department of Internal Affairs, above n 1404.

¹⁶⁴⁹ See The Department of Internal Affairs, above n 1404; The Department of Internal Affairs "Digital Child Exploitation Filtering System Code of Practice May 2012" (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Code-of-Practice-May-2012>>.

¹⁶⁵⁰ The Department of Internal Affairs, above n 1618.

¹⁶⁵¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.

images of child pornography will be filtered, but it also declares that the privacy of ISP customers will be maintained in agreement with Clause 3.4.¹⁶⁵²

As previously specified, the Department of Internal Affairs retains a list of filtered websites which is required under Clause 5 of the Code of Practice.¹⁶⁵³ This list is reviewed monthly to make sure that it is up to date, in accordance with Clause 5.3 of the Code of Practice.¹⁶⁵⁴ Furthermore, this list is comparable to a detailed shopping list for any devoted paedophile, which is why the list is not available to the public.¹⁶⁵⁵ When this type of list has been made accessible to the public in other countries, it has caused major problems for law enforcement agencies.¹⁶⁵⁶ However, the Department of Internal Affairs has received requests under Section 12 of the Official Information Act 1982¹⁶⁵⁷ for the list to be released.¹⁶⁵⁸ Section 12 of the Official Information Act 1982 states:¹⁶⁵⁹

12 Requests

[(1) Any person, being—

(a) A New Zealand citizen; or

(b) A permanent resident of New Zealand; or

(c) A person who is in New Zealand; or

(d) A body corporate which is incorporated in New Zealand; or

(e) A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,— may request a Department or Minister of the

¹⁶⁵² The Department of Internal Affairs “Code of Practice” (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Code-of-Practice>>.

¹⁶⁵³ The Department of Internal Affairs, above n 1619.

¹⁶⁵⁴ The Department of Internal Affairs, above n 1619.

¹⁶⁵⁵ O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 15.

¹⁶⁵⁶ O’Brien, National Manager Censorship Compliance Unit, above n 1494, at 15.

¹⁶⁵⁷ Official Information Act 1982 (NZ).

¹⁶⁵⁸ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 12.

¹⁶⁵⁹ Official Information Act 1982, s 12.

Crown or organisation to make available to him or it any specified official information.]

[(1A) Notwithstanding subsection (1) of this section, a request made, on or after the date of commencement of this subsection, by or on behalf of a natural person for access to any personal information which is about that person shall be deemed to be a request made pursuant to subclause (1)(b) of principle 6 of the Privacy Act 1993, and shall be dealt with accordingly, and nothing in this Part or in Part 5 of this Act shall apply in relation to any such request.]

(2) The official information requested shall be specified with due particularity in the request.

(3) If the person making the request asks that his request be treated as urgent, he shall give his reasons for seeking the information urgently

The Department of Internal Affairs refused to release the list of the banned sites because it has the statutory authority to refrain from doing so under Section 6(c) of the Official Information Act 1982.¹⁶⁶⁰ Section 6 of the Official Information Act 1982 contains a number of reasons that allow the Department of Internal Affairs to withhold information, such as where the release of this information is prejudicial to the maintenance of the law.¹⁶⁶¹

Pursuant to Section 6(c) of the Official Information Act 1982, the Department of Internal Affairs claimed that it had the right to refuse to release the list of banned sites because there is no way to justify that access to this material is in the public interest.¹⁶⁶² This matter then proceeded to the Ombudsman in accordance with Section 18(3) of the Official Information Act 1982.¹⁶⁶³ The Ombudsman visited the Department of Internal Affairs and randomly chose a number of sites to view that

¹⁶⁶⁰ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

¹⁶⁶¹ Official Information Act 1982, s 6.

¹⁶⁶² Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

¹⁶⁶³ Tech Liberty NZ “Internet Filtering FAQ” (21 April 2014)
<<http://techliberty.org.nz/issues/internet-filtering/filtering-faq/>>.

were being blocked by the Filtering System.¹⁶⁶⁴ Upon viewing the blocked sites, the Ombudsman accepted that there was no public interest in the public being able to access this material and subsequently upheld the decision of the Department of Internal Affairs.¹⁶⁶⁵

The Code of Practice is intended to provide transparency and the Department of Internal Affairs considers that continued public support for the Filtering System requires it to be as accessible to the public and their scrutiny as possible.¹⁶⁶⁶ Consequently, the Department of Internal Affairs also agreed that it would implement an Independent Reference Group under Clause 4 of the Code of Practice.¹⁶⁶⁷ This Independent Reference Group would oversee the running of the Filtering System and the Department of Internal Affairs would act on any of its recommendations.¹⁶⁶⁸ The Independent Reference Group has the authority to modify the Code of Practice at any time and this is intended to maintain transparency and public support.¹⁶⁶⁹

1.22.2 Oversight: The Independent Reference Group

The general function of the Independent Reference Group is to ensure that the operation of the Filtering System is conducted with integrity and adheres to the principles set down in the Code of Practice.¹⁶⁷⁰ This Independent Reference Group is intended to maintain public confidence in the Filtering System because of its independence from the Department of Internal Affairs and the transparency of its decisions which are posted¹⁶⁷¹ on the Department's website.¹⁶⁷² The Independent

¹⁶⁶⁴ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

¹⁶⁶⁵ At 7.

¹⁶⁶⁶ The Department of Internal Affairs, above n 1619.

¹⁶⁶⁷ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.

¹⁶⁶⁸ At 13.

¹⁶⁶⁹ At 14.

¹⁶⁷⁰ The Department of Internal Affairs "Independent Reference Group" (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Independent-Reference-Group>>.

¹⁶⁷¹ To view the meeting minutes and briefing documents of the Independent Reference Group see The Department of Internal Affairs, above n 1644.

¹⁶⁷² Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 9.

Reference Group is made up of people from different areas of the Internet industry.¹⁶⁷³ The membership of the Independent Reference Group is representative of Government agencies, ISPs, and community organisations with an interest in the welfare of children.¹⁶⁷⁴ McCully, a former member of the Independent Reference Group, reveals its makeup and purpose in the following statement:¹⁶⁷⁵

There are five members: you have service providers like Telecom, and someone from the Children's Commission, the Family Commission, and an independent technology guy that was quite anti-filtering. So there was a mixed bunch of us and we were like a board. We oversaw the functioning of the filter and made sure that it was only doing what they [the Department of Internal Affairs] said it was doing. We would meet quarterly, and receive reports on how everything is working and what's being blocked.

Although the Independent Reference Group has oversight of the operation of the Filtering System, any ISP could pull out at any stage, as the Filtering System operates on a voluntary basis.¹⁶⁷⁶ As of January 2013 eight ISPs had registered for the Filtering System and it is estimated that they account for over 95 percent of New Zealand's Internet traffic.¹⁶⁷⁷ Steve O'Brien has also confirmed that no ISP has refused to utilise the Filtering System and as of March 2015 over 90 percent of all Internet traffic was filtered.¹⁶⁷⁸

The establishment of the Independent Reference Group as an autonomous organisation to oversee the operation of the Filtering System meets part of the requirements laid out by the Special Rapporteur, Frank La Rue.¹⁶⁷⁹ The Independent Reference Group, as already explained, is made up of members who are

¹⁶⁷³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 14.

¹⁶⁷⁴ The Department of Internal Affairs, above n 1644, at 9.

¹⁶⁷⁵ McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 5.

¹⁶⁷⁶ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 14.

¹⁶⁷⁷ ECPAT Child Alert, above n 1462.

¹⁶⁷⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 17.

¹⁶⁷⁹ La Rue, above n 1031, at [31].

representative of the community.¹⁶⁸⁰ These community stakeholders ensure that the Filtering System has an extra layer of protection to prevent any arbitrary or discriminatory action.¹⁶⁸¹ They therefore form part of the protections which prevent the Filtering System from being abused by the Department of Internal Affairs, and act as an independent regulatory body as required by the Special Rapporteur.¹⁶⁸²

1.22.3 The Appeal Procedure

Clause 6 of the Code of Practice details the appeal process for anyone who believes that the website that they have attempted to access should not be blocked.¹⁶⁸³ As previously explained, when a request is blocked, the user is presented with a landing page that includes information on how the user can appeal the decision to block that website.¹⁶⁸⁴ The user can use the dropdown box on the landing page to forward an appeal to the CCU.¹⁶⁸⁵ The information on the landing page also includes the process for the submission of an appeal and informs the user that their privacy can be maintained by lodging an anonymous appeal.¹⁶⁸⁶

Each appeal has to be considered by an Inspector of Publications who re-examines the website to determine whether it should still be on the filtering list.¹⁶⁸⁷ Each appeal and the resulting action undertaken by the Inspector of Publications must be entered in an appropriate report,¹⁶⁸⁸ which is forwarded to the Independence Reference Group.¹⁶⁸⁹ The Department of Internal Affairs is then required to act on any recommendations made by the Independence Reference Group concerning the report.¹⁶⁹⁰ To date there have been no successful appeals because the Filtering

¹⁶⁸⁰ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 9.

¹⁶⁸¹ La Rue, above n 1031, at [31].

¹⁶⁸² At [31].

¹⁶⁸³ The Department of Internal Affairs, above n 1404, at 6.

¹⁶⁸⁴ At 62.

¹⁶⁸⁵ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 15.

¹⁶⁸⁶ The Department of Internal Affairs, above n 1404, at 64.

¹⁶⁸⁷ At 65.

¹⁶⁸⁸ At 67.

¹⁶⁸⁹ At 68.

¹⁶⁹⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.

System has not blocked any websites that the public should be able to lawfully access.¹⁶⁹¹ Lloyd Bezett details the nature of the appeals and confirms what Steve O'Brien has stated:¹⁶⁹²

We have an appeal process and most of the correspondence that we get from people is abuse for the fact that they have been prevented from accessing material that they have wanted to access.

The appeal process contained within the Department of Internal Affairs' Code of Practice satisfies part of the requirements laid out in the Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/17/27.¹⁶⁹³ The Special Rapporteur required that there be an appeal process and remedy against abusive application of the Filtering System.¹⁶⁹⁴ It is clearly evident that the appeal process contained within the Code of Practice meets this requirement.¹⁶⁹⁵ The fact that a report must also be forwarded to the Independent Reference Group and that the Department of Internal Affairs is obliged to act on any recommendations of the Independent Reference Group is an important aspect of the appeal process.¹⁶⁹⁶ The significance of this aspect is that it can be acknowledged to be a remedy against any abusive application of New Zealand's Filtering System.¹⁶⁹⁷

1.22.4 Transnational Filtering of the Internet

Advocates of filtering software argue that filtering can respond to concerns that regulatory solutions struggle to solve, such as the transnational nature of the Internet.¹⁶⁹⁸ As stated above, the purpose of Internet filtering is to control access to

¹⁶⁹¹ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.

¹⁶⁹² At 10.

¹⁶⁹³ La Rue, above n 1031.

¹⁶⁹⁴ At [31].

¹⁶⁹⁵ At [31].

¹⁶⁹⁶ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.

¹⁶⁹⁷ La Rue, above n 1031, at [31].

¹⁶⁹⁸ Kimberly J Mitchell, David Finkelhor and Janis Wolak "The Exposure Of Youth To Unwanted Sexual Material On The Internet A National Survey of Risk, Impact, and Prevention" (2003) 34 Youth Society 330 at 335.

information that is regarded to be inappropriate or illegal in certain jurisdictions.¹⁶⁹⁹ This type of control software is known to reduce the risk of unwanted exposure of young people to all forms of pornography.¹⁷⁰⁰ Therefore, although Internet filtering is a contentious issue, it is possible to gain a certain degree of acceptance by society.¹⁷⁰¹ Acceptance by the public is necessary to allow States to carry out some measure of regulation of harmful content.¹⁷⁰² This type of harmful content includes child pornography, which is considered to be the most harmful of all content.¹⁷⁰³ Moreover, a number of arguments appear in the debate around Internet filtering.¹⁷⁰⁴ The main argument utilised to support filtering of the Internet is that the public needs to be protected from harmful content.¹⁷⁰⁵ The theory of harm discussed in the first chapter of this thesis established that the regulation of child pornography is justified because it harms society. This argument in favour of filtering demonstrates that others generally agree that child pornography on the Internet is indeed harmful to society.¹⁷⁰⁶

Filtering systems, however, only function at a national level and as a result vary from country to country.¹⁷⁰⁷ In recent years, some countries' law enforcement agencies have worked in co-operation with ISPs to tackle the distribution of child pornography by combining legal and technological regulations.¹⁷⁰⁸ Law

¹⁶⁹⁹ Marie Eneman "Internet Service Provider (ISP) Filtering of Child-abusive Material: A Critical Reflection of its Effectiveness" (2010) 16 *Journal of Sexual Aggression* 223 at 226.

¹⁷⁰⁰ Janis Wolak, Kimberly Mitchell and David Finkelhor "Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users" (2007) 119 *Pediatrics* 247 at 247.

¹⁷⁰¹ See Jonathan Zittrain and John Palfrey "Internet Filtering: The Politics and Mechanisms of Control" in Ronald Deibert and others (eds) *Access Denied: The Practice and Policy of Global Internet Filtering* (The MIT Press, Cambridge, Mass, 2008).

¹⁷⁰² Eneman, above n 1673, at 227.

¹⁷⁰³ Andrew Murray *The Regulation of Cyberspace* (Routledge-Cavendish, New York, 2006) at 213.

¹⁷⁰⁴ See Stuart Hamilton "To What Extent can Libraries Ensure Free, Equal and Unhampered Access to Internet-accessible Information Resources from a Global Perspective?" (PhD Thesis, Royal School of Library and Information Science, Copenhagen, 2004) at ch 5; David Wall *Cybercrime* (Polity, Cambridge, 2007) at ch 6.

¹⁷⁰⁵ Hamilton, above n 1678, at ch 5; Wall, above n 1678, at ch 6.

¹⁷⁰⁶ See Eneman, above n 1673; Murray, above n 1677; Carr and Hilton, above n 1399; M Eneman "A Critical Study of ISP Filtering of Child Pornography" (paper presented to European Conference on Information Systems, 2006).

¹⁷⁰⁷ Carr and Hilton, above n 1399, at 68.

¹⁷⁰⁸ Eneman, above n 1673, at 223.

enforcement agencies are encouraged to establish links with ISPs¹⁷⁰⁹ as ISPs are crucial partners for the Police.¹⁷¹⁰ Co-operation can reduce the difficulty of issues such as the absence of specific legislation setting out the obligations of ISPs.¹⁷¹¹ This type of issue emphasises the importance for law enforcement agencies to establish good working relations with ISPs and to elicit their co-operation in the fight against child pornography on the Internet.¹⁷¹²

In Sweden, filtering of the Internet is based upon co-operation between the Police and the country's ISPs.¹⁷¹³ The Swedish model is similar to New Zealand's as it is based upon a voluntary partnership between law enforcement agencies and the Internet industry.¹⁷¹⁴ Filtering software is used by the Swedish Police and ISPs to block access to blacklisted websites.¹⁷¹⁵ Nevertheless, unlike New Zealand, there are unresolved concerns regarding the transparency of the Swedish model of filtering, as the list of blocked websites is not evaluated by a third party.¹⁷¹⁶ Complications can arise when a Swedish ISP blocks access to a website containing child pornography and the server hosting this content is in another jurisdiction with different legislation regarding child pornography.¹⁷¹⁷ This demanding issue draws attention to the requirement for national and international coordination to improve the effectiveness of Internet filtering, as a measure to control and prevent accessing of child pornography.¹⁷¹⁸

¹⁷⁰⁹ Richard Wortley and Stephen Smallbone "Child Pornography on the Internet Guide No41" (11 July 2014) Center for Problem-Oriented Policing, State University of New York <http://www.popcenter.org/problems/child_pornography/print/> at 4.

¹⁷¹⁰ At 4.

¹⁷¹¹ See Akdeniz, above n 148, at pt 3.

¹⁷¹² Wortley and Smallbone, above n 1683, at 4.

¹⁷¹³ Eneman, above n 1673, at 224.

¹⁷¹⁴ At 233.

¹⁷¹⁵ At 224.

¹⁷¹⁶ At 233.

¹⁷¹⁷ At 232.

¹⁷¹⁸ At 232.

1.23 Recommendations

1.23.1 The Encouragement of Filtering in other Jurisdictions

The implementation and employment of New Zealand's Filtering System should act as a model for the introduction of similar filtering initiatives in other jurisdictions.¹⁷¹⁹ The completely voluntary and collaborative approach to the implementation of the filtering software between the Department of Internal Affairs and the Internet Industry has ensured that the Filtering System has not become a political football for politicians looking to win votes.¹⁷²⁰ New Zealand's Filtering System is simply designed to prevent the public from accessing¹⁷²¹ harmful content which often results in direct harm being perpetrated on children.¹⁷²² Moreover, the operation of the Filtering System has demonstrated and confirmed that the public, the Internet industry, and law enforcement agencies can *willingly* unite in the fight against child pornography.¹⁷²³ The international fight against the dissemination of child pornography over the Internet needs to be conducted in a unified and coordinated manner due to the international nature of the medium.¹⁷²⁴

It is therefore argued that New Zealand's Filtering System should be utilised as a template to encourage more countries to adopt filtering as a way to, firstly, protect their citizens and secondly, reduce the number of children being abused by child pornographers.¹⁷²⁵ The more countries encouraged to adopt a method of self-regulation, the smaller the market for child pornography will become, and the

¹⁷¹⁹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.

¹⁷²⁰ For a discussion on the pitfalls of implementing a mandatory filtering system, see Jenny Kortlander "Is Filtering the New Silver Bullet in the Fight Against Child Pornography on the Internet? A Legal Study into the Experiences of Australia and Germany" (2011) 17 *Computer and Telecommunications Law Review* 199.

¹⁷²¹ Carr and Hilton, above n 1399, at 68.

¹⁷²² At 68.

¹⁷²³ This is a significant step in the right direction as generally the level of engagement between law enforcement agencies, the public and the commercial sector is at best limited, and also restricted by legislation.

¹⁷²⁴ Interview with Philp Hamlin, Barrister and former Crown Prosecutor, New Zealand (25 June 2014) at 9.

¹⁷²⁵ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.

harder it will be for criminal organisations to feed off the misery of the young victims of the international trade of child pornography over the Internet.¹⁷²⁶ It is further contended that New Zealand must become more proactive when it takes part in global Internet conferences and should openly encourage other countries to take up a similar type of filtering to New Zealand.¹⁷²⁷ The importance of these recommendations is that they afford greater protection to children and the community by promoting awareness of the dangers associated with child pornography.¹⁷²⁸

1.24 Overall Conclusion for Chapter 4

Law enforcement personnel insist that filtering of the Internet is a significant aspect of law enforcement agencies' strategy to counter the availability of child pornography on the Internet to users.¹⁷²⁹ New Zealand's approach to filtering Internet content is functioning as intended.¹⁷³⁰ The Department of Internal Affairs' Filtering System is not intended to prevent access to all child pornography as this is simply technologically unfeasible.¹⁷³¹ It does, however, stop the public from accidentally accessing websites known to harbour child pornography.¹⁷³² The Filtering System also prevents those people curious about child pornography¹⁷³³ from allowing their curiosity to draw them into committing a criminal offence by downloading and viewing child pornography.¹⁷³⁴ Most importantly of all, by limiting consumers to the knowledgeable and determined, the Filtering System

¹⁷²⁶ Akdeniz, above n 148, at ch 9.

¹⁷²⁷ Interview with Lee Chisholm, Operations Manager, NetSafe, New Zealand (1 April) at 6.

¹⁷²⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 18.

¹⁷²⁹ At 5.

¹⁷³⁰ The simple fact that the Filtering System has blocked over 27 million attempts to access child pornography is a clear indication that it is operating as intended.

¹⁷³¹ Rashid and others, above n 1398, at 230–232.

¹⁷³² McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 4.

¹⁷³³ Carr and Hilton, above n 1399, at 68.

¹⁷³⁴ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 16.

reduces the commercial market for child pornography,¹⁷³⁵ which results in fewer children in New Zealand and overseas being sexually abused.¹⁷³⁶

The voluntary nature of the Filtering System means that there is a cohesive and coordinated approach to filtering between the Department of Internal Affairs and the Internet industry.¹⁷³⁷ This approach also has numerous safeguards against scope creep to filter other kinds of material, thus assisting to legitimise the use of this software and protecting the right to freedom of expression which is critically important in a democratic democracy such as New Zealand.¹⁷³⁸ Moreover, New Zealand's Filtering System meets all of the requirements set out by Special Rapporteur Frank La Rue, which further supports the argument that it is both valid and justifiable.¹⁷³⁹

¹⁷³⁵ Carr and Hilton, above n 1399, at 68.

¹⁷³⁶ At 69.

¹⁷³⁷ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 12; Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

¹⁷³⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13; Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 8; Dunne, Minister of The Department of Internal Affairs of New Zealand, above n 1458, at 3.

¹⁷³⁹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13; Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 8; Dunne, Minister of The Department of Internal Affairs of New Zealand, above n 1458, at 3.

Chapter 5

Crimes and Law Enforcement

1.25 Overall Introduction

The classification process and the Filtering System discussed in the previous chapters are critical aspects of New Zealand's overall response to the downloading of child pornography from the Internet. These components of New Zealand's classification system operate in conjunction with law enforcement agencies ability to arrest and prosecute both suppliers and users of this offensive material. Chapter 5 investigates the prosecution provisions of New Zealand's classification legislation with particular reference to child pornography. This chapter will analyse the elements of the existing offences created by the Films, Videos and Publications Classification Act 1993¹⁷⁴⁰ and will provide an overview of the processes that relate to the investigation, apprehension and prosecution of child pornography offenders. It also examines these processes and prosecution provisions to determine whether they advance the notion of children's rights. Chapter 5 will also scrutinise the new Objectionable Publications and Indecency Legislation Bill 2013¹⁷⁴¹ and its amended offences to determine their efficacy for investigations conducted by law enforcement agencies. This chapter then draws attention to areas of concern and offers recommendations that are intended to provide law enforcement agencies with the ability to address these concerns.

1.26 The Optional Protocol and Prosecuting Child Pornography Offences

As already noted, the outlawing and prosecution of all child pornography offending should be guided by the provisions of the Optional Protocol as they are critical to safeguarding children's rights.¹⁷⁴² This internationally recognised instrument has been specially introduced to counter concerns regarding the dissemination of child

¹⁷⁴⁰ Films, Videos, and Publications Classification Act 1993.

¹⁷⁴¹ Objectionable Publications and Indecency Legislation Bill 2013 (124-1).

¹⁷⁴² Santos Pais, above n 650, at 559.

pornography on the Internet. Therefore, the significance of this assertion is that the instrument provides an ideal platform to re-energise international efforts to counter child pornography by reducing the inconsistencies between international standards and responding to the reality confronting law enforcement agencies on the ground.¹⁷⁴³ The Optional Protocol obliges States to criminalise all interaction with child pornography¹⁷⁴⁴ and also to punish those who are found to be in possession of this content.¹⁷⁴⁵ Article 3(3) of the Optional Protocol requires the Government to appropriately prosecute any individual who participates in or is complicit with any content offending.¹⁷⁴⁶ The Optional Protocol also places an obligation on the State to implement legislation to allow law enforcement agencies to seize all equipment used to disseminate child pornography.¹⁷⁴⁷ Moreover, Article 4(3) also obliges the Government to provide its Courts with sufficient jurisdiction to prosecute an offender when they have committed a child pornography offence overseas.¹⁷⁴⁸ This provision operates in conjunction with Article 5 which necessitates that the Government must provide the legal basis for the extraction of an offender when formally requested by another State.¹⁷⁴⁹

1.27 The Prosecution of an Offender by New Zealand's Law Enforcement Agencies

1.27.1 Introduction

This section will explore New Zealand's prosecution provisions and the procedures associated with investigating child pornography offending. It provides an overview of the law enforcement agencies tasked with investigating content offending and

¹⁷⁴³ At 559.

¹⁷⁴⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 3(1).

¹⁷⁴⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(1)(c).

¹⁷⁴⁶ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(3).

¹⁷⁴⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 7.

¹⁷⁴⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 4(3).

¹⁷⁴⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 art 5(2).

also highlights the reality of online investigations. This section then explores to what extent these responses are informed by children's rights and whether they are adequate to counter the dissemination of child pornography through the Internet.

1.27.2 New Zealand's Prosecution Provisions

In New Zealand, once a person has been found to be in possession of objectionable material sourced from the Internet, the offender is charged and prosecuted under one of the following provisions of the Films, Videos, and Publications Classification Act 1993 ('Classification Act 1993' or 'Act').¹⁷⁵⁰ The importance of these provisions to this thesis is that they play the same critical role as the procedural provisions within the Classification Act 1993. However, a point of contention was raised by a fellow student which does require a response. This student questioned why New Zealand's child pornography provisions were contained within the Classification Act 1993 and not the Crimes Act 1961.¹⁷⁵¹ The question was posed to Dr Andrew Jack, the Chief Censor of the Classification Office. Dr Jack responded that the offending within the Classification Act 1993 concerns the publication itself and does not directly relate to physical offending like the Crimes Act 1961.¹⁷⁵² The Classification Act 1993 concerns the depiction of child pornographic material which is separate from physical offending.¹⁷⁵³ These provisions enable law enforcement agencies to prosecute offenders and thus respond to the vulnerability of children and reduce the harm caused by child pornography offending all over the world.¹⁷⁵⁴

¹⁷⁵⁰ See the offence provisions in the Films, Videos, and Publications Classification Act 1993 pt 8.

¹⁷⁵¹ Crimes Act 1961 (NZ).

¹⁷⁵² Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 3.

¹⁷⁵³ At 3.

¹⁷⁵⁴ At 3.

1.27.3 Section 123

Subsections (1)¹⁷⁵⁵ and (3) of Section 123 of the Classification Act 1993 define offences of strict liability,¹⁷⁵⁶ which are directed towards commercial dealing in objectionable material.¹⁷⁵⁷ This strict liability covers offences relating to the making,¹⁷⁵⁸ supplying¹⁷⁵⁹ or distributing¹⁷⁶⁰ of an objectionable publication under Section 123(1).¹⁷⁶¹ This is *regardless* of whether the defendant had any knowledge or any reasonable cause to believe that the publication to which the charge relates was objectionable pursuant to Section 123(3).¹⁷⁶² This Section states:¹⁷⁶³

123 Offences of strict liability relating to objectionable publications

(1) Every person commits an offence against this Act who—

(a) Makes an objectionable publication; or

(b) Makes a copy of an objectionable publication for the purposes of supply, distribution, display, or exhibition to any other person; or

[(c) imports into New Zealand an objectionable publication for the purposes of supply or distribution to any other person; or]

[(d) supplies or distributes (including in either case by way of exportation from New Zealand) an objectionable publication to any other person; or]

¹⁷⁵⁵ Section 123(1)(c) as amended by s 26 of the Amendment Act 2005 contains a list of six specific offences that are specified as strict liability offences under the Films, Videos, and Publications Classification Act 1993 (NZ).

¹⁷⁵⁶ Other strict liability offences can be found in Sections 125, 126, 127, 130 and 131 of the Films, Videos, and Publications Classification Act 1993.

¹⁷⁵⁷ Harvey, above n 922, at 305.

¹⁷⁵⁸ For an example of what constitutes the making or copying of an objectionable publication, refer to *Kellet v Police* (2005) 21 CRNZ 743 (NZ HC) at [18, 19].

¹⁷⁵⁹ ‘Supply’ means to sell, or deliver by way of hire, or offer for sale or hire, as stated by s 2 of the Films, Videos, and Publications Classification Act 1993.

¹⁷⁶⁰ ‘Distribution’ is defined in s 123(1)(b) of the Films, Videos, and Publications Classification Act 1993. For a further discussion on distribution, refer to *Espinosa v Department of Internal Affairs* High Court Auckland CRI 2008–404–233, 7 October 2008.

¹⁷⁶¹ *R v Spark*, above n 961, at [15].

¹⁷⁶² At [15].

¹⁷⁶³ Films, Videos, and Publications Classification Act 1993, s 123.

[(e) has in that person's possession, for the purposes of supply or distribution to any other person, an objectionable publication; or]

[(f) in expectation of payment or otherwise for gain, or by way of advertisement, displays or exhibits an objectionable publication to any other person.]

[(2) Every person who commits an offence against subsection (1) is liable,—

(a) in the case of an individual, to a fine not exceeding \$10,000:

(b) in the case of a body corporate, to a fine not exceeding \$30,000.]

(3) It shall be no defence to a charge under subsection (1) of this section that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable.

(4) Without limiting the generality of this section, a publication may be—

[(a) supplied (within the meaning of that term in section 2) for the purposes of any of paragraphs (b) to (e) of subsection (1); or]

[(b) distributed (within the meaning of that term in section 122) for the purposes of any of paragraphs (b) to (e) of subsection (1); or]

[(c) imported into New Zealand for the purposes of paragraph (c) of subsection (1),—]

not only in a physical form but also by means of the electronic transmission (whether by way of facsimile transmission, electronic mail, or other similar means of communication, other than by broadcasting) of the contents of the publication.

1.27.3.1 The Different forms of *Actus Reus* within Section 123

1.27.3.1.1 Making an Objectionable Publication

Section 123(1)(a) of the Act establishes that it is an offence to make an objectionable publication.¹⁷⁶⁴ The *actus reus* of this offence was clarified by the

¹⁷⁶⁴ Films, Videos, and Publications Classification Act 1993, s 123(1)(a).

High Court in *Kellet v Police*.¹⁷⁶⁵ The Court held that there must be some form of editorial involvement which goes beyond merely the copying of the image to fulfil the requirement in terms of a ‘making’ charge under the Act.¹⁷⁶⁶ The Court of Appeal in *R v Spark* subsequently agreed with the High Court.¹⁷⁶⁷ Steve O’Brien of the CCU also acknowledges that in order for an offender to be charged with making an objectionable publication, the offender has to have added some creative element to an existing image.¹⁷⁶⁸ This creative element could include the renaming and altering of the images to suit the offender’s personal preferences.¹⁷⁶⁹ The other more obvious example of when an offender would be charged for making an objectionable publication is when they are utilising a camera to produce objectionable images of a child.¹⁷⁷⁰

1.27.3.1.2 Supplying or Distributing an Objectionable Publication

Section 123(1)(b) of the Act contains the prohibition against supplying or distributing an objectionable publication.¹⁷⁷¹ O’Brien reveals that the *actus reus* of supplying is met when an offender makes available to another person an objectionable publication for gain.¹⁷⁷² Furthermore, the element of distributing requires the offender to make the objectionable publication available to other individuals on the Internet.¹⁷⁷³ The High Court case of *Shaw v Department of Internal Affairs*¹⁷⁷⁴ held that the *actus reus* of making available to another person is met where the user is aware that material is being accessed from their computer by other Internet users.¹⁷⁷⁵

¹⁷⁶⁵ *Kellet v Police*, above n 1732.

¹⁷⁶⁶ At [18–19].

¹⁷⁶⁷ *R v Spark*, above n 961, at [36].

¹⁷⁶⁸ O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 24.

¹⁷⁶⁹ At 24.

¹⁷⁷⁰ At 24.

¹⁷⁷¹ Films, Videos, and Publications Classification Act 1993 s 123(1)(b).

¹⁷⁷² O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 25.

¹⁷⁷³ At 25.

¹⁷⁷⁴ *Shaw v DIA*, above n 268.

¹⁷⁷⁵ At [6].

1.27.3.1.3 Importing an Objectionable Publication

Section 123(1)(c) establishes the offence of importing an objectionable publication into New Zealand.¹⁷⁷⁶ Section 2 of the Customs Excise Act 1996 defines importation as ‘the arrival of the goods into the country from any point outside New Zealand’.¹⁷⁷⁷ The District Court case of *New Zealand Customs Service v Yang*¹⁷⁷⁸ demonstrates that entering New Zealand with an objectionable publication from China amounts to importing an objectionable publication.¹⁷⁷⁹ As a result, the *actus reus* of this offence is the transporting of an objectionable publication into New Zealand.¹⁷⁸⁰

1.27.3.1.4 Possession of an Objectionable Publication

Section 123(1)(e) of the Act creates the offence of possessing an objectionable publication.¹⁷⁸¹ This provision of the Act was considered in the District Court of *Department of Internal Affairs v Young*¹⁷⁸² where it was confirmed that an offender is in possession of an objectionable publication when they deliberately access this material on the Internet and have control of it.¹⁷⁸³ O’Brien also explains that the CCU must demonstrate to the Court that the offender knew they were viewing objectionable content and the offender had control over it.¹⁷⁸⁴ Therefore, the *actus reus* of this provision would be achieved by viewing objectionable content that has been intentionally Google searched.¹⁷⁸⁵

¹⁷⁷⁶ Films, Videos, and Publications Classification Act 1993, s 123(1)(c).

¹⁷⁷⁷ Customs Excise Act 1996 (NZ), s 2.

¹⁷⁷⁸ *New Zealand Customs Service v Yang* District Court, Auckland CRI-2006–092–7202, 28 August 2007.

¹⁷⁷⁹ At [5].

¹⁷⁸⁰ At [5].

¹⁷⁸¹ Films, Videos, and Publications Classification Act 1993, s 123(1)(e).

¹⁷⁸² *Department of Internal Affairs v Young*, above n 118.

¹⁷⁸³ At [13].

¹⁷⁸⁴ O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 24.

¹⁷⁸⁵ At 24.

1.27.3.1.5 Displaying or Exhibiting an Objectionable Publication

Section 123(1)(f) of the Act contains the prohibition against displaying or exhibiting an objectionable publication.¹⁷⁸⁶ Section 2 of the Act defines exhibiting as ‘organising the screening of a film to the public’.¹⁷⁸⁷ O’Brien indicates that an offender will be charged under this provision when they are found to have displayed or exhibited objectionable content to the public on a website.¹⁷⁸⁸ The High Court in *Batty v Choven*¹⁷⁸⁹ held that the action of placing images on a website constitutes displaying objectionable content.¹⁷⁹⁰ Accordingly, the *actus reus* of this provision is the act of presenting objectionable content to the public on a website.¹⁷⁹¹

It is the intention of Parliament that the inclusion of this provision within the Classification Act 1993 will send a clear signal that it is not acceptable to possess objectionable material.¹⁷⁹² Furthermore, where a person is found with this type of material there will be serious legal repercussions.¹⁷⁹³ The overall purpose of this provision is to clarify and tighten New Zealand’s legislation.¹⁷⁹⁴ Section 123 ensures that where there was previously no sanction for the possession of an objectionable publication in New Zealand’s legislation, the inclusion of this provision within the Classification Act 1993 clearly creates an undeniable criminal offence.¹⁷⁹⁵

1.27.3.2 Strict Liability

In the legal sense, a strict liability offence is where the motives or consequences of an offence are irrelevant matters.¹⁷⁹⁶ Therefore, there can be no defence in terms of

¹⁷⁸⁶ Films, Videos, and Publications Classification Act 1993, s 123(1)(f).

¹⁷⁸⁷ Films, Videos, and Publications Classification Act 1993, s 2.

¹⁷⁸⁸ O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 25.

¹⁷⁸⁹ *Batty v Choven* HC, Auckland CRI-2005–404–313, 11 December 2005.

¹⁷⁹⁰ At [31].

¹⁷⁹¹ At [33].

¹⁷⁹² Hansard, above n 907, at 17498.

¹⁷⁹³ At 17498.

¹⁷⁹⁴ At 17497.

¹⁷⁹⁵ At 17497.

¹⁷⁹⁶ Stan Cohen “Downloading Evil” (2007) 36 Index on Censorship 111 at 112.

good intentions and the prosecution does not have to prove actual harm or increased risk of harm.¹⁷⁹⁷ This analysis of the strict liability provisions within the Act is confirmed in *Department of Internal Affairs v Young* where it was held by the District Court that:¹⁷⁹⁸

It is s 124 of the Act which establishes the more serious imprisonable offence of offending against s 123 with knowledge or having reasonable cause to believe that a publication is objectionable. Offences against s 123 are offences of strict liability, that is to say, it is no defence to any such charge that a defendant had no knowledge or reasonable cause to believe that the publication to which the charge relates was objectionable.

This particular provision within the Act has been implemented by Parliament to deal with all commercial avenues of supplying child pornography.¹⁷⁹⁹ Commercial child pornographers do not necessarily intend their viewers to be or become child abusers.¹⁸⁰⁰ Hardened pornographers only want the audience to be stimulated enough to purchase or provide access to additional child pornography.¹⁸⁰¹ Consequently, these child pornographers are not concerned about other possible outcomes and their only intention is to operate without restrictions, so as to make large profits in a largely unregulated market.¹⁸⁰²

Nevertheless, the issue of strict liability has been the subject of some debate.¹⁸⁰³ The main issue in this debate is whether or not a lack of knowledge of a browser's cache¹⁸⁰⁴ *should* amount to an excuse that would justify a prosecution.¹⁸⁰⁵ Although there is no doubt that under the present legislation this is an offence and would

¹⁷⁹⁷ At 112.

¹⁷⁹⁸ *Department of Internal Affairs v Young*, above n 118, at [8].

¹⁷⁹⁹ Hansard, above n 5, at 18429.

¹⁸⁰⁰ Cohen, above n 1770, at 112.

¹⁸⁰¹ At 112.

¹⁸⁰² At 112.

¹⁸⁰³ Harvey, above n 922, at 304–311.

¹⁸⁰⁴ When an Internet user surfs the Internet, their computer automatically downloads and stores the images viewed directly to the cache of the Internet browser on the computer's hard drive. These images are burnt into the hard drive and are therefore retrievable when a forensic examination is conducted by a law enforcement agency.

¹⁸⁰⁵ Harvey, above n 922, at 305.

result in a prosecution under Section 123 of the Act,¹⁸⁰⁶ objections have been voiced to this provision. The former Green Party Minister, Keith Locke expressed his concerns about the strict liability provision being applied in the Internet age.¹⁸⁰⁷ The Minister indicated that:¹⁸⁰⁸

In this bill, for more serious convictions for possession the prosecution has to prove the possessor had knowledge of the material. But in several places in the legislation there is what is called a strict liability regime or absolute liability regime for possession, where people cannot use a defence that they did not know what was in the email or attachment. If they did find out what the material was once they opened it up and then deleted it they may still get done, because forensic tests can check out what was on their system prior to deletion. The absolute liability regime for possession might have been OK pre the internet when dealing with picture books, and videos, because it was hard to buy a picture book without knowing pretty much what is in it.

However, these comments made by the former Minister have not been endorsed by the New Zealand Courts¹⁸⁰⁹ or the National Manager of the CCU, Steve O'Brien.¹⁸¹⁰ O'Brien reveals that a prosecution would only be undertaken when it could be determined that the offender has dedicated themselves to this type of offending, and not when a person was unaware that what they were accessing was objectionable.¹⁸¹¹ O'Brien states:¹⁸¹²

We would only undertake a prosecution if we could show that a person was a dedicated offender and not just browsing the Internet and coming across this material almost by mishap as opposed to a dedicated path. So the onus is on us to show that this individual hasn't downloaded anything but he keeps going back to this one site and he spends several hours on this site at a time. This would show that he has a dedicated path to what he wants.

¹⁸⁰⁶ Films, Videos, and Publications Classification Act 1993 s 123.

¹⁸⁰⁷ Hansard, above n 5, at 18439.

¹⁸⁰⁸ At 18439.

¹⁸⁰⁹ See *Department of Internal Affairs v Young*, above n 118.

¹⁸¹⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.

¹⁸¹¹ At 5.

¹⁸¹² At 5.

The description of a Section 123 offence as one of strict liability suggests it is of the category considered in *Civil Aviation Department v MacKenzie*¹⁸¹³ so that a total absence of fault may constitute a defence¹⁸¹⁴ to the charge.¹⁸¹⁵ However, what in fact the law and Court of Appeal appear to have had in mind is absolute liability as defined in the more recent case of *Millar v Ministry of Transport*.¹⁸¹⁶ The Court of Appeal in *Miller* held that absolute liability has no *mens rea* component and, therefore, it is impossible to escape liability by way of one's mental state.¹⁸¹⁷ Furthermore, it is odd that Section 123 is intended to contain strict liability provisions when Section 123(3) expressly forbids people from raising a defence of reasonable mistake.¹⁸¹⁸ Professor of Law Jeremy Finn considers that Subsection 123(3) is intended to ensure that the defendant cannot rely on a mistake of law, given that the classification of a publication is a question of law.¹⁸¹⁹ If this is so, Section 123 can be referred to as an offence of strict liability as it places the burden of proof on the defendant.¹⁸²⁰ Nevertheless, Professor Finn also finds it difficult to ascertain how a lack of fault can be demonstrated in relation to the different forms of the offence.¹⁸²¹

The description of a strict liability offence by the Court of Appeal in *Civil Aviation Department* indicates that where an offender has made a reasonable mistake and acted with all due diligence to avoid the commission of an offence there can be no liability for an offence under Section 123.¹⁸²² Moreover, the prosecution is under no obligation to prove the *mens rea* of an offence under Section 123¹⁸²³ as confirmed by the Court of Appeal in *Millar v Ministry of Transport*.¹⁸²⁴ It was also

¹⁸¹³ *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (NZ Court of Appeal).

¹⁸¹⁴ The exceptions available to a defendant for offences set out in s 123 of the Act are contained within the Films, Videos, and Publications Classification Act 1993 s 124A.

¹⁸¹⁵ *Shaw v DIA*, above n 268, at [14].

¹⁸¹⁶ *Millar v Ministry of Transport* (1986) 1 NZLR 660 (NZ CA).

¹⁸¹⁷ At 11.

¹⁸¹⁸ Films, Videos, and Publications Classification Act 1993, s 123(3).

¹⁸¹⁹ Email from Jeremy Finn (Professor of Law, University of Canterbury) "Section 123 - Strict Liability or Absolute Liability" (1 September 2014).

¹⁸²⁰ Finn, Professor of Law, University of Canterbury, above n 1793.

¹⁸²¹ Finn, Professor of Law, University of Canterbury, above n 1793.

¹⁸²² *Civil Aviation Department v MacKenzie*, above n 1787, at 85.

¹⁸²³ *Millar v Ministry of Transport*, above n 1790, at 669.

¹⁸²⁴ *Millar v Ministry of Transport*, above n 1790.

held in *Millar* that the *mens rea* element of a strict liability offence can be assumed in the absence of evidence suggesting otherwise.¹⁸²⁵ However, the burden of establishing absence of fault rests with the defendant¹⁸²⁶ and the Section suggests that even proving absence of fault on reasonable grounds would not be a defence. These points of law were recognised by the Court of Appeal and acknowledged within Justice Richardson's judgement in the *Civil Aviation Department* case. The following extract from this judgement clarifies the Court's ruling on these points of law:¹⁸²⁷

Courts must be able to accord sufficient weight to the promotion of public health and safety without at the same time snaring the diligent and socially responsible. The principle of English criminal law that the burden of proof of a requisite mental state rests on the prosecution is not whittled down where in matters of public welfare regulation in an increasingly complex society the defence of due diligence is allowed because it is recognised that the price of absolute liability is too high. Second, as was emphasised in *Sault Ste Marie*, the defendant will ordinarily know far better than the prosecution how the breach occurred and what he had done to avoid it. In so far as the emphasis in public welfare regulations is on the protection of the interests of society as a whole, it is not unreasonable to require a defendant to bear the burden of proving that the breach occurred without fault on his part.

1.27.3.3 Extending the Scope of Trading and Commercial dealing in Child Pornography

Section 26 of the Amendment Act 2005 has extended the scope of trading and commercial offending within the Act.¹⁸²⁸ These components have been intentionally amplified to include the distribution or giving of an objectionable publication to another person without any requirement for financial gain.¹⁸²⁹ The expansion of the concepts of supply and distribution has been implemented in

¹⁸²⁵ At 669.

¹⁸²⁶ *Shaw v DIA*, above n 268, at [14].

¹⁸²⁷ *Civil Aviation Department v MacKenzie*, above n 1787, at 85.

¹⁸²⁸ Refer to the Films, Videos, and Publications Classification Act 1993 s 123(1)(f). This provision has been inserted by the Films, Videos, and Publications Classification Amendment Act 2005 s 26.

¹⁸²⁹ John McSoriley *Films, Videos, and Publications Classification Amendment Bill 2003 - Bills Digest No 1054* (2003) at 2.

accordance with policy directives from the Ministry of Justice.¹⁸³⁰ These directives are intended to ensure that the absence of any commercial incentive does not result in such offending being relegated to the much less serious category of criminal offending.¹⁸³¹ Moreover, an undeniable signal of the Government's determination to criminalise all avenues of dealing commercially in child pornography can be ascertained in the following statement by the then Minister of Justice Phil Goff. The Minister of Justice specified in Parliament that:¹⁸³²

Under the bill, [as the then Amendment Act 2005 was then known as] the offence of distributing an objectionable publication will encompass all the different ways in which offenders arrange to share, exchange, and access material on the Internet. It will include distribution, such as peer –to-peer sharing, as well as commercial transactions. People who provide access to objectionable material, either by actively sending material to another person or by allowing their computers to be used as virtual libraries, will be caught by the Act's new offence provisions.

This has been achieved by expanding the meaning of *distribution* so that in relation to a publication, the term means not only delivering, giving or offering the publication but also providing access to the publication.¹⁸³³ The expansion of the meaning of distribution is designed to confirm that the commercial element of Section 123 now recognises gain of any kind.¹⁸³⁴ As a result, providing access to objectionable material constitutes gain within the meaning of Section 123 of the Act.¹⁸³⁵ Section 123(3) of the Act, as inserted by Section 26 of the Amendment Act 2005, contains the penalties applicable for offences under Section 123.¹⁸³⁶ Every person who commits an offence against Section 123(1) is liable, in the case of an

¹⁸³⁰ Ross Carter *Films, Videos, and Publications Classification Amendment Bill* (PCO 5406/13 2003) at 1.

¹⁸³¹ At 4.

¹⁸³² Hansard, above n 5, at 18429.

¹⁸³³ McSoriley, above n 1803, at 2.

¹⁸³⁴ *Shaw v DIA*, above n 268, at [7].

¹⁸³⁵ At [7].

¹⁸³⁶ Films, Videos, and Publications Classification Act 1993 s 123(3).

individual, to a fine not exceeding \$10,000¹⁸³⁷ and, in the case of a body corporate, to a fine not exceeding \$30,000.¹⁸³⁸

The Amendment to the commercial component of Section 123 is in recognition of the fact that a monetary element is not always a central aspect in Internet related offending.¹⁸³⁹ Justice Mackenzie clarifies this point and gives judicial recognition to the intent of Parliament in *Shaw v Department of Internal Affairs*.¹⁸⁴⁰ Justice Mackenzie held that:¹⁸⁴¹

No actual gain need be proved. The requirement of the section is that the making available of the material be in expectation of payment or of some other gain. It does not require proof of actual gain, or of the quantum of the expected gain.

With child pornography in particular, there is much personal trading and gain in the form of accessing new material from Peer-to-Peer networks.¹⁸⁴² When this characteristic of child pornography offending is taken into consideration it is clear that the intention of Section 26 of the Amendment Act 2005 is to outlaw all avenues of supply. This prohibition includes making material available to other users of peer-to-peer applications in the expectation of gaining access to like-minded individuals' collections of child pornography.¹⁸⁴³

1.27.3.4 The Significance of Section 123

The strict liability provisions within Section 123 of the Classification Act 1993 are significant as they function well in terms of securing prosecutions for distributing child pornography.¹⁸⁴⁴ The importance of the successful prosecutions is that they reduce the potential risk of harm, not only to New Zealand's children, but also children around the world. Moreover, the favoured means to disseminate child

¹⁸³⁷ Films, Videos, and Publications Classification Act 1993, s 123(2)(a).

¹⁸³⁸ Films, Videos, and Publications Classification Act 1993, s 123(2)(b).

¹⁸³⁹ McSoriley, above n 1803, at 2.

¹⁸⁴⁰ *Shaw v DIA*, above n 268.

¹⁸⁴¹ At [11].

¹⁸⁴² McSoriley, above n 1803, at 2.

¹⁸⁴³ *Shaw v DIA*, above n 268, at [5,6,7].

¹⁸⁴⁴ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 4.

pornography over the Internet by offenders varies considerably.¹⁸⁴⁵ This issue is recognised and addressed by the expansion of the meaning of distribution within Section 123. This increase in what constitutes supply assists law enforcement agencies to keep pace with the continually evolving nature of the online environment. An indication of the continual evolution of online child pornography offending can be seen in the following comments of O'Brien:¹⁸⁴⁶

When we first started (the CCU) back in 94–95 it was the Computer Bulletin Boards that were being used at that time. Then they graduated to things like Internet Relay Chat and that was the favoured mechanism for a number of years. At that same time, Newsgroups were very popular and then Peer-to-Peer came along. Naturally, a lot of the advances of the Internet have been triggered by the advancement of different forms of pornography.

With Peer-to-Peer they were able to move large amounts of information in a very quick time. When we first started, individual images were very precious to an offender. Sometimes it would take half the night to download a few images so they were very precious. That trend is long gone now, due to how quick it is to do bulk downloads. The different social platforms now are very popular, Google, Yahoo, having an actual forum where they can move material and basically talk to each other. GigaDrive is very popular and anywhere they feel safe to move vast amounts of material and talk to like-minded people is going to be popular with these types of individuals. They want to be able to talk to like-minded people who share a similar interest.

Furthermore, where an offender has been found to be dealing in this material with thousands of images, the strict liability provisions within Section 123 signify that there can be no valid excuse for possessing such material.¹⁸⁴⁷ As previously explained, it is the intentional searching for and collecting of child pornography that

¹⁸⁴⁵ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 1.

¹⁸⁴⁶ At 1.

¹⁸⁴⁷ At 8.

drives the market for new material and this results in more children being harmed to meet this same demand.¹⁸⁴⁸

New Zealand's Inspectors of Publications also have the capability to exercise discretion when considering whether or not to prosecute a potential offender.¹⁸⁴⁹ This discretion can be perceived as a counterweight to the strict liability provisions and should ensure that only those who are intentionally distributing child pornography over the Internet will be prosecuted under Section 123. Such discretion allows an offender to plead guilty to a lesser-tier offence¹⁸⁵⁰ because, as noted previously, there is no full *mens rea* or knowledge aspect attached to Section 123.¹⁸⁵¹ However, it could also be argued that this discretion violates the principle of certainty, as the community should be able to ascertain when an offender will be prosecuted for a child pornography offence.

1.27.4 Section 124

Section 124 of the Classification Act 1993 contains the prohibition against offences involving knowledge relating to objectionable publications.¹⁸⁵² Parliament has determined that the knowledge-based offences contained within Section 124 are to be viewed as significant crimes.¹⁸⁵³ Consequently, the offences created by Section 124 are also considered to be second, or higher-tier offences.¹⁸⁵⁴ It is the intention of Parliament that this second tier of offences will encompass the standard clauses of the Act, while also providing a contextual right to determine material as being prohibited if it is finally regarded as objectionable.¹⁸⁵⁵ Accordingly, Section 124 states:¹⁸⁵⁶

¹⁸⁴⁸ At 9.

¹⁸⁴⁹ At 8.

¹⁸⁵⁰ At 8.

¹⁸⁵¹ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 5.

¹⁸⁵² Films, Videos, and Publications Classification Act 1993 s 124.

¹⁸⁵³ *R v Spark*, above n 961, at [19].

¹⁸⁵⁴ At [16].

¹⁸⁵⁵ Hansard, above n 907, at 12767.

¹⁸⁵⁶ Films, Videos, and Publications Classification Act 1993, s 124.

124 Offences involving knowledge in relation to objectionable publications

(1) Every person commits an offence against this Act who does any act mentioned in section 123(1) of this Act, knowing or having reasonable cause to believe that the publication is objectionable.

[(2) Every person who commits an offence against subsection (1) is liable,—

(a) in the case of an individual, to imprisonment for a term not exceeding 10 years:

(b) in the case of a body corporate, to a fine not exceeding \$200,000.]

Under Section 124, a person commits an offence under the Act who does any act mentioned in Section 123(1) of the Act, knowing or having reasonable cause to believe¹⁸⁵⁷ that the publication is objectionable.¹⁸⁵⁸ Every offence against Section 124(1) is punishable on conviction on indictment under Section 141A(a) as amended by Section 33 of the Amendment Act 2005.¹⁸⁵⁹ In order to convict for an offence under Section 124(1) a number of elements are vital for a successful prosecution.¹⁸⁶⁰ These consist of making available to another person an objectionable publication and knowing or having reasonable cause to believe that the publication is objectionable, while having an expectation of payment or gain.¹⁸⁶¹ Justice Harrison in *Espinosa v Department of Internal Affairs*¹⁸⁶² arranges these elements concisely and held that a prosecution under Section 124(1) requires proof of the following four elements:¹⁸⁶³

(1) possession of the publication (in order to be able to distribute);

(2) an objectionable publication;

¹⁸⁵⁷ This aspect of the offence is commonly referred to as the ‘objective test’. The objective test is where the requisite *mens rea* element of a crime is attributed to the accused on the basis that a reasonable person would have had the same psychological disposition in an identical situation. Therefore, criminal liability would be established once it was recognised that a reasonable person would have foreseen that the images in question were indeed objectionable.

¹⁸⁵⁸ Films, Videos, and Publications Classification Act 1993, s 124(1).

¹⁸⁵⁹ Films, Videos, and Publications Classification Act 1993, s 141A(a).

¹⁸⁶⁰ *Espinosa v Department of Internal Affairs*, above n 1734, at [15].

¹⁸⁶¹ *Shaw v DIA*, above n 268, at [4].

¹⁸⁶² *Espinosa v Department of Internal Affairs*, above n 1734.

¹⁸⁶³ At [15].

(3) knowledge that the publication is objectionable; and

(4) the act of distribution.

Consequently, in order to successfully prosecute an individual under this Section the prosecution must prove actual knowledge or reasonable cause for belief that the publication is objectionable.¹⁸⁶⁴ Due to the fact that the other elements of this Section are contained within the strict liability provisions of Section 123(1), once knowledge or reasonable cause to believe the publication is objectionable is established, no additional element of knowledge is required.¹⁸⁶⁵ In technical terms this requires the *actus reus*¹⁸⁶⁶ component of Section 123(1) and the *mens rea* component of 124(1) which is, more simply, a particular state of knowledge.¹⁸⁶⁷ Therefore, this offence will be committed where a person knows, or has reasonable grounds to believe, that the publication is objectionable.¹⁸⁶⁸

In addition to Section 124, it is an offence under Section 127(4)¹⁸⁶⁹ of the Act to exhibit or display an objectionable publication to a person under the age of 18 years, knowing or having reasonable cause to believe that the publication is objectionable.¹⁸⁷⁰ Sections 124(2)(a) and 127(5)(a) of the Act, as amended by Sections 27 and 29 of the Amendment Act 2005, state that any person who commits one of the offences established under the foregoing provisions is liable to imprisonment for a term not exceeding ten years.¹⁸⁷¹ Furthermore, Sections 124(2)(b) and 127(5)(b) as amended by Sections 27 and 29 of the Amendment Act

¹⁸⁶⁴ *Shaw v DIA*, above n 268, at [13].

¹⁸⁶⁵ At [13].

¹⁸⁶⁶ In this context the *actus reus* of the offence would be the downloading of an objectionable image as exhibited by child pornography.

¹⁸⁶⁷ *R v Spark*, above n 961, at [17].

¹⁸⁶⁸ Carter, above n 1804, at 4.

¹⁸⁶⁹ Section 132A of the Act contains the essential aspects of the offence that are considered to be aggravating features under the Act. They must be given due consideration when sentencing for offences under Section 127(4). Moreover, Section 141A(b), as introduced by Section 33 of the Amendment Act 2005, states that every offence against Section 127(4) is an offence punishable on conviction on indictment.

¹⁸⁷⁰ Films, Videos, and Publications Classification Act 1993 s 127(4).

¹⁸⁷¹ Films, Videos, and Publications Classification Act 1993, ss 124(2)(a), 127(5)(a).

2005 declare that where any person, being a body corporate commits such an offence, they are liable to a fine not exceeding \$200,000.¹⁸⁷²

1.27.4.1 Parliament's Intention

The intention of Parliament in these amended Sections is clearly to send an irrefutable message to child pornographers that their deviant behaviour is unacceptable and that continued involvement with such material will attract only the harshest penalties from the New Zealand Government.¹⁸⁷³ The following comments of the then Minister of Justice Phil Goff further clarify the reasons for the implementation of these amendments and their intended purpose. The Minister specified to Parliament that:¹⁸⁷⁴

The fact that a publication deals with child pornography will also be a matter under the law that the judge must take into account as an aggravating factor in sentencing. The maximum penalty of 10 years reflects the fact that although traders in child pornography may not themselves be directly involved in abusing children, by promoting a market for abuse images, they are in fact indirectly responsible for it.

The increase in maximum penalties for the most serious offences to 10 years' imprisonment brings New Zealand's censorship regime into line with those of the United Kingdom and Canada, which both have a maximum sentence of 10 years' imprisonment for trading and producing child pornography.¹⁸⁷⁵ However, in accordance with Section 128 this does not apply to the exhibition or display, to any person, of any publication where the publication is displayed and exhibited for educational¹⁸⁷⁶ or professional purposes.¹⁸⁷⁷

¹⁸⁷² Films, Videos, and Publications Classification Act 1993, ss 124(2)(b), 127(5)(b).

¹⁸⁷³ Hansard, above n 5, at 18429.

¹⁸⁷⁴ At 18428.

¹⁸⁷⁵ Carter, above n 1804, at 4.

¹⁸⁷⁶ Films, Videos, and Publications Classification Act 1993, s 128(a).

¹⁸⁷⁷ Films, Videos, and Publications Classification Act 1993, ss 128(b), (c).

1.27.4.2 The Significance of Section 124

The significance of Section 124 is that this Section provides law enforcement agencies with the statutory authority to respond to recent changes in offending behaviour that are a direct result of the evolution of the Internet.¹⁸⁷⁸ Much of the trade in child pornography across Peer-to-Peer networks is undertaken so that the users can gain access to collections of images that contain new and highly sought-after material.¹⁸⁷⁹ Section 124 recognises that in the modern online world, the traders of child pornography are not always driven by financial gain.¹⁸⁸⁰ Consequently, Section 124 ensures that where an offender deliberately provides access to child pornography on a Peer-to-Peer network in the expectation that they will gain access to similar material, then this form of behaviour is perceived as a significant offence.¹⁸⁸¹ Moreover, the importance of Section 124 is that it provides the Police with the tools to break the cycle of abuse. This cycle begins with the creation of a community of like-minded individuals who interact with each other to distribute and collect images.¹⁸⁸² The desire of these individuals is to obtain additional images that often portray more extreme violence against children.¹⁸⁸³ Once completed, the cycle begins again.¹⁸⁸⁴

1.27.5 Section 131

Section 131 of the Act states that, ‘Subject to the specific statutory exceptions contained within Subsections (4) and (5), every person commits an offence against this Act who without lawful authority or excuse has in their possession¹⁸⁸⁵ an objectionable publication’.¹⁸⁸⁶ This is an offence of strict liability, as Section 131(3)

¹⁸⁷⁸ Office of the Federal Ombudsman for Victims of Crime *Internet-Facilitated Child Sexual Abuse in Canada* (2007) at 4, 5.

¹⁸⁷⁹ Wortley and Smallbone, above n 127, at 9.

¹⁸⁸⁰ At 8.

¹⁸⁸¹ *R v Spark*, above n 961, at [19].

¹⁸⁸² Quayle and Taylor, above n 126, at 345–348.

¹⁸⁸³ Office of the Federal Ombudsman for Victims of Crime, above n 1852, at 5.

¹⁸⁸⁴ At 5.

¹⁸⁸⁵ For a discussion on what is considered to be possession in accordance with the Act, refer to *Goodin v Department of Internal Affairs*, above n 915, at 14–20.

¹⁸⁸⁶ Films, Videos, and Publications Classification Act 1993 s 131(1).

confirms that it is no defence to a charge under Subsection (1) of this Section that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable.¹⁸⁸⁷ Consequently, Section 131 affirms that:¹⁸⁸⁸

131 Offence to possess objectionable publication

(1) Subject to subsections (4) and (5) of this section, every person commits an offence against this Act who, without lawful authority or excuse, has in that person's possession an objectionable publication.

(2) Every person who commits an offence against subsection (1) of this section is liable to a fine not exceeding,—

(a) In the case of an individual, \$2,000:

(b) In the case of a body corporate, \$5,000.

(3) It shall be no defence to a charge under subsection (1) of this section that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable.

(4) Nothing in subsection (1) of this section makes it an offence for any of the following persons to be in possession of an objectionable publication, where such possession is for the purpose of and in connection with the person's official duties:

(a) The Chief Censor:

(b) The Deputy Chief Censor:

(c) Any classification officer:

(d) Any person holding office pursuant to clause 2 of Schedule 1 to this Act:

(e) Any member of the Board:

¹⁸⁸⁷ Films, Videos, and Publications Classification Act 1993, s 131(3).

¹⁸⁸⁸ Films, Videos, and Publications Classification Act 1993, s 131.

(f) The labelling body or any person who is carrying out the functions of the labelling body:

(g) Any Inspector:

(h) Any member of the Police:

(i) Any officer of the Customs:

(j) Any Judge of the High Court, or District Court Judge, Coroner [, Justice, or Community Magistrate]:

(k) In relation to any publication delivered to the National Librarian pursuant to [Part 4 of the National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003], the National Librarian, any other employee [in the department responsible for the administration of that Act], or any person employed in the Parliamentary Library:

(l) Any other person in the service of the Crown.

(5) It is a defence to a charge under subsection (1) of this section if the defendant proves that the defendant had possession of the publication to which the charge relates, in good faith,—

(a) For the purpose or with the intention of delivering it into the possession of a person lawfully entitled to have possession of it; or

(b) For the purposes of any proceedings under this Act or any other enactment in relation to the publication; or

(c) For the purpose of giving legal advice in relation to the publication; or

(d) For the purposes of giving legal advice, or making representations, in relation to any proceedings; or

(e) In accordance with, or for the purpose of, complying with any decision or order made in relation to the publication by the Chief Censor, the Classification Office, the Board, or any court, Judge[, Justice, or Community Magistrate]; or

(f) In connection with the delivery of the publication to the National Librarian in accordance with [Part 4 of the National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003].

(6) Nothing in subsection (5) of this section shall prejudice any defence that it is open to a person charged with an offence against this section to raise apart from that subsection.

(7) For the avoidance of doubt, in this section the term proceedings include proceedings before the Classification Office.

Section 131 of the Classification Act 1993 implies that where an individual is intentionally accessing child pornography in the full knowledge of the type of material that would be viewed, without actually saving the images, then these actions do amount to possession under the Act.¹⁸⁸⁹ This component of Section 131 was discussed in District Court case of *Department of Internal Affairs v Young*.¹⁸⁹⁰ It was held in this case by Judge Ryan:¹⁸⁹¹

As to the essential point for decision I am unable to discern that there is any logical reason for taking the view that consciously saving an objectionable publication to a file, a disk or printing or dealing with the publication in any other way, is a necessary ingredient of possession of such a publication when it is deliberately downloaded from the internet in the full knowledge of the nature of the material to the intent that it may be displayed on a screen albeit for the private viewing only of the user of the computer, no other use being made of it. The publication is tangibly present on the computer screen. The defendant who assiduously sought such publication had full knowledge of it. He had full control of it although the exercise of that control was limited to accessing, opening, viewing and closing the publication.

However, it was held by the High Court in *Goodin v Department of Internal Affairs*¹⁸⁹² that the mere presence of an objectionable publication on a computer hard drive would not amount to possession of that publication by the owner of the computer if the accused had no knowledge it was there.¹⁸⁹³ Justice O'Regan is of

¹⁸⁸⁹ See *Department of Internal Affairs v Young*, above n 118.

¹⁸⁹⁰ *Department of Internal Affairs v Young*, above n 118.

¹⁸⁹¹ At [13].

¹⁸⁹² *Goodin v Department of Internal Affairs*, above n 915.

¹⁸⁹³ At [19]; *Department of Internal Affairs v Merry*, above n 928; *Atkins v Director of Public Prosecutions* (2000) 2 All ER 425 (gb).

the view that proof of possession requires proof of some element of knowledge.¹⁸⁹⁴ In *Meyrick v Police*¹⁸⁹⁵ Justice Nicolson agreed and held that for there to be possession within the meaning of Section 131 of the Act each of the following four essential elements must be proved beyond reasonable doubt.¹⁸⁹⁶

- (i) the defendant had actual or potential control,
- (ii) the defendant knew what it was that he controlled,
- (iii) the defendant had the intention to exercise control, and
- (iv) the defendant had possession voluntarily.

Furthermore, Section 131(4) states that it is not an offence for a person to be in possession of an objectionable publication, where such possession is for the purpose of and in connection with the person's official duties.¹⁸⁹⁷ It is also a defence to a charge of possessing an objectionable publication where the defendant proves that they had possession of the publication to which the charge relates, in good faith, and for any of the lawful purposes contained within Sections 131(5)(a)–(f).¹⁸⁹⁸

1.27.5.1 The Significance of Section 131

Section 131 of the Classification Act 1993 is significant as it confirms that anyone who is intentionally viewing child pornography on the Internet is liable for prosecution.¹⁸⁹⁹ The fact that an offender did not deliberately save the images is irrelevant, as they are considered to be in possession of the images once they have opened them in the full knowledge of what will be viewed on their computer screen.¹⁹⁰⁰ Moreover, under Section 131(3) an offender does not need to know that the image is objectionable.¹⁹⁰¹ When the offender is fully aware of what they are

¹⁸⁹⁴ *Goodin v Department of Internal Affairs*, above n 915, at [19].

¹⁸⁹⁵ *Meyrick v Police* HC Hamilton CRI-2005–419–58, 31 July 2007.

¹⁸⁹⁶ At [157].

¹⁸⁹⁷ Films, Videos, and Publications Classification Act 1993 s 131(4).

¹⁸⁹⁸ Films, Videos, and Publications Classification Act 1993, s 135(5).

¹⁸⁹⁹ See *Department of Internal Affairs v Young*, above n 118.

¹⁹⁰⁰ At [13].

¹⁹⁰¹ Films, Videos, and Publications Classification Act 1993, p 131(3).

downloading there is no requirement that they know that it is unlawful, so there can be no mistake of law.¹⁹⁰² This stance on possession contributes to reducing the potential harm to children by sending a clear and undeniable signal to the community that any interaction with this material whatsoever will not be tolerated.

The public is generally unaware that by actively seeking out this material, they are in fact causing a spike in demand,¹⁹⁰³ which drives the market to produce additional child pornography.¹⁹⁰⁴ This spike in demand results in further children around the world being subjected to sexual abuse. Therefore, the importance of Section 131 is that it recognises that anyone who is deliberately viewing child pornography is committing a serious criminal offence and should be charged under Section 131 since they are key players in perpetuating more harm on those children.¹⁹⁰⁵

1.27.6 Section 131A

It is also an offence¹⁹⁰⁶ under Section 131A (1) as amended by Section 31 of the Amendment Act 2005 for a person to have in their possession an objectionable publication while knowing or having reasonable cause to believe that the publication is objectionable.¹⁹⁰⁷ To place this offending in its legislative context, each of Sections 131A (1) and 131 are concerned with the possession of objectionable publications, as defined within the Act.¹⁹⁰⁸ What distinguishes the two provisions is the question of whether the offender ‘knew’ or had ‘reasonable cause to believe’ that the publication was objectionable.¹⁹⁰⁹ Section 131A has the added *mens rea* component of knowledge attached to it which demonstrates that law enforcement agencies must not only prove that the offender is in possession of

¹⁹⁰² *Department of Internal Affairs v Young*, above n 118, at [13].

¹⁹⁰³ Bell, National Director Ecpat Child Alert New Zealand, above n 1453.

¹⁹⁰⁴ US Department of Justice, above n 84, at 3.

¹⁹⁰⁵ Bell, National Director Ecpat Child Alert New Zealand, above n 1453.

¹⁹⁰⁶ As stated above, s 132A of the Act contains the aggravating factors that must be taken into consideration when sentencing for offences under s 131A(1).

¹⁹⁰⁷ Films, Videos, and Publications Classification Act 1993 s 131A(1).

¹⁹⁰⁸ *Clark v Police* NZHC, 2013 at [14].

¹⁹⁰⁹ At [14].

the material but also that he knows that it is objectionable.¹⁹¹⁰ Where this is clearly evident, the offender has offended against Section 131A (1) of the Act.¹⁹¹¹ Section 131A states that:¹⁹¹²

[131A Offences relating to possession of objectionable publications and involving knowledge

(1) Every person commits an offence who does any act that constitutes an offence against section 131(1), knowing or having reasonable cause to believe that the publication is objectionable.

(2) Every person who commits an offence against subsection (1) is liable,—

(a) in the case of an individual, to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$50,000:

(b) in the case of a body corporate, to a fine not exceeding \$100,000.]

Every person who commits an offence against Section 131(1) is liable to a fine or a term of imprisonment where they know or have reasonable cause to believe that the publication is objectionable as stated in Section 131A(1) of the Classification Act 1993.¹⁹¹³ In the case of an individual this fine must not exceed \$50,000,¹⁹¹⁴ and in the case of a body corporate, may not exceed \$100,000.¹⁹¹⁵ The term of imprisonment that can be imposed on an offender may not exceed five years.¹⁹¹⁶ Moreover, Section 141A, as amended by Section 33 of the Amendment Act 2005, states that every offence against Section 131A(1) is an offence punishable on conviction on indictment.¹⁹¹⁷

¹⁹¹⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.

¹⁹¹¹ *Clark v Police*, above n 1882, at [14].

¹⁹¹² Films, Videos, and Publications Classification Act 1993, s 131A.

¹⁹¹³ Films, Videos, and Publications Classification Act 1993, s 131A(1).

¹⁹¹⁴ Films, Videos, and Publications Classification Act 1993, s 131A(2)(a).

¹⁹¹⁵ Films, Videos, and Publications Classification Act 1993, s 131A(2)(b).

¹⁹¹⁶ Films, Videos, and Publications Classification Act 1993, s 131A(2)(b).

¹⁹¹⁷ See Films, Videos, and Publications Classification Act 1993, s 141A(1)(b)(d); Films, Videos, and Publications Classification Amendment Act 2005 s 33(1)(c).

1.27.6.1 The Significance of Section 131A

The significance of Section 131A of the Classification Act 1993 is that it provides law enforcement agencies with the ability to prosecute an offender for a full *mens rea* offence.¹⁹¹⁸ The legislative history of this provision indicates that it has been written into law as a direct legislative response to the escalation in child pornography offences.¹⁹¹⁹ Section 131A is intended to demonstrate the seriousness with which the Government views this type of offending.¹⁹²⁰ The importance of this provision to the protection of children is that it illustrates to the community that offending of this nature is a truly serious crime and that the consequences for this type of offending are severe.

1.27.7 Section 145A

Section 145A of the Classification Act 1993 as amended by Section 32 of the Amendment Act 2005 provides law enforcement agencies with the statutory authority to exercise extraterritorial jurisdiction against child pornography offending.¹⁹²¹ The inclusion of this provision is intended to meet the requirements set out by Article 4 of the Optional Protocol to implement jurisdiction over child pornography offending.¹⁹²² Accordingly, Section 145A states:¹⁹²³

[145A Extraterritorial jurisdiction for certain offences as required by Optional Protocol

(1) In this section and sections 145B and 145C,—

child pornography means—

(a) a representation, by any means, of a person who is or appears to be under 18 years of age engaged in real or simulated explicit sexual activities; or

¹⁹¹⁸ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 5.

¹⁹¹⁹ *Department of Internal Affairs v Wigzell*, above n 190, at [40].

¹⁹²⁰ Films, Videos, and Publications Classification Amendment Bill 2003 (91-1), cl 30.

¹⁹²¹ Films, Videos, and Publications Classification Act 1993, s 145A(2).

¹⁹²² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 4.

¹⁹²³ Films, Videos, and Publications Classification Act 1993, s 145A.

(b) a representation of the sexual parts of a person of that kind for primarily sexual purposes Optional Protocol means the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by the General Assembly of the United Nations at New York on 25 May 2000

relevant offence means an offence against—

(a) section 124(1); or

(b) section 127(4); or

(c) section 129(3); or

(d) section 131A(1); or

(e) section 209(1A) of the Customs and Excise Act 1996.

(2) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for a relevant offence that involves child pornography if the person to be charged—

(a) has been found in New Zealand; and

(b) has not been extradited on the grounds that he or she is a New Zealand citizen.

(3) This section does not affect the application of any section referred to in paragraphs (a) to (e) of the definition of relevant offence in

subsection (1) in respect of—

(a) acts that occurred wholly within New Zealand; or

(b) an offence that, under section 7 of the Crimes Act 1961, is deemed to be committed in New Zealand; or

(c) acts to which section 8 of that Act applies; or

(d) acts that, under section 8A of that Act, are deemed to have taken place within New Zealand.]

It is, therefore, an offence according to Section 145A as amended by Section 34 of the Amendment Act 2005 to travel overseas and commit a child pornography

offence as defined in the above-mentioned provisions of the Classification Act 1993.¹⁹²⁴ These extraterritorial powers have also been included in the Customs Excise Act 1996 ('Customs Act 1996'). Section 209(1A) of the Customs Act 1996 makes it an offence to knowingly import or export an objectionable publication¹⁹²⁵ and Section 209(6) contains the relevant offence as defined in Section 145A(1) of the Classification Act 1993.¹⁹²⁶

Section 145A(3) reserves New Zealand's ordinary provisions for extraterritorial jurisdiction in Sections 7, 7A and 8 of the Crimes Act 1961.¹⁹²⁷ Section 7 states that for the purpose of jurisdiction, where a person who *is not* in New Zealand is party to any part of an offence committed in New Zealand, that person is to be regarded as having committed the offence within New Zealand.¹⁹²⁸ This Section and Section 7A of the Crimes Act 1961 establish that any dealings involving a person under the age of 18 years for the purpose of sexual exploitation constitute an offence, regardless of whether the person charged *is in* New Zealand.¹⁹²⁹ Furthermore, Section 8 of the Crimes Act 1961 states that where a person commits an act *outside* New Zealand which is a crime under the Crimes Act 1961, that crime can be considered to have occurred *within* New Zealand.¹⁹³⁰ The purpose of these provisions is to outlaw the sexual exploitation of any person under 18 years of age, regardless of whether or not the offence occurred outside of New Zealand.¹⁹³¹

New Zealand's obligations in this area extend beyond its borders because international human rights law now recognises that these rights have an extraterritorial dimension.¹⁹³² The reason for this stance is that without extraterritorial obligations, human rights will never assume its ultimate goal as the

¹⁹²⁴ Films, Videos, and Publications Classification Act 1993, s 145A(2).

¹⁹²⁵ Customs Excise Act 1996 (NZ), s 209(1A)(a).

¹⁹²⁶ Customs Excise Act 1996, s 209(6).

¹⁹²⁷ Crimes Act 1961 (NZ), ss 7, 7A, 8.

¹⁹²⁸ Crimes Act 1961, s 7.

¹⁹²⁹ Crimes Act 1961, s 98AA(1)(a)(i).

¹⁹³⁰ Crimes Act 1961, s 8.

¹⁹³¹ Crimes Act 1961, s 98AA(1)(a)(i).

¹⁹³² Fons Cooman *Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2013) at 5–6.

legal basis for guaranteeing the universal protection of society and its children from concerns such as child pornography.¹⁹³³ Therefore, New Zealand does have an obligation to protect children in foreign jurisdictions as human rights obligations are no longer limited to its territory.¹⁹³⁴ These fundamental rights are considered to be restricted by the jurisdiction of the State¹⁹³⁵ which is founded upon the notion of the State's ability to exercise lawful authority over an organisation or individual.¹⁹³⁶ In accordance with this duty, New Zealand has a responsibility to respond to the actions of one of its citizens when they are involved with content offending which is causing harm to children in another part of the world because of its obligations to protect children in compliance with the Optional Protocol.¹⁹³⁷ The importance of these extraterritorial commitments is that they confirm that this concern has to be informed by the human rights obligation to protect children both domestically and internationally.

The High Court in *Batty v Choven*¹⁹³⁸ provides an illustration of these extraterritorial obligations in action. The appellant had set up a commercial website¹⁹³⁹ hosted on an ISP server based in the United States.¹⁹⁴⁰ Pornographic content would be posted on this server by the appellant which was then uploaded to the Internet.¹⁹⁴¹ The Department of Internal Affairs gained access to the website through the use of a computer in Wellington.¹⁹⁴² It was found that the website contained objectionable content and the appellant was charged with child pornography offences under Sections 123 and 124 of the Classification Act

¹⁹³³ ETO Consortium *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2013) at 3.

¹⁹³⁴ Committee on the Rights of the Child, above n 644, at [39].

¹⁹³⁵ At [39].

¹⁹³⁶ Olivier De Schutter and others "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2012) 34 Human Rights Quarterly 1084 at 1102.

¹⁹³⁷ Marko Milanovic *Extraterritorial Application of Human Rights Treaties* (OUP Oxford, Oxford, 2011) at 7.

¹⁹³⁸ *Batty v Choven*, above n 1763.

¹⁹³⁹ At [6].

¹⁹⁴⁰ At [7].

¹⁹⁴¹ At [27].

¹⁹⁴² At [9].

1993.¹⁹⁴³ Counsel for the appellant argued that the displaying of the images occurred on a server outside of New Zealand and it was the server not the appellant who displayed the images.¹⁹⁴⁴ Justice Allan disagreed with this argument as all of the relevant acts constituting the *actus reus* of the offence had taken place in New Zealand.¹⁹⁴⁵ The Court also held that the steps taken by the appellant in New Zealand formed part of the offence and Section 7 of the Crimes Act considers the offence to have been committed within New Zealand.¹⁹⁴⁶ The appeal was subsequently dismissed by the High Court.¹⁹⁴⁷

1.27.7.1 The Significance of Section 145A

The significance of Section 145A of the Classification Act 1993 is that the inclusion of this provision into law demonstrates to the international community that New Zealand is committed to its international obligations.¹⁹⁴⁸ This commitment is demonstrated by Section 145A(2) which provides an innovative form of extraterritorial jurisdiction. Where an offender has committed an offence overseas and is arrested within New Zealand¹⁹⁴⁹ and this offender cannot be extradited because they are a citizen, the New Zealand Courts will have jurisdiction.¹⁹⁵⁰ The only concern regarding this provision is that New Zealand almost always extradites its nationals and only refuses extradition in accordance with Sections 30(2) and 30(3) of the Extradition Act 1999.¹⁹⁵¹ It could therefore be argued that this provision is pointless as it will never be utilised. Nevertheless, Section 145A(2) of the Act mirrors the obligatory principle of extradite or prosecute in Article 4(3) of the Optional Protocol.¹⁹⁵² Section 145A(3) in accordance with Sections 7, 7A and 8 of the Crimes Act¹⁹⁵³ reflects the obligations in Article 4(1) of the Optional Protocol

¹⁹⁴³ At [9].

¹⁹⁴⁴ At [30].

¹⁹⁴⁵ At [33].

¹⁹⁴⁶ At [33].

¹⁹⁴⁷ At [40].

¹⁹⁴⁸ See chapter 2 for a discussion of New Zealand's international obligations.

¹⁹⁴⁹ Films, Videos, and Publications Classification Act 1993 s 145A(2)(a).

¹⁹⁵⁰ Films, Videos, and Publications Classification Act 1993, s 145A(2)(b).

¹⁹⁵¹ Extradition Act 1999 ss 30(2), 30(3).

¹⁹⁵² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), Art 4(3).

¹⁹⁵³ Crimes Act 1961 (NZ), ss 7, 7A, 8.

to establish jurisdiction over territory and ships.¹⁹⁵⁴ The requirements of Article 4(2)(b) of the Optional Protocol are also realised with the same Sections of the Acts as New Zealand has jurisdiction to prosecute an offender who is a national of the State.¹⁹⁵⁵

Section 145A enables law enforcement agencies to use these extraterritorial powers to prosecute individuals who travel overseas and are involved in child pornography offending.¹⁹⁵⁶ This Section also ensures that law enforcement agencies have the ability to respond to the changing nature of child pornography offending. Furthermore, the importance of this provision in terms of child protection is that it will prevent people committing an offence against a child while travelling overseas and then using New Zealand as a refuge to shield themselves from any potential prosecutions from law enforcement agencies.

1.27.8 New Zealand's Law Enforcement Agencies

1.27.8.1 The Censorship Compliance Unit

The Censorship Compliance Unit of the Department of Internal Affairs is responsible for enforcing the offence provisions of the Films, Videos, and Publications Classification Act 1993 within New Zealand.¹⁹⁵⁷ Since July 1996, this Unit has been proactively investigating and prosecuting individuals who trade in objectionable material via the Internet.¹⁹⁵⁸ All of the Unit's personnel are Inspectors of Publications pursuant to Section 103 of the Act who specialise in censorship enforcement that includes the monitoring of objectionable content on the Internet.¹⁹⁵⁹ In addition, all of New Zealand's Inspectors of Publications are

¹⁹⁵⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 4(1).

¹⁹⁵⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 4(2)(b).

¹⁹⁵⁶ See *Holland v R* Court of Appeal, Wellington CA217/2012, 28 November 2012; *LM v R* Court of Appeal, Wellington CA217/2012, 15 April 2013.

¹⁹⁵⁷ Carr, above n 151, at 12.

¹⁹⁵⁸ At 12.

¹⁹⁵⁹ Office of Film and Literature Classification "Enforcing New Zealand Censorship Law" (2013) <<http://www.censor.org.nz/classification-law/enforcing-nz-censorship-law.html>>.

principally law enforcement personnel who are appointed by the Secretary of Internal Affairs to enforce and police all classification decisions made under the Classification Act 1993.¹⁹⁶⁰ These Inspectors of Publications perform a number of duties,¹⁹⁶¹ which include:¹⁹⁶²

1. Helping to ensure that publications considered to be objectionable are not made available to members of the public;
2. Helping to ensure that the decisions of the Office of Film and Literature Classification are adhered to by the film and video industry, magazine distributors, and shops; and
3. Investigation of complaints.

The Minister of the Department of Internal Affairs, Peter Dunne endorses this stipulated approach to the performance of the duties of members of the CCU.¹⁹⁶³ The Minister also stated:¹⁹⁶⁴

The Unit was set up once the Films, Videos, and Publications Classification Act 1993 was passed through Parliament. The Unit's main role is reinforcing the Act. It makes sure those publications that are deemed to be objectionable are not available to the public. The Unit also makes sure that any decision by the Classification Office is honoured. It is one thing to restrict a publication, but making sure that that restriction is honoured is an important part of the function of the Unit. The Classification Office receives a lot of complaints from people, and where these complaints need to be investigated, the Unit plays an important part under its functions within the Act.

Steve O'Brien, the National Manager of the CCU, reveals the functions of the Unit in the following statement:¹⁹⁶⁵

¹⁹⁶⁰ Films, Videos, and Publications Classification Act 1993 s 103 and Part VII.

¹⁹⁶¹ Report of the Government Administration Committee, above n 267, at 57.

¹⁹⁶² The Department of Internal Affairs "Censorship Compliance" (2012) The Department of Internal Affairs <<http://www.dia.govt.nz/Services-Censorship-Compliance-Index>>.

¹⁹⁶³ Dunne, Minister of The Department of Internal Affairs of New Zealand, above n 1458, at 2.

¹⁹⁶⁴ At 2.

¹⁹⁶⁵ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.

Our mandate is to enforce the Films, Videos, and Publications Classification Act 1993. The Act is split into two parts. One deals with legal publications, labelling and the distribution of legal publications. The other deals with objectionable publications and this is where we realistically spend most of our time. We make sure that objectionable material is not made available to the public.

This specialist Unit¹⁹⁶⁶ focuses much of its censorship compliance activity on detecting, investigating and prosecuting the trade in child pornography, which is classified as objectionable under Section 3(2)(a) of the Act.¹⁹⁶⁷ The Unit accomplishes this by monitoring Internet Relay Chat (IRC) channels and investigating websites and Newsgroups.¹⁹⁶⁸ When a Government Administration Committee viewed first-hand how the CCU undertakes this surveillance work¹⁹⁶⁹ it was both surprised and impressed with the surveillance work undertaken by the Unit.¹⁹⁷⁰ The Minister of the Department of Internal Affairs, Peter Dunne has also been pleased by the initiatives developed by the CCU.¹⁹⁷¹ The Minister stated:¹⁹⁷²

They have a very comprehensive set up and I have had the privilege of spending several hours with the CCU to look at several of the initiatives that they have undertaken. I was mightily impressed with all that they do and how they carry out their role under the Act.

Moreover, the CCU provides valuable information to the public concerning online child safety, anti-virus and family protection software.¹⁹⁷³ The CCU also reviews Internet activity, and provides convenient links to other websites that contain information on child safety and other Internet-related issues.¹⁹⁷⁴

¹⁹⁶⁶ The CCU currently has 12 operational members.

¹⁹⁶⁷ Report of the Government Administration Committee, above n 267, at 57.

¹⁹⁶⁸ Carr, above n 151, at 12.

¹⁹⁶⁹ Report of the Government Administration Committee, above n 267, at 57.

¹⁹⁷⁰ At 57.

¹⁹⁷¹ Dunne, Minister of The Department of Internal Affairs of New Zealand, above n 1458, at 2.

¹⁹⁷² At 2.

¹⁹⁷³ The Department of Internal Affairs, above n 1936.

¹⁹⁷⁴ The Department of Internal Affairs, above n 1936.

1.27.8.2 The New Zealand Police

The New Zealand Police Force is also responsible for enforcing the classification provisions within the Classification Act 1993.¹⁹⁷⁵ Every Officer of the New Zealand Police, as previously noted, is deemed to be an Inspector of Publications for the purposes of Section 103(3) of the Act.¹⁹⁷⁶ Accordingly, the New Zealand Police has established a specialist unit known as the Online Child Exploitation Across New Zealand (OCEANZ)¹⁹⁷⁷ Unit whose operational mandate includes:¹⁹⁷⁸

1. Coordinating international investigations into online paedophile networks;
2. Identifying child sexual offenders by monitoring social network websites;
3. Targeting New Zealand child exploitation sites, including those producing images and abuse for financial gain, in an effort to identify and rescue victims; and
4. Gathering intelligence for sharing with district-based child exploitation squads, the Department of Internal Affairs, Customs and international partners.

Detective Senior Sergeant John Michael, Officer in Charge of OCEANZ, believes that OCEANZ has an important role to play because it focuses on child protection.¹⁹⁷⁹ Michael further states that:¹⁹⁸⁰

This is one of the most important roles in policing. It doesn't matter if it is physical offending or online child exploitation; they are both equally important.

¹⁹⁷⁵ Films, Videos, and Publications Classification Act 1993 s 103(3).

¹⁹⁷⁶ Films, Videos, and Publications Classification Act 1993, s 103(3).

¹⁹⁷⁷ New Zealand Police "Online Child Safety" (18 July 2014) <<http://www.police.govt.nz/advice/email-and-internet-safety/online-child-safety>>.

¹⁹⁷⁸ New Zealand Police, above n 1951.

¹⁹⁷⁹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 1.

¹⁹⁸⁰ At 1.

OCEANZ¹⁹⁸¹ works very closely with the other law enforcement agencies in New Zealand which investigate child pornography offending such as the CCU and the New Zealand Customs Service.¹⁹⁸² This co-operative approach to investigations between all three agencies working in this same space guarantees that they collaborate to achieve their common goal, which is to reduce the harm to children.¹⁹⁸³ The above comment by Michael indicates that New Zealand's law enforcement agencies agree with the theory of this thesis, that child pornography is indeed harmful to children.¹⁹⁸⁴ Moreover, the co-operative approach to investigations within Government increases the effectiveness of the response to child pornography offending on the Internet by New Zealand's law enforcement agencies.¹⁹⁸⁵

OCEANZ is also proactively constructing robust partnerships with law enforcement agencies in other jurisdictions which are operating in this same arena,¹⁹⁸⁶ including the Federal Bureau of Investigation (FBI) and Australian State and Federal Police.¹⁹⁸⁷ These partnerships make it considerably easier to investigate child pornography offending and to elicit an appropriate response from the relevant overseas agencies.¹⁹⁸⁸ OCEANZ is also part of an international taskforce, known as the Virtual Global Taskforce,¹⁹⁸⁹ which has been set up to assist with protecting children from all forms of online sexual abuse.¹⁹⁹⁰ This taskforce comprises a collection of law enforcement agencies and private sector representatives that represent their own country.¹⁹⁹¹ They include private sector and non-government agencies such as Microsoft and the National Center for Missing and Exploited

¹⁹⁸¹ OCEANZ currently has four and a half operational members.

¹⁹⁸² Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 4.

¹⁹⁸³ At 4.

¹⁹⁸⁴ See Chapter 1 of this thesis for a discussion of the harm principle.

¹⁹⁸⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 4.

¹⁹⁸⁶ At 4.

¹⁹⁸⁷ At 4.

¹⁹⁸⁸ At 4.

¹⁹⁸⁹ New Zealand Police, above n 1951.

¹⁹⁹⁰ Virtual Global Taskforce "What We Do – Virtual Global Taskforce" (18 July 2014) <<http://www.virtualglobaltaskforce.com/what-we-do/>>.

¹⁹⁹¹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 6.

Children¹⁹⁹² based in the United States.¹⁹⁹³ New Zealand is represented on the taskforce by the New Zealand Police.¹⁹⁹⁴ The Virtual Global Taskforce has been specifically established to implement and scrutinise strategies and policy designed to prevent the sexual exploitation of children when they are online.¹⁹⁹⁵ The taskforce is also very active in efforts designed to prevent individuals from travelling overseas to have sex with children, commonly referred to as sex tourism.¹⁹⁹⁶ However, this organisation only operates at a strategic level, not an operational level.¹⁹⁹⁷ Its purpose is to recommend strategies or policies that countries can implement, so they become more effective at investigating these types of crimes.¹⁹⁹⁸ The Virtual Global Taskforce also assists countries that have deficient legislative systems and struggle to investigate this category of criminal offending.¹⁹⁹⁹

1.27.8.3 The New Zealand Customs Service

The New Zealand Customs Service ('Customs Service') is in charge of the security of New Zealand's borders²⁰⁰⁰ and is, therefore, responsible for investigating the cross-border movement of child pornography.²⁰⁰¹ The Customs Service is highly proactive in investigating child pornography offending.²⁰⁰² However, the point of difference between the Customs Service, the CCU and the Police is that the Customs Service operates under its own legislation, the Customs Excise Act

¹⁹⁹² The National Center for Missing and Exploited Children is a non-profit organisation that was established by the United States Congress in 1984. This organisation was formed in response to a number of high profile child abductions in the United States.

¹⁹⁹³ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 6.

¹⁹⁹⁴ At 6.

¹⁹⁹⁵ At 6.

¹⁹⁹⁶ At 6.

¹⁹⁹⁷ At 6.

¹⁹⁹⁸ At 6.

¹⁹⁹⁹ At 6.

²⁰⁰⁰ New Zealand Customs Service "New Zealand Customs Service" (19 July 2014) <<http://www.customs.govt.nz/about/Pages/default.aspx>>.

²⁰⁰¹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 4.

²⁰⁰² Email from Tim Houston (Investigator, Child Exploitation Operations Team, Intelligence, Investigations and Enforcement, New Zealand Customs Service) "The Child Exploitation Operations Team" (21 July 2014).

1996²⁰⁰³ ('Customs Act 1996').²⁰⁰⁴ Customs officials are not considered to be Inspectors of Publications in accordance with Section 105(1) of the Classification Act 1993.²⁰⁰⁵ The Customs Service has the right to examine electronic devices that may have child pornography stored on them when they are being moved through New Zealand's ports or airports.²⁰⁰⁶ The statutory authority for this examination can be found in Section 175D(1)(b) of the Customs Excise Act 1996 which states that a Customs officer may seize and detain goods that they suspect are evidence of the commission of an offence.²⁰⁰⁷

Section 54(1)(aa) of the Customs Act 1996 prohibits the importation of child pornography²⁰⁰⁸ and Section 56(1)(a) outlaws the exportation of objectionable material as defined in Section 2 of the Films, Videos, and Publications Classification Act 1993.²⁰⁰⁹ Furthermore, Section 56(1A) of the Customs Act 1996 enables the Customs Service to actively search online and treat electronic material as goods as defined under their legislation.²⁰¹⁰ The Customs Service operates in both of these areas and is part of a taskforce²⁰¹¹ that works with Internal Affairs and the Police.²⁰¹² The Child Exploitation Operations Team²⁰¹³ was also established by the Customs Service in 2008.²⁰¹⁴ This team is a dedicated investigative resource, whose purpose is to investigate and enforce legislation concerning the importation and exportation of objectionable publications, specifically child pornography.²⁰¹⁵

²⁰⁰³ Customs Excise Act 1996 (NZ).

²⁰⁰⁴ Houston, Investigator, Child Exploitation Operations Team, Intelligence, Investigations and Enforcement, New Zealand Customs Service, above n 1976.

²⁰⁰⁵ Houston, Investigator, Child Exploitation Operations Team, Intelligence, Investigations and Enforcement, New Zealand Customs Service, above n 1976.

²⁰⁰⁶ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 4.

²⁰⁰⁷ Customs Excise Act 1996, s 175D(1)(b).

²⁰⁰⁸ Customs Excise Act 1996, s 54(1)(aa).

²⁰⁰⁹ Customs Excise Act 1996, s 56(1)(a).

²⁰¹⁰ Customs Excise Act 1996, s 56(1A).

²⁰¹¹ This taskforce has no official name.

²⁰¹² Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 4.

²⁰¹³ The Child Exploitation Operations Team currently has two full-time investigators.

²⁰¹⁴ Houston, Investigator, Child Exploitation Operations Team, Intelligence, Investigations and Enforcement, New Zealand Customs Service, above n 1976.

²⁰¹⁵ Houston, Investigator, Child Exploitation Operations Team, Intelligence, Investigations and Enforcement, New Zealand Customs Service, above n 1976.

Tim Houston, an investigator and operational member of the Child Exploitation Operations Team, notes that all three agencies have different powers under diverse legislation, but they all function under similar guidelines.²⁰¹⁶

1.27.9 The Taskforce and Specialised Cross-agency Co-operation

Under the working protocols of a taskforce these domestic agencies are jointly responsible for sharing investigative information and forensic resources among each other²⁰¹⁷ and with other law enforcement agencies upon request.²⁰¹⁸ Houston states that the taskforce recognises the importance of sharing information and the agencies involved engage in specialised training with each other to enhance this aspect of investigative intelligence.²⁰¹⁹ The working protocols of the taskforce also attempt to strengthen New Zealand's legislation and thereby reduce the vulnerability of children by requiring the agencies to attend annual training sessions to ensure best practice.²⁰²⁰ The introduction of this taskforce has helped reduce the amount of resources required to gather intelligence on content offending.²⁰²¹ This efficiency is a significant boost for children's rights as it increases the pace at which the agencies can respond to a situation where a child is in imminent danger.²⁰²² This development indicates that this taskforce is a specific response by law enforcement agencies to the vulnerability of children and is informed by the fact that children require specialised protection from the availability of child pornography on the Internet.

²⁰¹⁶ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 4.

²⁰¹⁷ New Zealand Government, above n 951, at 5.

²⁰¹⁸ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁰¹⁹ At 14.

²⁰²⁰ New Zealand Government, above n 951, at 5.

²⁰²¹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 14.

²⁰²² At 13.

1.27.10 The Seizure of an Objectionable Publication

1.27.10.1 The Seizure of an Objectionable Publication and the Powers of a Person who is Exercising their Official Duties

The CCU, as Inspectors of Publications, or any member of the Police, who in the course of carrying out their lawful duties discovers an objectionable publication, can also seize a publication, when they believe on reasonable grounds that the publication is objectionable.²⁰²³ However, this statutory authority to seize an objectionable publication is not enforceable when the publication is in the possession of any person who is exercising their official duties as a specified official under Section 131(4) and of the Classification Act 1993.²⁰²⁴ This list of officials includes amongst others the Chief Censor,²⁰²⁵ any Classification Officer²⁰²⁶ and any member of the Police.²⁰²⁷ Moreover, this same statutory exemption also applies to a person who is in possession of an objectionable publication in good faith.²⁰²⁸ This includes situations in which a person has the intention of delivering the objectionable publication into the possession of a person lawfully entitled to have possession of it under the Act.²⁰²⁹

1.27.11 The Investigation and Apprehension of an Offender

1.27.11.1 Investigations Undertaken by the CCU and the New Zealand Police

The CCU and the New Zealand Police undertake proactive investigations and receive informal intelligence from overseas agencies.²⁰³⁰ They also receive complaints from within New Zealand relating to different types of objectionable publications including child pornography.²⁰³¹ Where these agencies detect an

²⁰²³ Films, Videos, and Publications Classification Act 1993 s 108(1).

²⁰²⁴ Films, Videos, and Publications Classification Act 1993, s 108(2) and 131(4).

²⁰²⁵ Films, Videos, and Publications Classification Act 1993, s 131(4)(a).

²⁰²⁶ Films, Videos, and Publications Classification Act 1993, s 131(4)(c).

²⁰²⁷ Films, Videos, and Publications Classification Act 1993, s 131(4)(h).

²⁰²⁸ Films, Videos, and Publications Classification Act 1993, s 131(5).

²⁰²⁹ Films, Videos, and Publications Classification Act 1993, s 131(5)(a).

²⁰³⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

²⁰³¹ O'Brien, National Manager Censorship Compliance Unit, above n 1494, at 8.

individual on a Peer-to-Peer Network distributing child pornography, they will conduct an investigation to identify who that person is²⁰³² and collect all the relevant data required to have a search warrant granted.²⁰³³

1.27.11.1.1 The Issuing of a Search Warrant on an ISP

An application for a Search Warrant under Sections 109, 109A or Section 109B of the Classification Act 1993 may be made by an Inspector of Publications or any member of the Police²⁰³⁴ in the prescribed form.²⁰³⁵ So, once the CCU and the Police have made an application for a search warrant a District Court Judge, Justice of the Peace, Community Magistrate or a Registrar who is not a member of the Police may, on an application in writing that is made under oath, issue a search warrant²⁰³⁶ according to the provisions contained within Section 109 of the Classification Act 1993.²⁰³⁷ This Section of the Classification Act 1993²⁰³⁸ has also been amended and substituted by Section 23 of the Amendment Act 2005.²⁰³⁹

A search warrant may only be issued when it is assumed that there are reasonable grounds for believing that an offender is in possession of an objectionable publication.²⁰⁴⁰ As a result, law enforcement would explain under oath to the relevant official that at a certain time an individual was observed sharing or downloading objectionable images from a specific IP address.²⁰⁴¹ Once this search warrant is approved it permits the Inspectors of Publications to source the details of that person's physical address from their ISP, via a search warrant under Section

²⁰³² Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²⁰³³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

²⁰³⁴ Films, Videos, and Publications Classification Act 1993, s 109.

²⁰³⁵ Films, Videos, and Publications Classification Act 1993, s 110(1).

²⁰³⁶ A search warrant may also be issued under Section 6 of the Search and Surveillance Act 2012. Furthermore, this Act enables warrantless searches to be conducted under Section 15.

²⁰³⁷ Films, Videos, and Publications Classification Act 1993, s 109.

²⁰³⁸ Sections 109 and 109C have been amended by the Films, Videos, and Publications Classification Amendment Act 2005 s 23.

²⁰³⁹ Films, Videos, and Publications Classification Amendment Act 2005, s 23.

²⁰⁴⁰ Films, Videos, and Publications Classification Act 1993, s 109(a).

²⁰⁴¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

109 of the Act, when that person has been trading in objectionable content from a New Zealand Internet address.²⁰⁴² This search warrant is then executed on the ISP that the person in question is utilising.²⁰⁴³ All the CCU or Police requests from the ISP at this stage is the subscriber data.²⁰⁴⁴ The CCU or Police would approach the ISP and state in accordance with this search warrant or production order that the ISP is required to give them the basic subscriber details of the individual who has the account.²⁰⁴⁵

1.27.11.1.2 The Issuing of a Search Warrant on an Offender's Residence

Once the CCU or Police has the account holder information, including the physical address of the offender from the ISP, they may then decide to question that person²⁰⁴⁶ to ascertain what their Internet activity has been.²⁰⁴⁷ If further investigation is required, they can then apply to a District Court Judge for another search warrant to search the physical address of the suspected offender after an initial intelligence-gathering phase at that address.²⁰⁴⁸ A Search Warrant may also be issued where there are reasonable grounds to believe that there will be evidence of the commission of an offence²⁰⁴⁹ or that a publication or tool is intended to be used for the purpose of committing a similar offence.²⁰⁵⁰ However, search warrants for offences against Sections 126 and 131A must be issued under Section 109A or 109B of the Act.²⁰⁵¹ Section 109A of the Act authorises the issue of a search warrant where there are reasonable grounds for believing there are, in the place to be searched, items that will be evidence of the commission of an offence against

²⁰⁴² Report of the Government Administration Committee, above n 267, at 57.

²⁰⁴³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

²⁰⁴⁴ At 8.

²⁰⁴⁵ At 8.

²⁰⁴⁶ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²⁰⁴⁷ At 5.

²⁰⁴⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

²⁰⁴⁹ Films, Videos, and Publications Classification Act 1993 s 109(b).

²⁰⁵⁰ Films, Videos, and Publications Classification Act 1993, s 109(c).

²⁰⁵¹ Films, Videos, and Publications Classification Act 1993, s 109A and 109B.

Section 131A.²⁰⁵² Moreover, in all circumstances, it must be reasonable to do so.²⁰⁵³ This recourse is limited as only a District Court Judge can issue this warrant.²⁰⁵⁴ In deciding whether to issue such a warrant,²⁰⁵⁵ the Judge is required by Section 109A(2) to have regard to:²⁰⁵⁶

- (a) the nature and seriousness of the alleged offending to which the application relates; and
- (b) any information provided by the applicant about the importance, to the investigation of the offence, of the issue of a warrant; and
- (c) any other matter the Judge considers relevant.

These same requirements are contained within Section 109B(b). Section 109B enables a Justice of the Peace, Community Magistrate, or Registrar to issue a search warrant.²⁰⁵⁷ However, this provision is only applicable where all reasonable efforts have been made to obtain a warrant under Section 109A²⁰⁵⁸ and no District Court Judge is available to deal with such an application under Section 109A.²⁰⁵⁹

Once the second search warrant is granted the CCU or Police will then exercise a search on that particular address²⁰⁶⁰ in accordance with Section 111(1) of the Classification Act 1993.²⁰⁶¹ This search warrant allows law enforcement to seize the suspect's computer and any other publications that may be present.²⁰⁶² The CCU or Police will also seize computer storage devices and interview any suspects at the address.²⁰⁶³

²⁰⁵² *R v Kempen* District Court, Christchurch CRI-2011-009-2703, 13 July 2012 at [3].

²⁰⁵³ At [3].

²⁰⁵⁴ At [3].

²⁰⁵⁵ At [3].

²⁰⁵⁶ Films, Videos, and Publications Classification Act 1993, s 109A(2).

²⁰⁵⁷ Films, Videos, and Publications Classification Act 1993, s 109B.

²⁰⁵⁸ Films, Videos, and Publications Classification Act 1993, s 109B(a)(i).

²⁰⁵⁹ Films, Videos, and Publications Classification Act 1993, s 109B(a)(ii).

²⁰⁶⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

²⁰⁶¹ Films, Videos, and Publications Classification Act 1993, s 111(1).

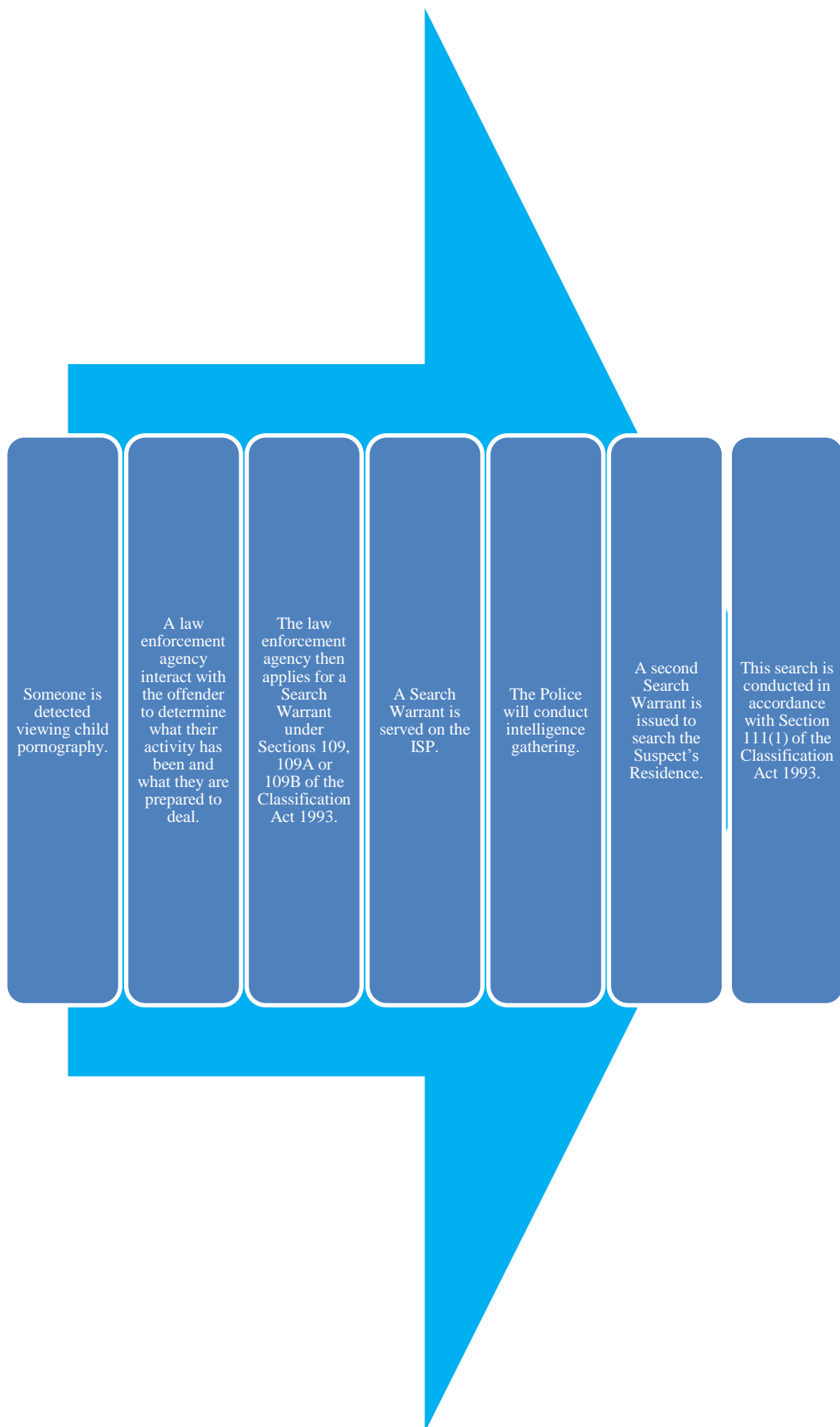
²⁰⁶² Report of the Government Administration Committee, above n 267, at 58.

²⁰⁶³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

1.27.11.1.3 Investigations Process Diagram

The following diagram illustrates the basis sequential steps undertaken by law enforcement to locate an offender and to confiscate any objectionable publications that they have in their possession:

Investigations Process 2



1.27.11.1.4 Leave of the Attorney-General

After seizure, the CCU will undertake a forensic examination of any computer hardware and depending on what evidence is found will prepare a case against the offender.²⁰⁶⁴ All evidence is then sent to the Department of Internal Affairs' legal team.²⁰⁶⁵ This evidence is then submitted to Crown Law who seeks leave of the Attorney-General to continue the prosecution²⁰⁶⁶ in accordance with Section 144(1) of the Classification Act 1993.²⁰⁶⁷ Once this leave is granted, the file is sent to the relevant Crown Solicitor in whichever District the offence has occurred.²⁰⁶⁸ The CCU and Police must also ascertain whether prosecution is the most appropriate response to the specific situation, as they often find themselves dealing with teenagers and young people who have been committing child pornography offences.²⁰⁶⁹ Young people sometimes do not understand what they are doing is wrong, so prosecution is not always the best course of action.²⁰⁷⁰

Where the Police initiates a prosecution and the person is charged under the Classification Act 1993 the Police must also seek permission of the Attorney-General before they can commence a prosecution.²⁰⁷¹ However, Section 144(2) of the Classification Act 1993 enables the Attorney-General to delegate the powers of the Attorney-General to the Commissioner of Police in respect of any offences concerning publications.²⁰⁷² The Commissioner of Police can then delegate those powers to other members of the Police in accordance with Section 145(1) of the Act.²⁰⁷³

²⁰⁶⁴ At 8.

²⁰⁶⁵ At 8.

²⁰⁶⁶ At 8.

²⁰⁶⁷ Films, Videos, and Publications Classification Act 1993 s 144(1).

²⁰⁶⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

²⁰⁶⁹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²⁰⁷⁰ At 5.

²⁰⁷¹ At 5.

²⁰⁷² Films, Videos, and Publications Classification Act 1993, s 144(2).

²⁰⁷³ Films, Videos, and Publications Classification Act 1993, s 145(1).

Within the Police, the power to authorise a prosecution against a person is delegated to the 12 District Commanders who oversee their own District.²⁰⁷⁴ Once the prosecution is authorised the matter will proceed before the Courts.²⁰⁷⁵ Often the evidence before the Court is so compelling that many of the offenders plead guilty.²⁰⁷⁶ The Police do not have many cases that proceed to trial.²⁰⁷⁷ The cases that do proceed to trial are usually based on the argument by the defence that they were not using the computer or there was some technical aspect of the investigation that was incorrect.²⁰⁷⁸

1.27.11.2 Investigations Commenced by the New Zealand Customs Service

The New Zealand Customs Service is responsible for assessing the public as they arrive in New Zealand.²⁰⁷⁹ The Customs Service must evaluate every person and the risk of any goods that they transport into the country.²⁰⁸⁰ This demonstrates that Customs Officers can assess the potential risk of any person who is returning or entering New Zealand.²⁰⁸¹ Customs Officers have the right to interact with the public at the airport and to examine any media devices travellers have on their persons²⁰⁸² in accordance with Section 39(3)(b) of the Customs Act 1996.²⁰⁸³ If a person arrives in New Zealand and they are found to have computer hardware which contains child pornography,²⁰⁸⁴ Customs Officers can then question that person under Section 145(2)(a) of the Customs Act 1996.²⁰⁸⁵ This questioning is intended to establish the facts as to the origin of the images and how and why they have been

²⁰⁷⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²⁰⁷⁵ At 5.

²⁰⁷⁶ At 5.

²⁰⁷⁷ At 5.

²⁰⁷⁸ At 5.

²⁰⁷⁹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁰⁸⁰ At 5.

²⁰⁸¹ At 5.

²⁰⁸² At 5.

²⁰⁸³ Customs Excise Act 1996 (NZ), s 39(3)(b).

²⁰⁸⁴ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁰⁸⁵ Customs Excise Act 1996, s 145(2)(a).

imported.²⁰⁸⁶ The images can then be seized and detained in accordance with Section 175D(1)(b) of the Customs Act 1996.²⁰⁸⁷

Section 175D(2) gives Customs Officers several options once goods are seized or detained under Section 175D(1)(b).²⁰⁸⁸ One of the options is that the detained goods must be delivered into the custody of an appropriate person by a Customs Officer where that person as specified in Subsection (3) of Section 175D of the Customs Act 1996.²⁰⁸⁹ In terms of child pornography, when a Customs Officer believes that Subsection (1)(b) applies, the appropriate person is an Inspector of Publications within the meaning of the Classification Act 1993.²⁰⁹⁰

Customs Officers have very similar powers to the Police such as the right to arrest a suspected offender.²⁰⁹¹ The statutory power to arrest a person who has been found importing child pornography can be found in Section 174(1) of the Customs Act 1996.²⁰⁹² This Section states that a Customs Officer who suspects that a person has committed an offence against the Act may arrest that person.²⁰⁹³ Furthermore, based on what Customs have found during the investigation, they can then charge a suspected offender under Section 54(1)(aa) for possession of prohibited imports or Section 56(1)(a) for possession of prohibited exports under the Customs Excise Act 1996.²⁰⁹⁴

The Customs Service can also initiate investigations into the exportation of objectionable material.²⁰⁹⁵ In terms of online investigations, the Customs Service often receives information from other international law enforcement partners who

²⁰⁸⁶ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁰⁸⁷ Customs Excise Act 1996, s 175D(1)(b).

²⁰⁸⁸ Customs Excise Act 1996, s 175D(2).

²⁰⁸⁹ Customs Excise Act 1996, s 175D(2)(a).

²⁰⁹⁰ Customs Excise Act 1996, s 175D(3)(b).

²⁰⁹¹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁰⁹² Customs Excise Act 1996, s 174(1).

²⁰⁹³ Customs Excise Act 1996, s 174(1).

²⁰⁹⁴ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁰⁹⁵ At 5.

have identified a person in New Zealand who has distributed child pornography overseas.²⁰⁹⁶ Customs Officers have the authority to examine goods that are being exported under Section 49(2)(b) ²⁰⁹⁷ and question a suspected offender as per Section 145(2)(a) of the Customs Act 1996.²⁰⁹⁸ The Customs Service can also apply for search warrants under Section 167 of the Customs Act 1996²⁰⁹⁹ which sanctions a search the offender's home and work premises.²¹⁰⁰ Customs Officers have the authority to examine media, conduct interviews and arrest the suspected offender on site.²¹⁰¹ The investigation would then proceed through the classification and Court process.²¹⁰²

1.27.12 Conclusion

The Classification Act 1993 does generally provide New Zealand's law enforcement agencies with the necessary ability to apprehend and prosecute child pornography offenders. However, this legislation must be continually critiqued to ensure that its provisions and processes are adequate to enable law enforcement to effectively suppress child pornography that is being sourced from the Internet. Therefore, although the legislation will require future-proofing, it does empower New Zealand's law enforcement agencies to adequately respond to the dissemination of child pornography via the Internet.

1.28 The Objectionable Publications and Indecency Legislation Bill and the Substantive Changes to Child Pornography Offences

1.28.1 Introduction

This section examines the Objectionable Publications and Indecency Legislation Bill 2013 ('the Bill') and its proposed substantive changes to child pornography offences under the Bill. It will scrutinise these amendments to ascertain their

²⁰⁹⁶ At 5.

²⁰⁹⁷ Customs Excise Act 1996, s 49(2)(b).

²⁰⁹⁸ Customs Excise Act 1996, s 145(2)(a).

²⁰⁹⁹ Customs Excise Act 1996, s 167.

²¹⁰⁰ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²¹⁰¹ At 5.

²¹⁰² At 5.

efficacy for child pornography investigations and also highlight any possible detrimental effects that these amendments may have on the operation of the Films, Videos, and Publications Classification Act 1993 ('Classification Act 1993').²¹⁰³ The importance of these amendments with regards to this thesis is that they have the potential to increase the effectiveness of New Zealand's institutional responses to child pornography offending.

It must also be stated that the Bill has become law. However, the value of the Bill to this thesis is that it provides a convenient example of the Government's response to concerns about the changing nature of child pornography offending via the Internet. The provisions of the Bill demonstrate how the offence provisions of the Classification Act 1993 are being future-proofed against perceived advances in technology.

1.28.2 The Objectionable Publications and Indecency Legislation Bill

1.28.2.1 The Purpose of the Bill

This amendment to the Classification Act 1993 is in response to the evolution of Internet-related child pornography offending.²¹⁰⁴ The former Minister of Justice Judith Collins believes that the existing legislation has not kept pace with advances in the information technology age.²¹⁰⁵ Recent advances in technology, such as the transmission and storage of an almost infinite quantity of images, have been recognised by the Government as a significant concern that must be addressed with the introduction of the new Bill.²¹⁰⁶ These identified inadequacies in New Zealand's legislation also permit adults with intentions to abuse children to more readily contact children, and for objectionable content to be more immediately available on the Internet.²¹⁰⁷

²¹⁰³ Films, Videos, and Publications Classification Act 1993.

²¹⁰⁴ Hansard "Objectionable Publications and Indecency Legislation Bill - First Reading" (2013) 695 New Zealand Parliamentary Debates 15101 at 15101–15102.

²¹⁰⁵ 3News "Child Sex Offenders Face Legal Crackdown" *3news.co.nz* (27 May 2013) <<http://www.3news.co.nz/politics/child-sex-offenders-face-legal-crackdown-2013052716>>.

²¹⁰⁶ Hansard, above n 2078, at 15102.

²¹⁰⁷ 3News, above n 2079.

1.28.3 Substantive Changes to Child Pornography Offences

1.28.3.1 Substantive Changes

The Bill's substantive changes to what child pornography offending are intended to assist law enforcement investigations and also ensure that the Classification Act 1993 is able to respond to advancements in technology. The Bill will also assist New Zealand to comply with its obligations in accordance with Article 3 of the Optional Protocol, as it will raise the awareness of children as rights holders by demonstrating that the law has the ability to respond to the changing nature of offending.²¹⁰⁸ Its provisions are also intended to adequately protect children in the future from the harm associated with child pornography offending.²¹⁰⁹

1.28.3.2 The Offence of Possession of Objectionable Publications

Clause 6 amends the offence of possession of an objectionable publication contained in Section 131A of the Classification Act 1993.²¹¹⁰ Clause 6(3) amends Section 131A of the Classification Act 1993²¹¹¹ so that possession of child pornography includes intentionally viewing child pornography without the requirement of consciously downloading or saving it.²¹¹² The former Minister of Justice contends that this amendment will remove any risk that a technically advanced offender would be able to legally view child pornography as long as the material is not intentionally downloaded or saved.²¹¹³ This amendment is also intended to future-proof the offences provisions of the Classification Act 1993 against unforeseeable advances in technology.²¹¹⁴ Detective Senior Sergeant John Michael of the New Zealand Police states that this provision is far broader than the present statutory definition of possession.²¹¹⁵ Those involved in law enforcement

²¹⁰⁸ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 18.

²¹⁰⁹ At 18.

²¹¹⁰ Objectionable Publications and Indecency Legislation Bill 2013 (124-1), cl 6.

²¹¹¹ Objectionable Publications and Indecency Legislation Bill, cl 5(3).

²¹¹² Hansard, above n 2078, at 15102.

²¹¹³ At 15102.

²¹¹⁴ At 15102.

²¹¹⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 16.

are adamant that the broadening of the definition to include intentionally accessing child pornography will significantly increase their ability to prosecute offenders.²¹¹⁶

The amendment increases the maximum available term of imprisonment from 5 to 10 years.²¹¹⁷ The increase in sentencing contained within Clause 6 of the Bill has the potential to address the escalation in volume of child pornography that offenders are now found to have in their possession.²¹¹⁸

1.28.3.3 The Attorney-General's Consent to Prosecute

The current requirement under Section 144 of the Classification Act 1993 that law enforcement obtain leave of the Attorney-General to prosecute an offender for a child pornography offence²¹¹⁹ is historically a safeguard against inappropriate public prosecutions.²¹²⁰ The Government now considers that New Zealand's law enforcement agencies have the experience to determine the appropriateness of a proposed prosecution, and also possess adequate internal processes to review the legitimacy of a prosecution.²¹²¹ Clause 8 of the Bill is removing an obsolete provision from New Zealand's legislation, as the requirement to seek leave of the Attorney-General to prosecute an offender has already been delegated by the Commissioner of Police to the 12 District Commanders of the New Zealand Police.

Clause 8 of the Bill will replace Sections 144 and 145 of the Classification Act 1993 with a new Section 144.²¹²² As a result, law enforcement will no longer be required to seek leave of the Attorney-General to prosecute an individual for a child pornography offence.²¹²³ The new Section 144 will also ensure that private

²¹¹⁶ At 16.

²¹¹⁷ Objectionable Publications and Indecency Legislation Bill 2013 (124-1), cl 6.

²¹¹⁸ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 2.

²¹¹⁹ Films, Videos, and Publications Classification Act 1993 s 144.

²¹²⁰ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²¹²¹ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²¹²² Objectionable Publications and Indecency Legislation Bill, cl 8.

²¹²³ Objectionable Publications and Indecency Legislation Bill, cl 8.

prosecutions, as defined in Section 5 of the Criminal Procedure Act 2011,²¹²⁴ cannot be instigated without the Attorney-General's consent.²¹²⁵ Moreover, prosecutions involving extraterritorial jurisdiction²¹²⁶ will still require the Attorney-General's consent.²¹²⁷

1.28.3.4 Indecent Communication with a Young Person

Clause 13 of the Bill inserts into the Classification Act 1993 Section 124A which creates a new offence of indecent communication with a young person under the age of 16 years.²¹²⁸ This offence is punishable by imprisonment for a term not exceeding three years.²¹²⁹ The new offence of indecent communication with a young person is intended to counter deficiencies in New Zealand's legislation.²¹³⁰ This inadequacy in child protection exists because of the discrepancy between objectionable publications offences within the Classification Act 1993²¹³¹ and the offence of sexual grooming in accordance with the Crimes Act 1961.²¹³² The establishment of this new category of offence is intended to deter adults from engaging in indecent communications with children.²¹³³ It is also a response to the increasing use of social networking sites by adolescents²¹³⁴ and the possibility of the medium being utilised by adults to groom children for sexual abuse.²¹³⁵ An indecent communication with a child can take a variety of forms, including text messaging and social networking communication.²¹³⁶ The Government has therefore determined that a specific offence to be established to ensure that this

²¹²⁴ Criminal Procedure Act 2011.

²¹²⁵ Objectionable Publications and Indecency Legislation Bill, cl 8.

²¹²⁶ Films, Videos, and Publications Classification Act 1993 s 145A.

²¹²⁷ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²¹²⁸ Objectionable Publications and Indecency Legislation Bill, cl 13.

²¹²⁹ Objectionable Publications and Indecency Legislation Bill, cl 13.

²¹³⁰ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²¹³¹ Films, Videos, and Publications Classification Act 1993, pt 8.

²¹³² Crimes Act 1961 (NZ), s 131B.

²¹³³ Dunedin Community Law Centre *Objectionable Publications and Indecency Legislation Bill* (2014) at 4.

²¹³⁴ At 4.

²¹³⁵ See Kimberly J Mitchell and others "Use of Social Networking Sites in Online Sex Crimes against Minors: An Examination of National Incidence and Means of Utilization" (2010) 47 J Adolesc Health 183.

²¹³⁶ Objectionable Publications and Indecency Legislation Bill 2013 (124-1), Explanatory Note.

potentially damaging behaviour towards children is criminalised.²¹³⁷ This provision within Section 124A will be available to law enforcement agencies, regardless of whether a record of a communication with a child has been made, or whether steps to physically meet the child have been undertaken by the offender.²¹³⁸

In its submission on the Bill the Legislation Advisory Committee has declared that Clause 13 is too broad²¹³⁹ as it has the potential to capture any ‘indecent’ communication.²¹⁴⁰ Such communications could include images or text messages sent deliberately by a person aged over 16 to another person who is aged under 16.²¹⁴¹ Therefore, there is a significant risk that the new offence will capture the sharing of immature and ‘indecent’ jokes or images between adolescent friends.²¹⁴² The Legislation Advisory Committee believes that the number of potential breaches of the provisions will be substantial, given the high volumes of electronic communications between teenagers.²¹⁴³ This criticism by the legislation Advisory Committee is not unwarranted²¹⁴⁴ as studies indicate that ‘sexting’ has now become a normalised part of adolescent sexual development.²¹⁴⁵

It does seem that the inclusion of the term ‘indecent’ within Clause 13 of the Bill does seem bizarre. As previously stated in this thesis, the term ‘indecent’ was deliberately excluded from the Classification Act 1993 and replaced with the term ‘objectionable’.²¹⁴⁶ This is because this term is considered to more adequately cover the prohibition of material on grounds other than sexual content, such as crime,

²¹³⁷ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²¹³⁸ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²¹³⁹ Legislation Advisory Committee *Objectionable Publications and Indecency Legislation Bill* (2013) at 3.

²¹⁴⁰ At 3.

²¹⁴¹ At 3.

²¹⁴² At 3.

²¹⁴³ At 3.

²¹⁴⁴ See Jody O’Callaghan “‘Sexting’ Growing Issue for Kiwi Teens” *Stuff.co.nz* (5 July 2012) <<http://www.stuff.co.nz/life-style/parenting/big-kids/tweens-to-teens/behaviour/7225686/Sexting-growing-issue-for-Kiwi-teens>>; OneNews “Concerns over Kiwi Teens ‘Sexting’” *TVNZ* (28 December 2009) <<http://tvnz.co.nz/technology-news/concerns-over-kiwi-teens-sexting-3319447>>.

²¹⁴⁵ Jeff R Temple and HyeJeong Choi “Longitudinal Association between Teen Sexting and Sexual Behavior” [2014] *Pediatrics* peds.2014 at 5.

²¹⁴⁶ Greig, above n 866, at [8].

cruelty and violence.²¹⁴⁷ The inclusion of the term ‘indecent’ will add significant and unwarranted complexity to the application of the Classification Act 1993.

It must also be reiterated that the Classification Act 1993 was introduced to prevent this level of complexity leading to inconsistencies in decisions concerning publications.²¹⁴⁸ As Dr Andrew Jack, the Chief Censor of the Classification Office confirms, one of the key aspects of the Classification Act 1993 ensuring the Act functions appropriately is that the Act only focuses on objectionable content that is ‘injurious to the public good’.²¹⁴⁹ Therefore, the decision of the Government to widen the scope of the Classification Act 1993 to incorporate the term ‘indecent’ will have a significant and possibly detrimental effect on the application of the Act.

1.28.4 Recommendations

1.28.4.1 The Offence of Possession of an Objectionable Publications

It is also recommended that Clause 6 of the Bill be included within Section 131A of the Classification Act 1993. The inclusion of this provision will allow the Courts the means to take into account the volume of child pornography that an offender has in their possession into account when considering sentencing.²¹⁵⁰ This proposed amendment will also provide the Act with the capability to respond to advances in technology because of the breadth of the provision.²¹⁵¹ The significance of these provisions is that they will increase the effectiveness of New Zealand’s institutional responses to child pornography offending and assist law enforcement to more adequately address this category of offence.

²¹⁴⁷ Internal Affairs and Local Government Select Committee, above n 942, at 7.

²¹⁴⁸ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 6.

²¹⁴⁹ At 6.

²¹⁵⁰ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 2.

²¹⁵¹ Hansard, above n 2078, at 15102.

1.28.4.2 The Attorney-General's Consent to Prosecute

It is recommended that Clause 8 of the Bill replace Sections 144 and 145 of the Classification Act 1993 as these Sections are now obsolete. New Zealand's legislation must be continually evaluated to ensure that it is sufficiently responding to increased opportunities to commit child pornography offences. The importance of the recommendation is that it will streamline processes which will greatly assist law enforcement agencies and the overall effectiveness of the Classification Act 1993.

1.28.4.3 Indecent Communication with a Young Person

It is recommended that the term 'indecent' should *not* be included within the Classification Act 1993. Clause 13 of the Bill should be amended to replace the term 'indecent' with a more suitable term. Any solution to this problem would have to recognise that the success of the Act lies in its focusing only on objectionable content that is injurious to the public good.²¹⁵² Any broadening of the scope of the Act could have a detrimental effect on the operation of the enforcement provisions of the Act. The significance of this recommendation is that it will ensure that the Classification Act 1993 continues to place substantial emphasis on the term 'objectionable' which has been the hallmark of New Zealand's child pornography legislation.

1.28.5 Conclusion

The Objectionable Publications and Indecency Legislation Bill 2013 has been introduced by Parliament to enhance New Zealand's censorship legislation. This Bill will clarify the possession provisions within the Classification Act 1993 and also streamline investigations. The Bill recognises that technology presents a significant challenge to the Classification Act 1993. Therefore, its provisions are

²¹⁵² Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 6.

intended to address these concerns and improve New Zealand's institutional responses to the dissemination of child pornography on the Internet.

1.29 Overall Conclusion for Chapter 5

The Classification Act 1993 does generally provide New Zealand's law enforcement agencies with the necessary substantive crimes and procedures to enable the apprehension and punishment of a broad range of pornography offenders. Law enforcement are adamant that the Act is functioning well in the online age because of its wide-reaching definitions.²¹⁵³ However, the Internet has created numerous challenges for the Act. These challenges include outlawing the grooming of children and the capability of the present legislation to permit law enforcement to adequately respond to this issue.²¹⁵⁴ The new Bill responds to the changing nature of the Internet by addressing this and other concerns. Nevertheless, New Zealand's legislation will require future-proofing to enable law enforcement to adequately respond to the dissemination of child pornography on the Internet. This future-proofing will be a *continuous process*, under which New Zealand's legislation is *constantly* critiqued and reviewed to ensure that its provisions and processes are up-to-date. This continuous process will enable law enforcement to effectively suppress all forms of child pornography sourced from the Internet. These reviews will also highlight any deficiencies and require the implementation of new provisions to assist with the investigation and prevention of child pornography offending.

²¹⁵³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269; Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 4.

²¹⁵⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 7.

Chapter 6

Law Enforcement Concerns

1.30 Overall Introduction

One of the critical operational problems for the law enforcement agencies as discussed in the previous chapter is the retention of data. Data retention is important because it provides a crucial trail that potentially leads back to the offenders. Advancements in technology have aggravated the problem, making it very difficult and at times impossible for law enforcement agencies to discover suspects' actions by normal means of investigation which can seriously hinder a child pornography investigation. This concern is compounded by the fact that the jurisdiction of our law enforcement agencies is limited to conduct within New Zealand. Given that there is no international jurisdiction over child pornography offences, New Zealand is forced to rely on the services of other States' authorities in systems of global co-operation when the conduct it seeks to suppress occurs extraterritorially. The transnational nature of the Internet has created serious issues concerning the capacity of law enforcement agencies to adequately investigate and prosecute child pornography offending.²¹⁵⁵ Chapter 6 discusses the law and the retention of subscriber data by New Zealand's ISPs. It examines the effects of advancements in technology on child pornography investigations and the merits of a compulsory order to compel an offender to surrender the passwords to any encrypted material under investigation. Chapter 6 also explores the merits of additional resourcing for law enforcement agencies and memoranda of understanding. The advantages of streamlined mutual production orders and the placement of additional Liaison Officers to assist with investigations are also considered. Finally, the chapter will discuss the concerns relating to law enforcement agencies operations and make recommendations to address these concerns.

²¹⁵⁵ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 4.

1.31 The Legislative Challenges confronting Law Enforcement in New Zealand

1.31.1 The Privacy Act 1993 and the Right to Privacy

The Long Title of the Privacy Act 1993²¹⁵⁶ states that the Act has been enacted to promote and protect individual privacy.²¹⁵⁷ This Act's jurisdiction is, therefore, limited to concerns relating to an individual's personal information²¹⁵⁸ as the Act's jurisdiction only extends to a breach regarding this specific aspect of privacy.²¹⁵⁹ This particular concept is also part of international human rights legislation which can assist with the interpretation of the law and the exercise of administrative discretion.²¹⁶⁰ The Universal Declaration of Human Rights 1948²¹⁶¹ affirms that no person should be subjected to arbitrary interference with their right to privacy.²¹⁶² Furthermore, the Privacy Act 1993 regulates how agencies within New Zealand utilise and give access to personal information consisting of any data related to Internet usage.²¹⁶³ Section 2(1)(a) of the Act also states that most persons or organisations that retain personal information on any individual would be considered an agency in accordance with the Act.²¹⁶⁴ This definition encompasses most government departments, companies, and all Internet Service Providers.²¹⁶⁵ Consequently, the Privacy Act 1993 creates substantial obligations for the commercial sector and, more importantly for this thesis, New Zealand's Internet Service Providers.²¹⁶⁶

One of the most important aspects of the Privacy Act 1993 is its establishment of 12 Information Privacy Principles (Privacy Principles) as defined in Section 6 of

²¹⁵⁶ Privacy Act 1993.

²¹⁵⁷ Privacy Act 1993, s Long Title.

²¹⁵⁸ Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 New Zealand Journal of Public and International Law 213 at 221.

²¹⁵⁹ Tim McBride "NZ's Privacy Act 1993 – Part 1" (1994) 2 Privacy Law & Policy Reporter 4.

²¹⁶⁰ Butler, above n 2132, at 218.

²¹⁶¹ Universal Declaration of Human Rights 1948 (un.org).

²¹⁶² Universal Declaration of Human Rights 1948, art 12.

²¹⁶³ Office of the Privacy Commissioner "The Privacy Act and Codes" (1 January 2016) Office of the Privacy Commissioner <<https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-act-and-codes-introduction/>>.

²¹⁶⁴ Privacy Act 1993 s 2(1)(a).

²¹⁶⁵ Privacy Act 1993, s 2(1)(a).

²¹⁶⁶ Butler, above n 2132, at 222.

the Act.²¹⁶⁷ These Privacy Principles govern the responsible collection and disclosure of personal information by any agency.²¹⁶⁸ Where any agency breaches a Privacy Principle, an individual may make a complaint to the Privacy Commissioner²¹⁶⁹ in the knowledge that their right to privacy has been transgressed.²¹⁷⁰ However, a successful complainant must also demonstrate that the breach caused loss or injury as defined in Section 66 of the Act.²¹⁷¹ Moreover, the right to privacy is not an absolute right.²¹⁷² The Courts in New Zealand have conceptualised this right²¹⁷³ and affirmed that it must be balanced against other important values.²¹⁷⁴ There are, consequently, numerous countervailing public interests that prevail over compliance with the Privacy Principles.²¹⁷⁵ In particular, non-compliance may be necessary in the following situations:²¹⁷⁶

1. to ensure that any public sector agency's efforts to prevent, detect, investigate, prosecute and punish offences are not hindered;
2. for the enforcement of a law imposing a pecuniary penalty or the protection of public revenue; or
3. for the conduct of proceedings before a court.

These exceptions to the Privacy Principles are an acknowledgement that the State requires the statutory authority to detect and investigate crime as a matter of public interest.²¹⁷⁷ However, the common law also establishes the rule that the Police must have a lawful basis for entering a private property for the purpose of detecting or preventing crime.²¹⁷⁸ The Police and any other law enforcement agency therefore,

²¹⁶⁷ Privacy Act 1993, s 6.

²¹⁶⁸ Butler, above n 2132, at 221.

²¹⁶⁹ The Office of the Privacy Commissioner is established in accordance with Section 12 of the Privacy Act 1993. The functions of the Privacy Commissioner are defined in Section 13 of the Act and include the promotion of the Act's Privacy Principles.

²¹⁷⁰ Privacy Act 1993, s 66.

²¹⁷¹ Privacy Act 1993, s 66.

²¹⁷² Rowena Cullen and Patrick Reilly "Information Privacy and Trust in Government: A Citizen-Based Perspective from New Zealand" (2008) 4 Journal of Information Technology & Politics 61 at 63.

²¹⁷³ Butler, above n 2132, at 225.

²¹⁷⁴ At 225.

²¹⁷⁵ Law Commission *Protecting Personal Information from Disclosure* (2002) at 6.

²¹⁷⁶ At 6.

²¹⁷⁷ *Police v McDonald* [2010] [2010] NZAR 59 (nz HC) at [35].

²¹⁷⁸ *Entick v Carrington* (1765) 95 ER 807 (gb).

have no right to enter private property without the operation of an implied licence.²¹⁷⁹ An implied licence is a development in the common law²¹⁸⁰ that reflects the importance of striking a balance between a person's right to privacy and the public interest in enforcement of the criminal law.²¹⁸¹

1.31.2 The New Zealand Bill of Rights Act 1990 and the Right to Privacy

The right to privacy is not specifically mentioned within the New Zealand Bill of Rights Act 1990²¹⁸² (Bill of Rights Act 1990).²¹⁸³ However, the Court of Appeal has observed that the fundamental purpose of Section 21 of the Bill of Rights Act 1990 is to protect the right to privacy.²¹⁸⁴ The Supreme Court agrees with this observation and has acknowledged that privacy concerns are protected from State interference²¹⁸⁵ by Section 21.²¹⁸⁶ This Section of the Bill of Rights Act 1990 states that everyone has the right to be secure against unreasonable search or seizure of their person or property.²¹⁸⁷ Moreover, all search powers employed by law enforcement within New Zealand engage the protections contained within Section 21.²¹⁸⁸ The Courts have also placed particular importance on upholding the right to privacy over digital information.²¹⁸⁹ Crucially for this thesis, the Supreme Court has also acknowledged the special privacy interests inherent to digital information.²¹⁹⁰ The Court affirmed that these interests are categorically protected from unreasonable intrusion by Section 21 of the Bill of Rights Act 1990.²¹⁹¹

²¹⁷⁹ *Robson v Hallett* (1967) 2 QB 939 (gb); *Howden v Ministry of Transport* (1987) 2 NZLR 747 (nz CA) at 751.

²¹⁸⁰ *Tararo v R* [2010] NZSC 157, 1 NZLR 145 (nz).

²¹⁸¹ *Police v McDonald* [2010], above n 2151, at [35].

²¹⁸² New Zealand Bill of Rights Act 1990 (NZ).

²¹⁸³ Rosemary Tobin "Privacy and Freedom of Expression in New Zealand" in Madeleine Colvin (ed) *Developing Key Privacy Rights* (Bloomsbury Publishing, Oxford, 2002) at 130.

²¹⁸⁴ *R v Williams* (2007) 3 NZLR 207 (nz CA) at [236].

²¹⁸⁵ *Hamed v R* (2012) 2 NZLR 305 (nz SC) at [12, 222].

²¹⁸⁶ At [10].

²¹⁸⁷ New Zealand Bill of Rights Act 1990, s 21.

²¹⁸⁸ *Cropp v Judicial Committee* (2008) 3 NZLR 774 (nz SC) at [18].

²¹⁸⁹ Tim Cochrane "Protecting Digital Privacy at the New Zealand Border" (2015) 4 New Zealand Law Journal 138 at 140.

²¹⁹⁰ *Dotcom v Attorney-General* [2014] NZSC 199 (nz SC) at [57].

²¹⁹¹ At [191].

The rights within the Bill of Rights Act 1990 must not be applied in isolation and these rights, like the right to privacy, are not absolute.²¹⁹² The objective of this limitation is not to shield individuals from State interference, but to protect them from unjustified and arbitrary intrusions.²¹⁹³ This limitation of specific rights consisting of the right to freedom of expression as asserted by Section 14 has been discussed in detail in Chapter 3 of this thesis. This discussion confirms that on numerous occasions New Zealand law has restricted the right to freedom of expression,²¹⁹⁴ the Films, Videos, and Publications Classification Act 1993 being an example of this manner of restriction.²¹⁹⁵

The structure and contents of Sections 4 – 6 of the Bill of Rights Act 1990 concern the interpretation and application of rights within the Act.²¹⁹⁶ Section 6 requires any enactment to be construed consistently with the rights and freedoms within the Act.²¹⁹⁷ When this consistency is not feasible, Section 4 of the Act comes into operation.²¹⁹⁸ This Section is specifically directed towards the Courts where they are instructed *not* to decline to apply any enactment that is inconsistent with any provision of the Act.²¹⁹⁹ The purpose of this Section is to provide the legislature with the ability to infringe upon rights where it is perceived to be in the public interest.²²⁰⁰ Furthermore, Section 5 of the Bill of Rights Act 1990 advocates the minimum standard that the State must meet when it limits any right or freedom.²²⁰¹ This Section states that these limits must be *reasonable* and *demonstrably justified*

²¹⁹² *MOT v Noort* (1992) 3 NZLR 260 (nz CA) at 283; *Solicitor-General v Radio New Zealand Ltd* (1994) 1 NZLR 48 (nz HC) at 59.

²¹⁹³ Scott Optican “Search and Seizure” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003) at 298.

²¹⁹⁴ Tobin, above n 2157, at 129.

²¹⁹⁵ Refer to the limitations on the right to freedom of expression discussed within Chapter 3.

²¹⁹⁶ Paul Rishworth “Interpreting Enactments – Section 4, 5, and 6” in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 116.

²¹⁹⁷ At 116.

²¹⁹⁸ At 116.

²¹⁹⁹ New Zealand Bill of Rights Act 1990 (NZ), s 4.

²²⁰⁰ Paul Rishworth “Affirming the Fundamental Values of the Nation - How the Bill of Rights and the Human Rights Act affect New Zealand” in Paul Rishworth and Grant Huscroft (eds) *Rights and Freedoms -The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) at 106.

²²⁰¹ Rishworth, above n 2170, at 116.

in a *free and democratic society*.²²⁰² The combined result of Sections 6 and 4 is a mandatory requirement imposed upon the Courts where they must determine whether a statutory meaning is consistent or inconsistent with the values contained within the Bill of Rights Act 1990.²²⁰³ An enactment can be considered to be consistent with the Bill of Rights Act 1990 where it imposes the types of limits²²⁰⁴ that are reasonable and demonstrably justified in a free and democratic society.²²⁰⁵ Therefore, the outcome of Sections 4 – 6 is that the Courts should endeavour to adopt meanings of statutes which only impose reasonable limits on rights as confirmed by the provisions of Section 6.²²⁰⁶

1.31.3 The New Zealand Bill of Rights Act 1990 and Regulatory Offences

Sections 22 – 27 of the Bill of Rights Act 1990 contain provisions which protect the legal rights of all suspects and criminal offenders.²²⁰⁷ In Sections 22 and 23 of the Act the provisions concern the right to liberty and confirm that a person has the right not to be arbitrarily arrested or detained.²²⁰⁸ This right to liberty is intended to protect an individual from any unlawful detention²²⁰⁹ or an abuse of power that results in unwarranted delays in any criminal proceedings.²²¹⁰ An arrested person also has the right to remain silent²²¹¹ together with various other rights as explained in Section 23 of the Act.²²¹² The objective of the right to remain silent is to protect an individual from being unlawfully coerced into giving evidence under duress.²²¹³ The overall purpose of the rights within Section 23 is to ensure that suspects have

²²⁰² New Zealand Bill of Rights Act 1990, s 5.

²²⁰³ Rishworth, above n 2170, at 118.

²²⁰⁴ At 118.

²²⁰⁵ New Zealand Bill of Rights Act 1990, s 5.

²²⁰⁶ Rishworth, above n 2174, at 105.

²²⁰⁷ Andrew Butler “Regulatory Offences and the Bill of Rights” in Paul Rishworth and Grant Huscroft (eds) *Rights and Freedoms -The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) at 347.

²²⁰⁸ New Zealand Bill of Rights Act 1990, s 22.

²²⁰⁹ Richard Mahoney “Arbitrary Arrest and Detention” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003) at 516.

²²¹⁰ At 521.

²²¹¹ New Zealand Bill of Rights Act 1990, s 23(4)(b).

²²¹² New Zealand Bill of Rights Act 1990, s 23.

²²¹³ Butler, above n 2181, at 385.

adequate protection against any deprivation of liberty at their first official encounter with authorities.²²¹⁴

The rights of a person once they have been charged with a criminal offence are contained within Section 24 of the Bill of Rights Act 1990. The fundamental premise of the rights contained in Section 24 is a guarantee of certain minimum standards of due process during the adjudication of a criminal charge.²²¹⁵ This Section also contains a number of rights, including the right to consult and instruct a lawyer.²²¹⁶ The right to counsel is a necessary component of the associated rights which maintain the freedom and dignity of an individual against the power of the State.²²¹⁷ For that reason, the right to instruct a lawyer as defined in Section 24(c) of the Act is a practical step towards assuring these rights.²²¹⁸

Section 25 of the Bill of Rights Act 1990 concerns the minimum expectable standards in any criminal procedure.²²¹⁹ This Section contains various rights consisting of the right to be presumed innocent until proved guilty²²²⁰ and the right to a fair and independent hearing before a Court.²²²¹ The rights within this Section are significant as they ensure that an individual has the right to an impartial trial before the Courts.²²²² Consequently, the rights within this Section have the potential to impact upon all of New Zealand's regulatory statutes, including the Crimes Act 1961²²²³ and the Films, Videos, and Publications Classification Act 1993.²²²⁴

²²¹⁴ Richard Mahoney "Other Rights of Persons Arrested or Detained Under any Enactment" in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003) at 552.

²²¹⁵ *R v Barlow* (1996) 14 CRNZ 9 (nz CA) at 31.

²²¹⁶ *Law Journal Library - HeinOnline.org* at s 24(c).

²²¹⁷ *MOT v Noort*, above n 2166, at 286.

²²¹⁸ Richard Mahoney "The Right to Counsel" in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003) at 525.

²²¹⁹ New Zealand Bill of Rights Act 1990 (NZ), s 25.

²²²⁰ New Zealand Bill of Rights Act 1990, s 25(c).

²²²¹ New Zealand Bill of Rights Act 1990, s 25(a).

²²²² Butler, above n 2181, at 367.

²²²³ Crimes Act 1961 (NZ).

²²²⁴ Butler, above n 2181, at 366.

Double jeopardy²²²⁵ and retroactive penalties are also outlawed by Section 26 of the Bill of Rights Act 1990.²²²⁶ The policy underlying the inclusion of double jeopardy within Section 26(2) of the Act is a determination to protect an individual from State harassment and oppression by means of multiple prosecutions.²²²⁷ The prohibition on retroactive penalties within Section 26(1) of the Act mirrors the recognised common law.²²²⁸ The established rule assimilated within this Section is the prohibition on allocating substantive criminal liability for behaviour not constituting an offence at the time the offence occurred.²²²⁹

The principles of natural justice²²³⁰ and its associated rights to justice are confirmed within Section 27 of the Bill of Rights Act 1990.²²³¹ The objective of Section 27 of the Act is to safeguard procedural protections considered fundamental to the rule of law.²²³² These procedural protections encompass the right to natural justice which requires the Courts and public authorities to consider both sides of a dispute before making any determination.²²³³ The right to natural justice also prohibits bias by the Courts²²³⁴ where no one can judge their own cause.²²³⁵

²²²⁵ Double jeopardy prevents a defendant from being tried again on the same or similar charges following a legitimate acquittal or conviction.

²²²⁶ New Zealand Bill of Rights Act 1990, s 26.

²²²⁷ Scott Optican “Retroactive Penalties and Double Jeopardy” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003) at 746.

²²²⁸ See *R v Hibberd* (2001) 2 NZLR 211 (nz CA).

²²²⁹ Optican, above n 2201, at 743.

²²³⁰ Natural justice is a legal term for the rule against bias and the right to a fair hearing.

²²³¹ New Zealand Bill of Rights Act 1990, s 27.

²²³² Grant Huscroft “The Right to Justice” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003) at 753.

²²³³ At 754.

²²³⁴ At 754.

²²³⁵ See *Pickering v Police* (1999) 5 HRNZ 154 (nz HC).

1.32 Mandatory Data Retention Periods for Internet Service Providers in New Zealand

1.32.1 Introduction

Law enforcement personnel have revealed during interviews that they have serious concerns relating to the retention of data by New Zealand's ISPs.²²³⁶ This section sets out the law, discusses those concerns and provides appropriate recommendations and conclusions.

1.32.2 The Optional Protocol and Mandatory Data Retention

The implementation of a mandatory data retention provision within New Zealand must be guided by the Optional Protocol. In accordance with Article 9(1) the State has an obligation to implement legislation that responds to the vulnerability of children and prevents the dissemination of child pornography on the Internet.²²³⁷ Article 9(1) signifies that New Zealand has a duty to recognise that data retention is an issue for law enforcement agencies.²²³⁸ This issue must therefore be addressed by introducing legislation to compel the commercial sector to retain subscriber information. Such an amendment to the legislation will guarantee that the State is fulfilling its obligations to its children as required by the Optional Protocol.

1.32.3 The Right to Privacy and Mandatory Data Retention

As previously mentioned, the right to privacy codified within Section 6 of the Privacy Act 1993 creates substantial obligations for New Zealand's ISPs.²²³⁹ These ISPs must ensure that personal information is kept securely²²⁴⁰ and only disclosed

²²³⁶ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5; Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 4; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17; Interview with Brian Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service (30 June 2014) at 5.

²²³⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 9(1).

²²³⁸ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²²³⁹ Butler, above n 2132, at 222.

²²⁴⁰ Privacy Act 1993 s 6.

for lawful purposes.²²⁴¹ This information must also be retained no longer than lawfully justified.²²⁴² However, these obligations can be annulled by the State's requirement to detect and investigate crime as a matter of public interest.²²⁴³ In accordance with this reasoning, the introduction of legislation to impose a mandatory data retention period upon New Zealand's ISPs is a matter that comes within this sphere of public interest. The ability of this information to assist with child pornography investigations is clearly a matter of public interest. Consequently, mandatory data retention by way of legislation is a justified limit upon the right to privacy.

Section 21 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act 1990) must also be considered when implementing a mandatory data retention period for New Zealand's ISPs. As previously stated, Section 21 protects an individual's right to privacy from unreasonable search and seizure of their property.²²⁴⁴ The Supreme Court has also recognised the special privacy interests inherent to digital information²²⁴⁵ and confirmed that these rights are protected from unreasonable intrusion.²²⁴⁶ However, the right to privacy within Section 21 is not absolute and this right must not be applied in isolation.²²⁴⁷ The objective of this limitation is not to shield an individual from lawful investigations, but to protect them from unlawful intrusions.²²⁴⁸ Moreover, the Courts cannot decline to apply any enactment that is inconsistent with Section 21 of Bill of Rights Act 1990²²⁴⁹ when the enactment is reasonable and demonstrably justified in a free and democratic society.²²⁵⁰ In conformity with this reasoning, it has been established that the State's requirement to detect and investigate child pornography offending is a matter of public interest, which justifies limiting the right to privacy contained within Section 21 of the Act.

²²⁴¹ Privacy Act 1993, s 6.

²²⁴² Privacy Act 1993, s 6.

²²⁴³ *Police v McDonald [2010]*, above n 2151, at [35].

²²⁴⁴ New Zealand Bill of Rights Act 1990 (NZ), s 21.

²²⁴⁵ *Dotcom v Attorney-General*, above n 2164, at [57].

²²⁴⁶ At [191].

²²⁴⁷ *MOT v Noort*, above n 2166, at 283; *Solicitor-General v Radio New Zealand Ltd*, above n 2166, at 59.

²²⁴⁸ *Optican*, above n 2167, at 298.

²²⁴⁹ New Zealand Bill of Rights Act 1990, s 4.

²²⁵⁰ New Zealand Bill of Rights Act 1990, s 5.

As a result, the employment of a mandatory data retention provision by law to assist with criminal investigations is most certainly demonstrably justified in a free and democratic society such as New Zealand.²²⁵¹

1.32.4 Data Retention in New Zealand

1.32.4.1 The Telecommunications Information Privacy Code 2003

The Telecommunications Information Privacy Code 2003²²⁵² ('Telecommunications Code 2003')²²⁵³ governs the retention of data in New Zealand by all telecommunications agencies including ISPs.²²⁵⁴ Rule 1 of the Telecommunications Code 2003 states:²²⁵⁵

Purpose of Collection of Telecommunications Information

Telecommunications information must not be collected by a telecommunications agency unless:

- (a) the information is collected for a lawful purpose connected with a function or activity of the agency; and
- (b) the collection of the information is necessary for that purpose.

Rule 9 of the Telecommunications Code 2003 relates to the retention of data by ISPs. This rule states:²²⁵⁶

Retention of Telecommunications Information

²²⁵¹ New Zealand Bill of Rights Act 1990, s 5.

²²⁵² Telecommunications Information Privacy Code 2003.

²²⁵³ To view a copy of the Telecommunications Information Privacy Code 2003 see Office of the Privacy Commissioner "Telecommunications Information Privacy Code" (16 October 2014) Office of the Privacy Commissioner <<https://privacy.org.nz/the-privacy-act-and-codes/codes-of-practice/telecommunications-information-privacy-code/>>.

²²⁵⁴ Telecommunications Information Privacy Code 2003, rul. 4(2)(e).

²²⁵⁵ Telecommunications Information Privacy Code 2003, rul. 1.

²²⁵⁶ Telecommunications Information Privacy Code 2003, rul. 9.

(1) A telecommunications agency that holds telecommunications information must not keep that information for longer than is required for the purposes for which the information may lawfully be used.

(2) This rule applies to telecommunications information obtained before or after the commencement of this code.

All codes of practice, including the Telecommunications Code 2003, are issued by the Privacy Commissioner under Part 6 of the Privacy Act 1993.²²⁵⁷ The Telecommunications Code 2003 sets out specific rules for the industry in its dealings with customers²²⁵⁸ and enables the industry to modify the Information Privacy Principles (Privacy Principles) contained in Parts 2 and 6 of the Privacy Act 1993.²²⁵⁹ Thus, where an industry code of practice has been issued by the Privacy Commissioner, the rules in the code of practice replace the information privacy principles.²²⁶⁰ These amendments to the Privacy Principles are designed to take into consideration the special characteristics of a particular industry such as telecommunications.²²⁶¹

A number of the aspects of the amendments to the Privacy Principles for the telecommunications industry have created certain exceptions relevant to a child pornography investigation. These exceptions are contained in Rules 2,²²⁶² 3,²²⁶³ 10²²⁶⁴ and 11²²⁶⁵ of the Telecommunications Code 2003. In terms of the exceptions, a departure from Rule 9 is permitted for a particular purpose where there is a competing public interest.²²⁶⁶ However, the major complaint of law enforcement

²²⁵⁷ Privacy Act 1993 pt 6.

²²⁵⁸ LawAccess “Codes of Practice for Particular Areas of Life” (16 October 2014) LawAccess <<http://www.lawaccess.govt.nz/Chapter/110-Mental-Health/46-Privacy/9-Codes-of-Practice/>>.

²²⁵⁹ Privacy Act 1993, pt 2 and 6.

²²⁶⁰ LawAccess, above n 2232.

²²⁶¹ Community Law: Free legal help throughout Aotearoa “Codes of Practice” Community Law: Free legal help throughout Aotearoa <<http://www.communitylaw.org.nz/community-law-manual/chapter-6-privacy/codes-of-practice/>>.

²²⁶² Telecommunications Information Privacy Code 2003, rul. 2(2)(d)(i).

²²⁶³ Telecommunications Information Privacy Code 2003, rul. 3(4)(i).

²²⁶⁴ Telecommunications Information Privacy Code 2003, rul. 10(1)(c)(i).

²²⁶⁵ Telecommunications Information Privacy Code 2003, rul. (1)(f)(ii).

²²⁶⁶ Office of the Privacy Commissioner “Telecommunications Information Privacy Code - General information” (16 October 2014) Office of the Privacy Commissioner

agencies is that the Telecommunications Code 2003 contains no provisions requiring the retention of user data by New Zealand's ISPs, unlike other jurisdictions such as the European Union.²²⁶⁷

1.32.5 Mandatory Data Retention in New Zealand

1.32.5.1 The Reality of Data Retention for Law Enforcement Agencies in New Zealand

Detective Senior Sergeant John Michael of the New Zealand Police confirms that New Zealand's ISPs are not mandated by legislation to retain user data for a particular period.²²⁶⁸ Sometimes, the Police can be interacting with an ISP that has no data records at all, or a period of time may have lapsed so they no longer maintain these records.²²⁶⁹ Michael considers this to be a significant barrier to any child pornography investigation.²²⁷⁰ Lloyd Bezett, Senior Policy Analyst, of the Department of Internal Affairs, agrees,²²⁷¹ and states that it is critically important that law enforcement agencies are able to ascertain the owner of a particular IP address.²²⁷² Once this information is available to law enforcement agencies an investigation can be undertaken to identify that specific person, with the exact IP address, who has accessed objectionable content at a certain time and date.²²⁷³ The existing barrier to the capability of law enforcement agencies to investigate content offending is a serious concern. The lack of retention of user data diminishes the efficacy of New Zealand's legislation and institutional mechanisms intended to reduce the vulnerability of children. It is an indication that the State is *not* fulfilling

<<https://privacy.org.nz/the-privacy-act-and-codes/codes-of-practice/telecommunications-information-privacy-code/telecommunications-information-privacy-code-general-information/>>.

²²⁶⁷ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

²²⁶⁸ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²²⁶⁹ At 5.

²²⁷⁰ At 5.

²²⁷¹ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 4.

²²⁷² At 4.

²²⁷³ At 4.

its special obligations and is failing to recognise and respond to the vulnerability of its children as required by Article 9(1) of the Optional Protocol.²²⁷⁴

Lloyd Bezett is also mindful that the Privacy Commissioner has issued the Telecommunications Code 2003 to telecommunications agencies.²²⁷⁵ Rule 4(2)(b) of the Telecommunications Code 2003 confirms to the agencies that they should only maintain data on customer traffic for as long as it is necessary to maintain their network.²²⁷⁶ Consequently, ISPs can decide not to retain data on their customers' Internet usage.²²⁷⁷ Bezett explains that the issue that law enforcement agencies have with Rule 4(2)(b) is that where an individual has a dynamic IP address,²²⁷⁸ the ISP might not be able to inform the Police who had that IP address at a particular time.²²⁷⁹

Another aspect of concern for law enforcement agencies is that investigations into child pornography offending on the Internet often involve evidence from overseas,²²⁸⁰ which can take several months to arrive.²²⁸¹ Once a certain length of time has elapsed there is no guarantee that the ISP has retained the information required by the Police.²²⁸² Furthermore, Tim Houston, an Investigator with the New Zealand Customs Service, reveals that the inability to identify an offender because of lack of access to relevant data seriously slows down and impedes investigations by law enforcement agencies.²²⁸³ Brian Thurlow, Senior Enforcement Advisor for

²²⁷⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 9(1).

²²⁷⁵ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 4.

²²⁷⁶ Telecommunications Information Privacy Code 2003, rul. 4(2)(b).

²²⁷⁷ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 4.

²²⁷⁸ A dynamic IP address is where the ISP holds a pool of IP addresses and allocates an IP address to anyone who asks for Internet access. This means that for this session you have this IP address and if you log in again in 20 minutes time you have another IP address.

²²⁷⁹ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 4.

²²⁸⁰ At 4.

²²⁸¹ At 4.

²²⁸² At 4.

²²⁸³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

the New Zealand Customs Service, recognises the impact of this issue on investigations and believes that law enforcement agencies should be provided with all relevant data required in an investigation, not only from ISPs, but also from all other telecommunication agencies.²²⁸⁴ Thurlow considers that criminals rely on these agencies' services when they commit crime and law enforcement agencies believe they should, as government officials, have access to the relevant data.²²⁸⁵ Moreover, Thurlow firmly supports the introduction of legislation that contains a mandatory data retention period for ISPs.²²⁸⁶

Philip Hamlin, a Barrister and Former Crown Prosecutor agrees with this proposal.²²⁸⁷ In Thurlow's view, a mandatory data retention period would not impose an undue financial burden on ISPs as mass storage is now relatively inexpensive²²⁸⁸ and readily available.²²⁸⁹ Any financial burden would be outweighed by the advantages to be gained by having the material available to law enforcement agencies.²²⁹⁰ This information would be enormously beneficial to investigations as it constitutes a valuable resource and would therefore help to provide children with enhanced protection.²²⁹¹ However, Thurlow also raises an important point.²²⁹² The introduction of any mandatory data retention period in New Zealand must be balanced against the individual's right to privacy under the Privacy Act 1993.²²⁹³ This balancing of rights is why such information should only be accessible to law enforcement agencies on the production of a search warrant that has been issued by a judicial sanction.²²⁹⁴

²²⁸⁴ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 5.

²²⁸⁵ At 5.

²²⁸⁶ At 5.

²²⁸⁷ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 6.

²²⁸⁸ Tim Houston, an Investigator with the New Zealand Customs Service, made the following remark on the cost of storage: This is ironic as the price of electronic storage is decreasing, which is good for the retention of data, but it's a double-edged sword, because we know that our offenders are amassing bigger collections because it's 100 dollars to buy a two terabyte hard drive.

²²⁸⁹ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 5.

²²⁹⁰ At 5.

²²⁹¹ At 5.

²²⁹² At 5.

²²⁹³ At 5.

²²⁹⁴ At 5.

1.32.6 Mandatory Data Retention in the European Union

1.32.6.1 The Data Retention Directive

The European Union Data Retention Directive, is formally known as ‘Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC (Data Retention Directive)’.²²⁹⁵ The purpose and scope of this Data Retention Directive are contained within Article 1.²²⁹⁶ This Article states that the Directive aims to harmonise provisions for Member States with respect to the retention of data.²²⁹⁷ It shall not apply to the content of electronic communications.²²⁹⁸

The obligation placed on member states to introduce legislation that orders the mandatory retention of information by ISPs is contained in Article 3 of the Data Retention Directive.²²⁹⁹ This Article states that Member States must adopt measures to ensure that data is retained in accordance with the provisions of Article 5 of the Directive.²³⁰⁰ According to Articles 5 and 6 of the Data Retention Directive, ISPs operating in member states have to store citizens’ telecommunications data²³⁰¹ for a minimum of six months and a maximum period of 24 months.²³⁰² Under Article 8, law enforcement agencies is able to request²³⁰³ access to user information such as the user’s IP address and email details as detailed in Article 5 of the Data Retention Directive.²³⁰⁴ Nevertheless, Article 4 confirms that permission to access this information should only be granted by a Court and can only be given to the

²²⁹⁵ Directive 2006/24/EU of the European Parliament 2006.

²²⁹⁶ Directive 2006/24/EU of the European Parliament 2006, art 1.

²²⁹⁷ Directive 2006/24/EU of the European Parliament 2006, art 1(1).

²²⁹⁸ Directive 2006/24/EU of the European Parliament 2006, art 1(2).

²²⁹⁹ Directive 2006/24/EU of the European Parliament 2006, art 3.

²³⁰⁰ Directive 2006/24/EU of the European Parliament 2006, art 3(1).

²³⁰¹ Directive 2006/24/EU of the European Parliament 2006, art 5.

²³⁰² Directive 2006/24/EU of the European Parliament 2006, art 6.

²³⁰³ Directive 2006/24/EU of the European Parliament 2006, art 8.

²³⁰⁴ Directive 2006/24/EU of the European Parliament 2006, art 5.

competent national authorities in specific cases and in accordance with the legislation of that country.²³⁰⁵

It must also be stated that on 8 April 2014, the Court of Justice of the European Union declared the Data Retention Directive to be invalid.²³⁰⁶ The Court held that the Data Retention Directive interfered with the rights to privacy and personal data protection²³⁰⁷ guaranteed by the European Union Charter of Fundamental Rights.²³⁰⁸ It is contended that although these specific rights are important they are not the concern of this subsection of the thesis. The purpose of this subsection is to illustrate how the Data Retention Directive and its implementation within the Republic of Ireland could assist New Zealand in responding to the concerns that New Zealand does not have any mandatory data retention enforced by legislation.²³⁰⁹ The Data Retention Directive and its application within the Republic of Ireland demonstrates how such an initiative could operate and function in accordance with legislation within New Zealand.

1.32.7 Mandatory Data Retention in the Republic of Ireland

1.32.7.1 The Republic of Ireland's Communications (Retention of Data) Act 2011

The Republic of Ireland's Communications (Retention of Data) Act 2011²³¹⁰ ('Retention of Data Act 2011') transposes the European Union's Data Retention Directive into the Republic's legislation.²³¹¹ The Government of the Republic also signed the Optional Protocol in 2000, and therefore constitutes a useful example of the implementation of national legislation to secure Internet data.²³¹² Section 3(1) of the Retention of Data Act 2011 requires Internet data to be retained by ISPs for

²³⁰⁵ Directive 2006/24/EU of the European Parliament 2006, art 6.

²³⁰⁶ C- 293/12, C- 594/12 *Digital Rights Ireland and Seitlinger and Others* [2014].

²³⁰⁷ At 1.

²³⁰⁸ European Union Charter of Fundamental Rights 2009.

²³⁰⁹ International Centre for Missing and Exploited Children *Child Pornography - Model Legislation and Global Review* (2013) at 31.

²³¹⁰ Communications (Retention of Data) Act 2011 (ie).

²³¹¹ Davinia Brennan "President Signs Communications (Retention of Data) Act 2011 into Law" (11 February 2011) <<http://www.irelandip.com/2011/02/articles/privacy-1/president-signs-communications-retention-of-data-act-2011-into-law/>>.

²³¹² United Nations, above n 1555.

a 12-month period.²³¹³ However, Section 2 of the Retention of Data Act 2011 does not require the contents of emails or other communications to be retained.²³¹⁴ The details of the data that must be retained in accordance with Section 3 are contained within Part 2 of the Act.²³¹⁵ Part 2 of the Retention of Data Act 2011 states that the data necessary to trace and identify the name and address of the user to whom an IP address is allocated must be retained.²³¹⁶ Moreover, the Retention of Data Act 2011 also requires ISPs retaining the above information to take certain security measures to safeguard the retained data.²³¹⁷ For example, under Section 4(1)(d)(ii) data must be destroyed by the ISP at the end of the specified retention period contained within Section 3(1).²³¹⁸ Nevertheless, a grace period of one month after this specified retention period has expired is granted to facilitate any last-minute requests.²³¹⁹

Section 6 of the Retention of Data Act 2011 enables the *Garda Síochána*,²³²⁰ members of the Defence Forces, and Revenue Officials to make a disclosure request to access retained information.²³²¹ Disclosure requests can only be made in limited circumstances,²³²² including the prevention, detection, investigation or prosecution of a serious offence.²³²³ Section 6(4) requires that disclosure requests be made in writing,²³²⁴ but requests may be made orally in cases of exceptional urgency, provided that the oral request is confirmed in writing to the ISP within two working days of the request being actioned.²³²⁵ Furthermore, Ireland's ISPs are not permitted to access the retained data except when they have the consent of the individual to

²³¹³ Communications (Retention of Data) Act 2011, s 3(1).

²³¹⁴ Communications (Retention of Data) Act 2011, s 2.

²³¹⁵ Communications (Retention of Data) Act 2011, pt 2.

²³¹⁶ Communications (Retention of Data) Act 2011, pt 2.

²³¹⁷ Brennan, above n 2285.

²³¹⁸ Communications (Retention of Data) Act 2011, s 4(1)(d)(ii).

²³¹⁹ Communications (Retention of Data) Act 2011, s 4(1)(d)(ii).

²³²⁰ *Garda Síochána* are commonly referred to as the Gardaí, which is the Police Force of Ireland.

²³²¹ Communications (Retention of Data) Act 2011, s 6.

²³²² Disclosure requests can also be made for safeguarding the security of the State, the saving of human life, as well as the prevention, detection and investigation of Revenue offences.

²³²³ Communications (Retention of Data) Act 2011, s 6(1).

²³²⁴ Communications (Retention of Data) Act 2011, s 6(4).

²³²⁵ Communications (Retention of Data) Act 2011, s 6(5).

whom the data relates,²³²⁶ or to comply with a disclosure request from law enforcement agencies²³²⁷ or an order from the Courts.²³²⁸

The Retention of Data Act 2011 also contains a number of safeguards for the retained data.²³²⁹ A High Court Judge is designated to review the operation of the Act in accordance with Section 11(1) of the Act.²³³⁰ The Judge is responsible for ensuring that law enforcement agencies are complying with the provisions of the Act²³³¹ and for providing the *Taoiseach*²³³² with a report on the general operation of the Act.²³³³ The designated High Court Judge also has the power in accordance with Section 12(2)(a) to investigate any case in which a disclosure request is made.²³³⁴ Moreover, Section 12(2)(b) allows the Judge to access and inspect any official documents relating to that request.²³³⁵ These safeguards were implemented in the expectation that the provisions would protect ISPs, and ensure they are not burdened by unreasonable disclosure requests.²³³⁶

1.32.8 Recommendations

1.32.8.1 Mandatory Data Retention

The Government must seriously consider the introduction of legislation to impose a mandatory data retention period on New Zealand's ISPs.²³³⁷ This mandatory data retention period would be an invaluable aid to law enforcement agencies.²³³⁸ It would prevent valuable resources from having to be directed away from

²³²⁶ Communications (Retention of Data) Act 2011, s 5(a).

²³²⁷ Communications (Retention of Data) Act 2011, s 5(b).

²³²⁸ Communications (Retention of Data) Act 2011, s 5(c).

²³²⁹ Brennan, above n 2285.

²³³⁰ Communications (Retention of Data) Act 2011, s 11(1).

²³³¹ Communications (Retention of Data) Act 2011, s 12(1)(b).

²³³² The *Taoiseach* is the head of Government or Prime Minister of Ireland.

²³³³ Communications (Retention of Data) Act 2011, s 12(1)(C).

²³³⁴ Communications (Retention of Data) Act 2011, s 12(2)(a).

²³³⁵ Communications (Retention of Data) Act 2011, s 12(2)(b).

²³³⁶ Brennan, above n 2285.

²³³⁷ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 5; Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 6.

²³³⁸ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

investigations²³³⁹ and provide a readily available pool of information for any potential law enforcement operation.²³⁴⁰ The introduction of a mandatory data retention period for New Zealand's ISPs would be beneficial to society since with all crime, including child pornography offending, there are victims.²³⁴¹ The retention of data would not only allow better tracking but also assist with the investigation of other online crimes.²³⁴² The introduction of this mandatory data retention period would also assist law enforcement agencies to prevent New Zealand's children from being victimised by those who trade in child pornography.²³⁴³ However, the most significant aspect of this recommendation is its potential to increase law enforcement agencies capability to respond to child pornography offending.

1.32.9 Conclusion

New Zealand's Telecommunications Code 2003 is inadequate and does not provide law enforcement agencies with the legislative mechanisms they require to investigate child pornography offending on the Internet.²³⁴⁴ These inadequacies are a serious hindrance to law enforcement investigations.²³⁴⁵ This is an unacceptable state of affairs. The implementation of a mandatory data retention period for New Zealand's ISPs would not constitute an undue burden for them to endure.²³⁴⁶ As Thurlow has aforementioned, any burden would be outweighed by the advantages to be gained by having this data available to law enforcement agencies.²³⁴⁷ If the Government is serious about reducing the consumption of child pornography and

²³³⁹ At 17.

²³⁴⁰ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 5.

²³⁴¹ At 5.

²³⁴² At 5.

²³⁴³ At 5.

²³⁴⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5; Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 4; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

²³⁴⁵ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

²³⁴⁶ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 5.

²³⁴⁷ At 5.

its dissemination on the Internet, then legislation forcing ISPs to retain data is urgently required. Furthermore, this amendment to the existing legislation must also address other concerns regarding advancements in technology. The importance of these amendments to assist with data retention is their potential to address concerns created by the rapid pace of technology which currently poses significant challenges for New Zealand's law enforcement agencies.

1.33 Law Enforcement and Data Encryption

1.33.1 Introduction

The retention of data by New Zealand's ISPs discussed in the previous section is a significant issue for law enforcement. This operational concern is often aggravated by advancements in technology that make it impossible for law enforcement agencies to trace subjects' actions by normal means of investigation. The employment of new technology by child pornographers can seriously hinder child pornography operations. This section examines the effects of advancements in technology on child pornography investigations and the merits of a compulsory order to compel an offender to surrender the passwords to any encrypted material under investigation. Tim Houston, an Investigator with the Child Exploitation Operations Team of the New Zealand Customs Service, stated during the interview phase of this thesis that law enforcement agencies require more support from the private sector to assist with investigations.²³⁴⁸ This section discusses Customs Officers' concerns and attempts to provide appropriate recommendations intended to improve law enforcement agencies' capability to engage with advancements in online technology.

²³⁴⁸ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640.

1.33.2 The Optional Protocol and a Compulsory Order for an Encryption or Password Code

As previously noted, the Optional Protocol obligates the State to implement legislation to outlaw child pornography²³⁴⁹ and respond to the vulnerability of children by sufficiently protecting them from the harm associated with child pornography offending.²³⁵⁰ This duty requires that New Zealand respond to the concerns of law enforcement agencies²³⁵¹ and introduces compulsory legislation to adequately address the encryption of software.²³⁵² Article 9(1) of the Optional Protocol justifies the implementation of this provision as it requires the State to employ measures to prevent child pornography offending.²³⁵³ One such measure is the introduction of legislation that would prevent offenders from usurping the law by shielding themselves from it via encryption software. Therefore, a compulsory order to force an offender to reveal the contents of any encrypted device will assist New Zealand to achieve its obligations in accordance with Article 9(1) of the Optional Protocol.

1.33.3 The Right to Privacy and Compulsory Decryption

As previous stated within this thesis, the right to privacy within Section 6 of the Privacy Act 1993 creates substantial obligations for New Zealand's commercial and private sectors.²³⁵⁴ Section 21 of the Bill of Rights Act 1990 also protects an individual's right to privacy from unlawful intrusions by the State.²³⁵⁵ However, these rights are not absolute²³⁵⁶ and the State can and does supersede these concerns

²³⁴⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 1.

²³⁵⁰ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 9(1).

²³⁵¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

²³⁵² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 9(1).

²³⁵³ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 9(1).

²³⁵⁴ Butler, above n 2132, at 222.

²³⁵⁵ *Hamed v R*, above n 2159, at [12, 222].

²³⁵⁶ Cullen and Reilly, above n 2146, at 63; *MOT v Noort*, above n 2166, at 59.

with specific legislation.²³⁵⁷ An example of this category of State intervention is clearly evident in Section 130(1) of the Search and Surveillance Act 2012. This Section of the Act enables a law enforcement official to request access to encrypted material on a storage device.²³⁵⁸ The employment of a new compulsory decryption provision within the Films, Videos, and Publications Classification Act 1993 is an extension of this category of State intervention.

As previously noted, Section 4 of the Bill of Rights Act 1990 provides the State with the authority to infringe upon the rights within this Act where it is perceived to be in the public interest.²³⁵⁹ Furthermore, it is most certainly in the public interest that a suspect who has been the subject of a search warrant is compelled to provide access to encrypted content suspected of being child pornography. This enactment is also consistent with the values in the Bill of Rights Act 1990. Compulsory decryption imposes a limitation on the right to privacy that is consistent with a democracy and is demonstrably justified.²³⁶⁰ This justification is evident by virtue of its intended purpose, which is to assist with child pornography investigations and not to usurp an individual's right to privacy.

1.33.4 The Apple iPhone 6 and Google's Android Platform

The Apple iPhone 6,²³⁶¹ along with its operating system iOS 8,²³⁶² and Google's Android Platform²³⁶³ will soon be encrypted by default.²³⁶⁴ Apple and Google claim

²³⁵⁷ Rishworth, above n 2174, at 106.

²³⁵⁸ Search and Surveillance Act 2012 s 130(1).

²³⁵⁹ Rishworth, above n 2174, at 106.

²³⁶⁰ New Zealand Bill of Rights Act 1990 (NZ), s 5.

²³⁶¹ The Apple iPhone 6 the latest Smartphone release from Apple. For more information see Apple "Apple - iPhone 6" (17 October 2014) Apple <<https://www.apple.com/nz/iphone-6/>>.

²³⁶² The iOS 8 is the eighth major release of the iOS mobile operating system designed by Apple.

²³⁶³ The Android is a mobile operating system or platform that is based on the Linux kernel and currently developed by Google.

²³⁶⁴ Trevor Timm "Your iPhone is now Encrypted The FBI says it'll help Kidnappers Who do you Believe?" *The Guardian* (30 September 2014) <<http://www.theguardian.com/commentisfree/2014/sep/30/iphone-6-encrypted-phone-data-default>>.

they will not be able to access these devices for anyone, including law enforcement agencies.²³⁶⁵ This claim is confirmed by Apple as stated on their website:²³⁶⁶

Your iMessages and FaceTime calls are your business, not ours. Your communications are protected by end-to-end encryption across all your devices when you use iMessage and FaceTime, and with iOS 8 your iMessages are also encrypted on your device in such a way that they can't be accessed without your passcode. Apple has no way to decrypt iMessage and FaceTime data when it's in transit between devices.

Apple has also recognised the importance of cloud storage²³⁶⁷ to its customers and confirms that the company is committed to making cloud storage as secure as possible.²³⁶⁸ To ensure this, all iCloud²³⁶⁹ content is encrypted through a number of undisclosed processes.²³⁷⁰ When a third party stores any data, Apple encrypts this data and does not allow any third party access to the password keys.²³⁷¹ Apple also provides users with an iCloud Keychain²³⁷² which retains all passwords in a format that neither Apple nor anyone else is unable to access.²³⁷³ Apple firmly believes that the iCloud Keychain is the best way to protect an iCloud account.²³⁷⁴ Moreover, the iCloud Keychain contains a two-step verification process which is designed to provide another layer of protection to the customer's iCloud account and any information contained within the account.²³⁷⁵

The next generation of Google's Android L²³⁷⁶ operating systems will also encrypt data by default.²³⁷⁷ Google has offered optional encryption on devices since 2011,

²³⁶⁵ Timm, above n 2338.

²³⁶⁶ Apple "Apple - Privacy - Privacy Built In" (17 October 2014) Apple <<https://www.apple.com/privacy/privacy-built-in/>>.

²³⁶⁷ Cloud storage involves storing data on multiple virtual servers that hosted by third-parties.

²³⁶⁸ Apple, above n 2340.

²³⁶⁹ iCloud is an Apple cloud storage service.

²³⁷⁰ Apple, above n 2340.

²³⁷¹ Apple, above n 2340.

²³⁷² The iCloud Keychain is a program developed by Apple to improve password management.

²³⁷³ Apple, above n 2340.

²³⁷⁴ Apple, above n 2340.

²³⁷⁵ Apple, above n 2340.

²³⁷⁶ Android L or Lollipop is a version of the Android operating system developed by Google.

²³⁷⁷ Craig Timberg "Newest Androids will Join iPhones in Offering Default Encryption, Blocking Police" *Washington Post* (18 September 2014) <<http://www.washingtonpost.com/blogs/the->

but few users are familiar with this feature.²³⁷⁸ The company has decided to design an activation procedure for new Android devices so that encryption of data happens automatically.²³⁷⁹ Once the activation procedure encrypts data, only an individual who enters the correct password will be able to access any information stored on that smartphone.²³⁸⁰ These password keys for the device are not stored by Google, so they cannot be shared with law enforcement agencies.²³⁸¹

Both Apple and Google have openly embraced this new form of encryption that will in most cases make it almost impossible for law enforcement officials to collect evidence from smartphones.²³⁸² The collection of evidence may not be possible even when authorities produce legally binding search warrants.²³⁸³ Both companies have been actively changing security features in response to the public backlash in the United States against Government surveillance.²³⁸⁴ This backlash comes in the wake of Edward Snowden's²³⁸⁵ revelations, including disclosures about the collection of phone records.²³⁸⁶ Furthermore, Mr Snowden's revelations have also raised concerns in New Zealand about the collection of information by government surveillance agencies such as the Government Communications Security Bureau²³⁸⁷

switch/wp/2014/09/18/newest-androids-will-join-iphones-in-offering-default-encryption-blocking-police/>.

²³⁷⁸ Timberg, above n 2351.

²³⁷⁹ Timberg, above n 2351.

²³⁸⁰ Timberg, above n 2351.

²³⁸¹ Michael Briggs "Android L Update To Encrypt Data By Default, Says Google : Tech : Design & Trend" (21 September 2014) <<http://www.designntrend.com/articles/19845/20140919/android-l-update-encrypt-data-default-google.htm>>.

²³⁸² Timberg, above n 2351.

²³⁸³ Timberg, above n 2351.

²³⁸⁴ Devlin Barrett "FBI Chief Warns Against Phone Encryption" (16 October 2014) *The Wall Street Journal* <<http://online.wsj.com/articles/fbi-chief-warns-phone-encryption-may-have-gone-too-far-1413489352>>.

²³⁸⁵ Edward Snowden is the source behind the biggest intelligence leak in the history of the United States National Security Agency. For more see Glenn Greenwald, Ewen MacAskill and Laura Poitras "Edward Snowden: the Whistleblower Behind the NSA Surveillance Revelations" *The Guardian* (10 June 2013) <<http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>>.

²³⁸⁶ Barrett, above n 2358.

²³⁸⁷ The Government Communications Security Bureau (GCSB) is charged with promoting New Zealand's national security by collecting and analysing information of an intelligence nature. The GCSB is a public service department of New Zealand.

(‘GCSB’).²³⁸⁸ In response to these concerns, Apple believes that its phones are exempt from Government prying, and states openly on its website that:²³⁸⁹

On devices running iOS 8, your personal data such as photos, messages (including attachments), email, contacts, call history, iTunes content, notes, and reminders is placed under the protection of your passcode. Unlike our competitors, Apple cannot bypass your passcode and therefore cannot access this data. So it’s not technically feasible for us to respond to government warrants for the extraction of this data from devices in their possession running iOS 8.

1.33.5 Criticism of Apple and Google by Law Enforcement Agencies

There has been much criticism of Apple and Google’s security measures by senior law enforcement officials in the United States, such as the Director of the FBI James Comey.²³⁹⁰ Comey’s criticism is in response to the difficulties that their security measures pose for legitimate crime detection.²³⁹¹ The type of smartphone encryption discussed is so secure that law enforcement agencies may never be able to gain access to information stored on the devices,²³⁹² even when they have legitimate search warrants.²³⁹³ The FBI warns that these changes in smartphone encryption could help criminals hide evidence, in addition to frustrating investigations of child abuse and other crimes.²³⁹⁴ John Escalante, the Chief of

²³⁸⁸ For more on these concerns see Adam Bennett, Rebecca Quilliam, Derek Cheng “US Spies have two Bases in New Zealand: Snowden” *New Zealand Herald* (16 September 2014) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11325214>; Brenden Manning “Spy Cairns: Cunliffe checks with former Labour Leaders” *New Zealand Herald* (17 September 2014) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11326495>; Adam Bennett “Key Not Sure if US Spy Agency Has Role Here” *New Zealand Herald* (18 September 2014) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11326648>.

²³⁸⁹ Apple “Apple - Privacy - Government Information Requests” (18 October 2014) Apple <<https://www.apple.com/privacy/government-information-requests/>>.

²³⁹⁰ James Comey “Going Dark: Are Technology, Privacy, and Public Safety on a Collision Course?” (16 October 2014) FBI <<http://www.fbi.gov/news/speeches/going-dark-are-technology-privacy-and-public-safety-on-a-collision-course>>.

²³⁹¹ Craig Timberg and Greg Miller “FBI blasts Apple, Google for Locking Police out of Phones” *Washington Post* (25 September 2014) <http://www.washingtonpost.com/business/technology/2014/09/25/68c4e08e-4344-11e4-9a15-137aa0153527_story.html>.

²³⁹² Timberg and Miller, above n 2365.

²³⁹³ Timberg and Miller, above n 2365.

²³⁹⁴ Barrett, above n 2358.

Detectives for Chicago's Police Department draws particular attention to the opportunities such devices offer paedophiles:²³⁹⁵

Apple will become the phone of choice for the paedophile and the average paedophile at this point is probably thinking, 'I've got to get an Apple phone'.

John Escalante's concern is also shared by other members of law enforcement agencies who believe that the capability to search web histories, messages and photos on smartphones is essential to solving a range of serious crimes, including child pornography offending.²³⁹⁶

The Director of the FBI agrees while conceding that the law has not kept pace with technology, and this disconnect has created a significant public safety problem.²³⁹⁷ The FBI call this disconnect 'Going Dark'.²³⁹⁸ Going Dark²³⁹⁹ occurs when those charged with protecting the public are not always able to access the evidence required to prosecute crime, even with lawful authority.²⁴⁰⁰ As a result, even when law enforcement agencies have the legal authority to intercept and access electronic communications, they often lack the technical ability to do so.²⁴⁰¹ The problem of Going Dark will most surely be amplified by Apple and Google's new security measures.²⁴⁰²

²³⁹⁵ Timberg and Miller, above n 2365.

²³⁹⁶ Timberg and Miller, above n 2365.

²³⁹⁷ Comey, above n 2364.

²³⁹⁸ Comey, above n 2364.

²³⁹⁹ Going Dark is the discrepancy between exercising lawful authority and the capability of law enforcement to enforce that same lawful authority. This disparity is when the Government is increasingly unable to collect valuable evidence in cases ranging from child exploitation and pornography to organised crime. It is often evidence that a Court has authorised the Government to collect. For more on this see Valerie Caproni "Going Dark: Lawful Electronic Surveillance in the Face of New Technologies" (20 October 2014) FBI <<http://www.fbi.gov/news/testimony/going-dark-lawful-electronic-surveillance-in-the-face-of-new-technologies>>.

²⁴⁰⁰ Comey, above n 2364.

²⁴⁰¹ Comey, above n 2364.

²⁴⁰² Comey, above n 2364.

1.33.6 PhotoDNA Technology

The technical difficulties confronted by law enforcement agencies have been recognised by Microsoft who developed PhotoDNA Technology²⁴⁰³ in 2009.²⁴⁰⁴ Microsoft contends that this technology assists law enforcement agencies to find and remove child pornography from the Internet.²⁴⁰⁵ Houston confirms this and states:²⁴⁰⁶

Photo DNA Technology is a tool developed by Microsoft that can match known and unknown child abuse imagery. It basically helps law enforcement identify the movement of illegal material through the online environment.

Microsoft donated its PhotoDNA Technology to the National Center for Missing and Exploited Children who provided a version of the PhotoDNA program for ISPs so that they could assist in preventing the spread of child pornography online.²⁴⁰⁷ This contribution by Microsoft has resulted in PhotoDNA becoming the industry standard for technology to combat online child pornography.²⁴⁰⁸ Furthermore, Microsoft has recognised the scale of the online child pornography problem and that the amount of information associated with this type of investigations is overwhelming.²⁴⁰⁹ This acknowledgement of the problem is why Microsoft partnered with NetClean²⁴¹⁰ to make PhotoDNA Technology available and cost-

²⁴⁰³ PhotoDNA Technology utilises a mathematical technique known as robust hashing. Robust hashing works by calculating a unique signature into a 'hash' that signifies the character of a particular photo. In the same way that the characteristics of every person's DNA are distinct, the signature or 'hash value' for every photo is also distinct. This distinctive difference enables the creation of a hash that can recognise an image based on its unique characteristics or its digital DNA.

²⁴⁰⁴ Microsoft "PhotoDNA Newsroom" (17 October 2014) News Center <<http://news.microsoft.com/presskits/photodna/>>.

²⁴⁰⁵ Microsoft, above n 2378.

²⁴⁰⁶ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 7.

²⁴⁰⁷ Microsoft, above n 2378.

²⁴⁰⁸ Microsoft, above n 2378.

²⁴⁰⁹ Bill Harmon "Microsoft PhotoDNA Technology to Help Law Enforcement Fight Child Pornography" (19 March 2012) Microsoft on the Issues <<http://blogs.microsoft.com/on-the-issues/2012/03/19/microsoft-photodna-technology-to-help-law-enforcement-fight-child-pornography/>>.

²⁴¹⁰ NetClean is a development company that provides technological solutions to fight child pornography on the Internet. These solutions are used worldwide by Government agencies, Internet Service Providers and law enforcement professionals.

free to law enforcement agencies at an international level.²⁴¹¹ PhotoDNA provides law enforcement agencies with a variety of options so that they can take advantage of the same effective technologies to fight child pornography that major technology companies such as Microsoft are already using themselves in their commercial operations.²⁴¹² The advantage of PhotoDNA Technology is that it will empower law enforcement agencies to efficiently identify and rescue victims, while also prosecuting child pornographers to ensure they are brought to justice.²⁴¹³

Christian Sjöberg, the CEO of NetClean reveals that NetClean's Analyze Digital Investigator²⁴¹⁴ and PhotoDNA aim to assist law enforcement agencies to expedite efforts to eradicate child pornography.²⁴¹⁵ NetClean's Analyze technology has been developed in collaboration with law enforcement agencies to fulfil the current and future requirements of digital media investigations.²⁴¹⁶ This technology provides a powerful platform for law enforcement agencies to manage digital media investigations at different modulated levels.²⁴¹⁷ As a result, investigations that previously consisted of a month's duration can now be concluded in a day or even a matter of hours.²⁴¹⁸ Sjöberg is adamant that PhotoDNA Technology has proved its worth and liberated resources but, most importantly of all, he believes that it saves children from abuse.²⁴¹⁹ Stuart Aston, Chief Security Officer at Microsoft in the United Kingdom, believes that without innovation and demand from the public

²⁴¹¹ Harmon, above n 2383.

²⁴¹² NetClean Technologies "Microsoft and NetClean provide PhotoDNA Technology to Help Law Enforcement Fight Online Child Sexual Exploitation" (19 March 2012) NetClean Technologies <<https://www.netclean.com/en/press/microsoft-and-netclean-provide-photodna-technology-to-help-law-enforcement-fight-online-child-sexual-exploitation/>>.

²⁴¹³ Harmon, above n 2383.

²⁴¹⁴ NetClean's Analyze Digital Investigator consists of several programs including the Analyze DI and Analyze Collaboration Server. These programs provide investigators with a highly useful set of toolkits required to effectively analyse, process and categorise high volumes of data. This software demonstrates that for law enforcement, rather than causing chaos, the data develops into a valuable asset and a key source of evidence. Analyze software has a central repository where data files can be stored in a highly organised manner and extracted with ease. This program also facilitates collaboration between and within Police forces, while assisting to amass and administer knowledge over time in order to drive better results.

²⁴¹⁵ NetClean Technologies, above n 2386.

²⁴¹⁶ NetClean Technologies "NetClean Analyze" (19 October 2014) <<https://www.netclean.com/en/analyze/investigations/overview/>>.

²⁴¹⁷ NetClean Technologies, above n 2390.

²⁴¹⁸ NetClean Technologies, above n 2390.

²⁴¹⁹ NetClean Technologies, above n 2386.

for technology companies and ISPs to play a more productive and proactive role in the fight against child pornography online, the technological advantage will remain with the child pornographers, rather than those working to protect children.²⁴²⁰ This statement by Aston clearly supports the observations of Houston and law enforcement agencies in New Zealand.

1.33.7 Law Enforcement and Support from the Private Sector

Tim Houston contends that the most important issue from a law enforcement perspective is that when a private sector company develops a new form of software such as Apple's iOS 8 which law enforcement agencies will come across in investigations, then that company must be able to support investigators in what they are attempting to achieve.²⁴²¹ This co-operative approach to assisting law enforcement agencies would be a significant advantage for any investigation.²⁴²² Houston would also like to see more technological support from private sector companies such as Apple at the international level of enforcement to reduce the potential for harm to children around the world.²⁴²³ Although companies such as Microsoft are already very proactive, this co-operative approach to assisting law enforcement agencies with online child pornography investigations does need to be continuous.²⁴²⁴ Houston believes that if Microsoft's Photo DNA Technology were to be made available not only to law enforcement agencies in New Zealand, but all

²⁴²⁰ Internet Watch Foundation "Microsoft and NetClean Provide PhotoDNA Technology to Help Law Enforcement Fight Online Child Sexual Exploitation" (19 March 2012) <<https://www.iwf.org.uk/about-iwf/news/post/320-microsoft-and-netclean-provide-photodna-technology-to-help-law-enforcement-fight-online-child-sexual-exploitation>>.

²⁴²¹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 15.

²⁴²² At 15.

²⁴²³ At 6.

²⁴²⁴ At 4.

over the world, it would substantially enhance efforts against the dissemination of child pornography on the Internet.²⁴²⁵

As already noted, Houston has observed that developments in software by new private sector companies are often utilised by child pornography offenders.²⁴²⁶ The issue with these new companies is that when law enforcement agencies approach them with a request for assistance, the companies can refuse to co-operate.²⁴²⁷ Sometimes, this may be due to legitimate legal barriers.²⁴²⁸ However, at other times these new companies simply do not want to co-operate.²⁴²⁹ Houston confirms that many child pornography investigations are reliant on the support of private sector companies.²⁴³⁰ For example, Houston is concerned about the development of new software and applications such as Apple's iOS 8 which enable more sophisticated technological offending.²⁴³¹ When an offender utilises this software and the Police in New Zealand observe that offender distributing child pornography online, the Police must be able to make a request to Apple to provide the relevant information about who is using their service.²⁴³² Houston concedes that if a company is unable to provide the Police with the relevant information due to contractual or commercial reasons, then potentially the Police may not be able to identify an offender because of the secure nature of that information.²⁴³³

1.33.8 Recommendations

1.33.8.1 The Private Sector and Assistance with Technology

Law enforcement agencies urgently requires additional technological support from the private sector to assist with investigations.²⁴³⁴ This support must also be able to

²⁴²⁵ At 4.

²⁴²⁶ At 15.

²⁴²⁷ At 15.

²⁴²⁸ At 15.

²⁴²⁹ At 15.

²⁴³⁰ At 15.

²⁴³¹ At 15.

²⁴³² At 15.

²⁴³³ At 15.

²⁴³⁴ At 6.

respond to the international nature of child pornography offending.²⁴³⁵ Therefore, the private sector needs to commit itself to responding to any request from a foreign law enforcement agency when that request is operating within the limits of the appropriate law.²⁴³⁶ Where a private sector company is able to provide further technical support about how their system works, obviously within the parameters of the law, then this will be a significant step forward not only for law enforcement but also children's rights.²⁴³⁷ Increased support for law enforcement operations from private sector companies will result in greater detection of offending and decrease the potential for harm to children.²⁴³⁸ A more systematic approach to supporting law enforcement agencies will also decrease the workload that confronts these agencies and enable the reallocation of valuable resources.²⁴³⁹ The importance of this recommendation is that this assistance from the private sector will guarantee that law enforcement agencies have the ability to effectively respond to modern trends in child pornography offending.

1.33.9 Conclusion

The private sector must realise that any advances in software, such as encryption, have the potential to become very problematic for law enforcement investigations.²⁴⁴⁰ This is why law enforcement agencies are requesting that companies provide them with the tools required to access their systems so that they can adequately protect children.²⁴⁴¹ Without the support of the private sector, law enforcement may be thwarted in their attempts to protect children. The proposition that the implementation of improved encryption applications by Apple and Google is in response to the demands of their consumers is not a significant argument, when

²⁴³⁵ At 6.

²⁴³⁶ At 15.

²⁴³⁷ At 15.

²⁴³⁸ At 6.

²⁴³⁹ Harmon, above n 2383.

²⁴⁴⁰ Barrett, above n 2358; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 15; Timberg and Miller, above n 2365; Comey, above n 2364.

²⁴⁴¹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6; Comey, above n 2364; Barrett, above n 2358.

balanced against the protection of children.²⁴⁴² There may well be a grain of truth in this argument in regard to personal politics, especially in the United States after the Edward Snowden incident and the controversy in New Zealand surrounding the GCSB. Nevertheless, surely the right to protect society's most vulnerable members, its children, must outweigh an individual's right to security of unlawful information. Improved technical support will empower law enforcement agencies to identify offenders so they are unable to victimise more children.²⁴⁴³

1.34 The Implementation of a Compulsory Order for an Encryption or Password Code

1.34.1 Introduction

The introduction of amended legislation is essential to respond to concerns regarding encryption. This section examines the introduction of an amendment to the Films, Videos, and Publications Classification Act 1993 which would place a *new* legal obligation on a suspected child pornographer. This legal obligation would require the suspect to provide law enforcement agencies with the relevant password to any encrypted software that is related to a child pornography investigation. The efficacy of this provision as an aid to law enforcement investigations will also be discussed.

1.34.2 The Decryption of Encrypted Data and New Zealand's Legislation

1.34.2.1 The Customs Excise Act 1996 and the Search and Surveillance Act 2012

As previously noted, the Customs Excise Act 1996²⁴⁴⁴ ('Customs Act 1996') is the primary statutory authority that governs the operations of the New Zealand Customs Service.²⁴⁴⁵ In accordance with Section 167(1) of the Customs Act 1996, a Customs Officer may make an application for a search warrant which is then issued by an

²⁴⁴² Timberg, above n 2351.

²⁴⁴³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁴⁴⁴ Customs Excise Act 1996 (NZ).

²⁴⁴⁵ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 1.

Issuing Officer.²⁴⁴⁶ This search warrant is only issued once the Issuing Officer is satisfied there are reasonable grounds to believe that²⁴⁴⁷ an offence has been committed against this Act²⁴⁴⁸ or there has been unlawful exportation or importation of goods.²⁴⁴⁹ However, the provisions of Part 4 of the Search and Surveillance Act 2012²⁴⁵⁰ also apply to Section 167 of the Customs Act 1996.²⁴⁵¹ Tim Houston of the New Zealand Customs Service states that Section 130(1) of the Search and Surveillance Act 2012 enables a Customs Officer searching a data storage device to request that the user of that device provide access to information stored on that device.²⁴⁵² Therefore, as Houston reveals, Customs Officers can, in the course of executing a lawful search warrant, request that the person in possession of a data storage device provides Customs with access to the encrypted information.²⁴⁵³ If a person refuses to provide Customs with access they can be charged and sentenced to a maximum term of three months' imprisonment.²⁴⁵⁴ However, Houston reveals that when the person has genuinely forgotten the password to the encryption software then it is a significant obstacle for any child pornography investigation.²⁴⁵⁵ This has happened on a number of occasions in Houston's experience.²⁴⁵⁶ The other concern with encryption is that it is becoming increasingly more secure, readily accessible and is free to download from the Internet.²⁴⁵⁷ The combined effect of these factors is that encryption will become a more common feature of concern for child pornography investigations.²⁴⁵⁸

²⁴⁴⁶ Customs Excise Act 1996, s 167(1).

²⁴⁴⁷ Customs Excise Act 1996, s 167(1).

²⁴⁴⁸ Customs Excise Act 1996, s 167(1)(a)(i).

²⁴⁴⁹ Customs Excise Act 1996, s 167(1)(a)(ii).

²⁴⁵⁰ Search and Surveillance Act 2012.

²⁴⁵¹ Customs Excise Act 1996, s 167(2).

²⁴⁵² Search and Surveillance Act 2012, s 130(1).

²⁴⁵³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁴⁵⁴ Customs Excise Act 1996, s 177(2).

²⁴⁵⁵ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁴⁵⁶ At 6.

²⁴⁵⁷ At 6.

²⁴⁵⁸ At 6.

1.34.2.2 Anti-Money Laundering and Countering of Financing of Terrorism Act 2009

Section 115 of the Anti-Money Laundering and Countering of Financing of Terrorism Act 2009²⁴⁵⁹ specifies that a person with the requisite knowledge of a computer network or storage device has a duty to assist any Customs Officer to access information held on a computer²⁴⁶⁰ or storage device.²⁴⁶¹ Section 115(2) details what the duty to provide access to information necessitates and states that access to information includes encryption keys that enable access to a computer system.²⁴⁶² Brian Thurlow, Senior Enforcement Advisor for the New Zealand Customs Service points out that this provision does not apply to objectionable publications and is only applicable to money laundering investigations.²⁴⁶³ However, Thurlow considers that these provisions should be utilised as a model for an amendment to introduce similar provisions within the Classification Act 1993.²⁴⁶⁴

1.34.3 The Implementation of a Compulsory Order to Decrypt Data

Steve O'Brien, National Manager of the Censorship Compliance Unit of the Department of Internal Affairs believes that New Zealand needs to seriously consider the introduction of some *compulsory order* into the Classification Act 1993.²⁴⁶⁵ This compulsory order would force an offender to give up their encryption or password codes to any data that is suspected of concealing child pornography.²⁴⁶⁶ O'Brien reveals that on occasions the CCU have been able to break the encryption of data believed to be hiding child pornography.²⁴⁶⁷ However, O'Brien noted this

²⁴⁵⁹ Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

²⁴⁶⁰ Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 115(1)(a).

²⁴⁶¹ Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 115(1)(b).

²⁴⁶² Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 115(2).

²⁴⁶³ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 6.

²⁴⁶⁴ At 7.

²⁴⁶⁵ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

²⁴⁶⁶ At 7.

²⁴⁶⁷ At 7.

will become extremely difficult with the creation of default encryption devices, such as the previously discussed Apple iPhone 6²⁴⁶⁸ and its operating system iOS 8.²⁴⁶⁹

There is general concern among law enforcement agencies about encryption and universal support for the establishment of some legal duty to provide access to information.²⁴⁷⁰ Thurlow is certain that investigations into child pornography would be greatly assisted by an amendment to the Classification Act 1993 compelling a person to provide access to that material on pain of penalty.²⁴⁷¹ Thurlow states:²⁴⁷²

I would like to see law that would compel a person to provide access to that material on pain of penalty. So, we would go to Court and the Court would instruct them to provide access to that material. If they don't we would bring them back to Court and this would continue until such time as they purge their contempt and provide access to the material.

In Thurlow's view, investigators would also support extending the provision so that suspects who failed to provide access to relevant information could be held in detention until access was provided.²⁴⁷³

In terms of far-reaching legislation such as that which is being proposed, the burden should be on the suspect to provide the key to the codes.²⁴⁷⁴ However, this obligation must be balanced with the offender's right to be silent²⁴⁷⁵ as required by

²⁴⁶⁸ The Apple iPhone 6 a Smartphone release from Apple, for more information see Apple, above n 2335.

²⁴⁶⁹ The iOS 8 is the eighth major release of the iOS mobile operating system designed by Apple.

²⁴⁷⁰ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7; Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 13; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁴⁷¹ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.

²⁴⁷² At 7.

²⁴⁷³ At 7.

²⁴⁷⁴ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

²⁴⁷⁵ At 7.

Section 23(4)(b) of the New Zealand Bill of Rights Act 1990.²⁴⁷⁶ There are also freedom of expression considerations²⁴⁷⁷ involved with this provision which require the State to balance this right with the right of children²⁴⁷⁸ to be treated with dignity and equality.²⁴⁷⁹ The concept of freedom of expression, as already noted, has limitations. These limitations include concerns such the need to respect children's rights²⁴⁸⁰ and the State's responsibility to guarantee the welfare of its citizens.²⁴⁸¹ These examples demonstrate that the State's duties to protect children from child pornography should always over-ride the right to freedom of expression. Moreover, O'Brien believes that law enforcement agencies should have the right to ensure that what is on the suspect's computer or storage device is not child pornography.²⁴⁸² In O'Brien's view, if a suspect has nothing to hide from law enforcement agencies, then they would provide the investigators with the relevant password or codes.²⁴⁸³ O'Brien maintains that when this information is not forthcoming, a compulsory order to release the pass codes should be in place under an amendment to the Classification Act 1993 so that law enforcement agencies can adequately investigate child pornography offending.²⁴⁸⁴

1.34.4 Recommendations

1.34.4.1 The Implementation of a Compulsory Decryption Provision

It is recommended that a compulsory decryption provision should be included within the Classification Act 1993.²⁴⁸⁵ It would provide an important advancement

²⁴⁷⁶ New Zealand Bill of Rights Act 1990 (NZ), s 23(4)(b).

²⁴⁷⁷ New Zealand Bill of Rights Act 1990, s 14.

²⁴⁷⁸ International Covenant on Civil and Political Rights 1966 (un.org), art 19(2).

²⁴⁷⁹ Universal Declaration of Human Rights 1948 (un.org), art 1.

²⁴⁸⁰ International Covenant on Civil and Political Rights 1966, art 19(3)(a).

²⁴⁸¹ International Covenant on Civil and Political Rights 1966, art 19(3)(b).

²⁴⁸² O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

²⁴⁸³ At 7.

²⁴⁸⁴ At 7.

²⁴⁸⁵ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

in the investigative capability of law enforcement agencies in New Zealand.²⁴⁸⁶ The provision would give investigators the ability to adequately investigate the dissemination of child pornography over the Internet.²⁴⁸⁷

This provision would also place a legal duty on a suspect to provide access to the encrypted information that is part of any child pornography investigation.²⁴⁸⁸ Child pornographers would no longer be able to utilise encryption as a shield to protect themselves from prosecution.²⁴⁸⁹ The importance of this provision is that it would enable law enforcement agencies to provide greater protection to children as it would significantly increase the likelihood of an offender being successfully prosecuted for child pornography offending. This provision would also ensure that the Classification Act 1993 has the necessary ability to respond to modern child pornography offending.

1.34.5 Conclusion

Law enforcement personnel have identified that the encryption of software is a significant barrier to child pornography investigations.²⁴⁹⁰ Although legislation is presently available to facilitate access to encrypted information, this legislation is considered to be inadequate.²⁴⁹¹ It is therefore concluded that an amendment to the Classification Act 1993 should be introduced to compel a suspected child

²⁴⁸⁶ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

²⁴⁸⁷ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

²⁴⁸⁸ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.

²⁴⁸⁹ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁴⁹⁰ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7; Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.

²⁴⁹¹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

pornographer to provide law enforcement agencies with access to any encrypted information. The significance of this provision to New Zealand's institutional responses to child pornography offending is that it will enable law enforcement agencies to adequately respond to the changing nature of child pornography offending. However, this issue is compounded by the fact that constant surveillance by other States, including New Zealand has created a demand for secrecy among users which commercial companies are simply seeking to meet. Various States around the world have allowed companies to conduct commerce via the Internet without establishing the necessary legislation required to assist law enforcement agencies to address concerns with the dissemination of child pornography.²⁴⁹² The only realistic answer to this situation is increased co-operation with other jurisdictions so that this and other concerns with child pornography investigations are adequately addressed.²⁴⁹³

1.35 Additional Resources to enable International Law Enforcement Co-operation

1.35.1 Introduction

The advances in technology and encryption discussed in the previous sections are serious operational concerns for law enforcement agencies. These concerns are compounded by lack of resourcing for law enforcement agencies which impedes their operational efficacy. This section of the thesis will discuss the additional resources to assist law enforcement investigations to co-operate with agencies in other jurisdictions. The importance of these additional resources is their potential to increase the effectiveness of New Zealand's institutional responses to child pornography offending and thereby reduce the harm to children around the world.

1.35.2 The Optional Protocol and Co-operation between Jurisdictions

The central starting point for improved co-operation between jurisdictions in child pornography investigations is the Optional Protocol.²⁴⁹⁴ This recognised

²⁴⁹² At 11.

²⁴⁹³ At 11.

²⁴⁹⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN).

international instrument contains provisions specifically designed to facilitate improved co-operation between jurisdictions.²⁴⁹⁵ The Optional Protocol places a number of obligations on signatories to provide assistance to other jurisdictions when requested to co-operate in child pornography investigations.²⁴⁹⁶ Article 5 of the Optional Protocol regulates the extradition of a person suspected of committing a child pornography offence.²⁴⁹⁷ Signatories to the Optional Protocol are also obliged to offer assistance in connection with investigations or criminal proceedings brought in respect of child pornography investigations as required by Article 6(1).²⁴⁹⁸ This obligation to assist other jurisdictions in Article 6(1) comprises the gathering and obtaining of evidence on child pornography offending as detailed in Article 3(1).²⁴⁹⁹ Article 7 of the Optional Protocol specifically requires States Parties to seize and confiscate goods or instruments when requested by a foreign State.²⁵⁰⁰ This Article is intended to facilitate the seizure of computers used to disseminate child pornography across the Internet on the request of a foreign law enforcement agency.²⁵⁰¹ Furthermore, the provisions within Articles 6 and 7 are also reinforced by Article 10(1) of the Optional Protocol.²⁵⁰² Article 10(1) imposes a universal obligation on signatories to take all necessary steps to strengthen international co-operation for the prosecution and punishment of child pornography offending.²⁵⁰³ Signatories are also required to provide financial and

²⁴⁹⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 5, 6, 7, 10.

²⁴⁹⁶ See Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 5, 6, 7.

²⁴⁹⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 5.

²⁴⁹⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 6(1).

²⁴⁹⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(1).

²⁵⁰⁰ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 7(b).

²⁵⁰¹ UNICEF Innocenti Research Centre, above n 690, at 12.

²⁵⁰² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 10(1).

²⁵⁰³ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 10(1).

technical assistance in accordance with Article 10(4) of the Optional Protocol to aid in the investigation and prosecution of child pornography offending.²⁵⁰⁴

The above provisions within the Optional Protocol demonstrate that co-operation between jurisdictions is considered to be a critically important aspect of modern law enforcement. It is also argued that New Zealand's institutional responses to child pornography offending across the Internet will be greatly enhanced by additional co-operation between jurisdictions. Furthermore, it may also be beneficial to *inform other States* of their obligations to provide assistance to other countries with child pornography investigations in accordance with the Optional Protocol.²⁵⁰⁵ This action would raise awareness of the issue and may result in increased willingness to provide support to investigations and thereby reduce the vulnerability of children to offending.²⁵⁰⁶ Community Stakeholder Debbi Tohill is insistent that the international community must be advised of their obligations to ensure that they recognise the harm and damage being perpetrated upon children.²⁵⁰⁷ Tohill also contends that recognition of these duties by States is the only way to guarantee that they will respond appropriately to this issue.²⁵⁰⁸ This comment indicates that co-operating with other jurisdictions should be encouraged by States as this is an important response to child pornography offending which not only protects children but also assists the States to attain their duties as signatories of the Optional Protocol. Such improved relationships and mechanisms will also assist New Zealand to achieve their own responsibilities. The significance of attaining these duties is that they will draw the attention of States to the magnitude of the problem confronting law enforcement agencies who have to respond to 20,000 new images being uploaded to the Internet every day.²⁵⁰⁹

²⁵⁰⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 10(4).

²⁵⁰⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 10(1).

²⁵⁰⁶ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 4.

²⁵⁰⁷ At 4.

²⁵⁰⁸ At 4.

²⁵⁰⁹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 9.

1.35.3 The Challenges of Policing the Internet

1.35.3.1 The Unique Challenges of Downloaded Child Pornography for Law Enforcement

The downloading of child pornography is unlike most crimes confronting New Zealand's law enforcement agencies,²⁵¹⁰ as the Internet poses unique challenges.²⁵¹¹ One such complication is that some countries have legislation that makes it arduous for them to investigate online crime, which is a serious problem for investigators.²⁵¹² As already stated in this thesis, another challenge is combating the increased distribution of child pornography which has amplified dramatically with the advent of the Internet.²⁵¹³ It is the Internet that provides offenders with an extremely effective forum and allows for the mass duplication and distribution of illegal content, including child pornography.²⁵¹⁴ These issues and the fact that the policing of cyberspace is a relatively new and intricate area of investigation compound the problems confronted by law enforcement agencies.²⁵¹⁵

The Internet is an international communication tool that crosses jurisdictional boundaries.²⁵¹⁶ The challenge for law enforcement is that the Internet is decentralised and widespread co-operation is required between officials in numerous jurisdictions to regulate the flow of information.²⁵¹⁷ An investigation that begins in New Zealand will almost certainly cross jurisdictional boundaries.²⁵¹⁸ Correspondingly, almost all investigations of downloaded child pornography involve the co-operation of law enforcement agencies in different jurisdictions, often at an international level.²⁵¹⁹

²⁵¹⁰ Wortley and Smallbone, above n 1683, at 1.

²⁵¹¹ At 1.

²⁵¹² Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

²⁵¹³ Prichard and others, above n 103, at 993.

²⁵¹⁴ Peel Regional Police "Internet Child Exploitation Unit" (29 September) Peel Regional Police <<http://www.peelpolice.on.ca/en/aboutus/internetchildexploitation.asp>>.

²⁵¹⁵ Peel Regional Police, above n 2488.

²⁵¹⁶ Wortley and Smallbone, above n 1683, at 2.

²⁵¹⁷ Ministry of Justice, above n 940.

²⁵¹⁸ Wortley and Smallbone, above n 1683, at 1.

²⁵¹⁹ At 1.

Detective Senior Sergeant John Michael of the New Zealand Police also believes that the international effort against the escalation of child pornography offending is subject to deficiencies in resources at the international level of policing.²⁵²⁰ This shortage of resources is in part attributed to the considerable extent of online offending²⁵²¹ and the fact that the response of law enforcement agencies consists of small teams of investigators²⁵²² who are focusing on child pornography offending at an international level.²⁵²³ Moreover, within some European countries it is illegal for law enforcement agencies to undertake covert investigations on the Internet and this is another challenge that must be overcome.²⁵²⁴

1.35.3.2 The Allocation of Resources around the World

Given the challenge of policing the Internet, enormous efforts have been concentrated on forging links at both national and international levels.²⁵²⁵ New Zealand must acknowledge that the appropriate allocation of resources at both the national and international level of policing is critical to reduce the potential for harm to New Zealand's children.²⁵²⁶ As the Internet is borderless, the sharing of contraband such as child pornography online is an international crime.²⁵²⁷ Homeland Security Investigations²⁵²⁸ ('HSI') in the United States has more than 70 offices sited overseas, and these resources give HSI the ability to pursue a case wherever in the world it may proceed.²⁵²⁹ HSI recognises that these international resources are essential aids in rescuing victims and also arresting child

²⁵²⁰ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

²⁵²¹ At 3.

²⁵²² However, Detective Senior Sergeant John Michael believes that within these small teams there is a vast amount of experience which is a real strength to any investigation.

²⁵²³ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

²⁵²⁴ Ministry of Justice, above n 940.

²⁵²⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

²⁵²⁶ At 3.

²⁵²⁷ US Department of Homeland Security "Child Exploitation/Operation Predator" (29 September 2011) US Department of Homeland Security <<http://www.ice.gov/predator/>>.

²⁵²⁸ The US Department of Homeland Security is a Department of the United States Federal Government. It was created in response to the September 11 attacks, with the primary responsibilities of protecting the United States from and responding to terrorist attacks.

²⁵²⁹ US Department of Homeland Security, above n 2501.

pornographers.²⁵³⁰ The Internet Child Exploitation Unit ('ICE Unit') of the Peel Regional Police in Canada actively investigates the online abuse of children.²⁵³¹ One example of its activities is the arrest of an Edmonton man who shared child pornography with ICE investigators who were posing as an underage girl online.²⁵³² The ICE Unit is also active in assisting other agencies with multi-jurisdictional investigations.²⁵³³ A substantial amount of the ICE Unit's investigative information comes from other agencies and international projects.²⁵³⁴ However, the ICE Unit recognises that Interpol becomes increasingly proactive when suspects and victims are identified by investigations.²⁵³⁵ This recognition of the value of Interpol is the primary reason why law enforcement agencies work closely with Interpol.²⁵³⁶ Interpol enables law enforcement agencies to liaise with agencies in a world-wide effort to combat the consumption and distribution of child pornography.²⁵³⁷

In Australia, the Australian Government recognises that the Australian Federal Police have a significant role to play in keeping children and young people secure.²⁵³⁸ In taking on this task, the Australian Federal Police have forged strong partnerships with all Australian law enforcement agencies, Government departments and with many international agencies.²⁵³⁹ The Australian Federal Police Child Protection Operations Team ('CPO') undertakes investigations and a co-ordination role.²⁵⁴⁰ This role includes co-ordinating investigations that are multi-jurisdictional and relate to the trading of child pornography within the online

²⁵³⁰ US Department of Homeland Security, above n 2501.

²⁵³¹ Peel Regional Police, above n 2488.

²⁵³² ALERT - Alberta Law Enforcement Response Teams "Edmonton Man Arrested in Child Sex Abuse Case" (6 November 2014) ALERT - Alberta Law Enforcement Response Teams <<http://www.alert-ab.ca/newsreleases/78-news-releases/2014/360-edmonton-man-arrested-in-child-sex-abuse-case>> at 2014.

²⁵³³ Peel Regional Police, above n 2488.

²⁵³⁴ Peel Regional Police, above n 2488.

²⁵³⁵ Peel Regional Police, above n 2488.

²⁵³⁶ Ministry of Justice, above n 940.

²⁵³⁷ Ministry of Justice, above n 940.

²⁵³⁸ Australian Federal Police "Child Protection Operations" (1 October 2014) <<http://www.afp.gov.au/policing/child-protection-operations.aspx>>.

²⁵³⁹ Australian Federal Police, above n 2512.

²⁵⁴⁰ Australian Federal Police "Online Child Exploitation" (30 September 2014) <<http://www.afp.gov.au/en/policing/child-protection-operations/online-exploitation.aspx>>.

environment.²⁵⁴¹ The CPO's role consists of engaging with the Virtual Global Taskforce, international law enforcement agencies and Interpol.²⁵⁴² The Australian Federal Police are also an affiliate of the Virtual Global Taskforce and are part of an alliance of law enforcement agencies from around the world which are operating together to fight online child pornography.²⁵⁴³

1.35.3.3 The Reality of Policing the Internet and New Zealand's Response

Policing the Internet raises some serious concerns for law enforcement.²⁵⁴⁴ One such concern is determining which law enforcement agency, in which jurisdiction, is responsible for investigating child pornography offending when there is no clue as to where the images were created.²⁵⁴⁵ Michael considers the co-operation between countries at the international level and then within agencies at the domestic level a positive aspect that strengthens investigations.²⁵⁴⁶ However, although there is good co-operation between agencies, there are also serious shortcomings in terms of formal legal co-operation, as the process for these formal requests is very cumbersome.²⁵⁴⁷ Tim Houston, an Investigator with the New Zealand Customs Service agrees and believes that international co-operation internationally could be improved.²⁵⁴⁸ The way to achieve this collaboration is to network with law enforcement partners overseas, which often involves sending personnel to international training courses and conferences.²⁵⁴⁹ One such example is the annual Interpol Meeting for Specialist where New Zealand's law enforcement agencies present information on the filtering of the Internet and child pornography

²⁵⁴¹ Australian Federal Police, above n 2514.

²⁵⁴² Australian Federal Police, above n 2514.

²⁵⁴³ Australian Federal Police, above n 2512.

²⁵⁴⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 1.

²⁵⁴⁵ Wortley and Smallbone, above n 1683, at 2.

²⁵⁴⁶ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

²⁵⁴⁷ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 17.

²⁵⁴⁸ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁴⁹ At 6.

statistics.²⁵⁵⁰ Furthermore, in Houston's view, New Zealand's law enforcement agencies need to be out interacting with other agencies, keeping their existing relationships going and actively establishing new contacts.²⁵⁵¹ These comments by Houston have already been supported by foreign law enforcement agencies who are actively seeking new relationships with other agencies.²⁵⁵² Houston continues:²⁵⁵³

This is extremely important for us. The way that we do this domestically is communicating with our colleagues at Internal Affairs and the Police. We also have training sessions and up-skilling across the three agencies. This is where the international training and conferences become extremely important because people overseas may be seeing things that we are not, and if we're not there we don't know about them. That's how we keep up with the play; we have good relationships with our partners domestically, and internationally.

Steve O'Brien, National Manager of the Censorship Compliance Unit, considers that an example of this can be seen in the Department of Internal Affairs which works proactively with Europol, Interpol and the Australian Federal Police at the international and supra-national levels.²⁵⁵⁴ As previously noted, the Department of Internal Affairs also works conjointly with the New Zealand Customs Service and the Police to co-ordinate investigations into the consumption and distribution of child pornography.²⁵⁵⁵ The Minister of the Department of Internal Affairs, Peter Dunne revealed that the CCU also works very closely with the FBI and the

²⁵⁵⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 20.

²⁵⁵¹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁵² Police Chief Magazine "Growing Challenge of Computer Forensics" (26 March 2015) Police Chief Magazine.org
<http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1136&issue_id=32007>; US Department of Justice "Programs Summary - Internet Crimes Against Children Task Force Program" (26 March 2015) US Department of Justice
<<http://www.ojjdp.gov/programs/progsummary.asp?pi=3>>.

²⁵⁵³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 9.

²⁵⁵⁴ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.

²⁵⁵⁵ Ministry of Justice, above n 940.

Department of Homeland Security in the United States.²⁵⁵⁶ The Minister also stated.²⁵⁵⁷

The CCU works very closely with a number of overseas agencies, doing things like swapping intelligence about people who are using the Internet to share objectionable material. We receive information on New Zealanders who may be potential offenders, which may result in prosecution action here. We also collect our own information that might be of interest to regulators overseas. There is a lot of international co-operation. Within New Zealand we work very closely with the Police, and the Customs Service.

John Michael is adamant that this co-operative approach to investigations ensures child pornography investigations are more effective and easier to manage.²⁵⁵⁸

Steve O'Brien revealed that the three-agency approach undertaken in New Zealand is in response to the magnitude of the problem confronting law enforcement agencies in New Zealand and also around the world.²⁵⁵⁹ The sheer quantity of work that law enforcement agencies are confronted with can be overwhelming for one agency on its own, so New Zealand's agencies combine resources to maximise their efforts.²⁵⁶⁰ Brian Thurlow, Senior Enforcement Advisor for the New Zealand Customs Service is of the view that there is a deficiency of dedicated human resources to cope with the dilemma of child pornography on the Internet.²⁵⁶¹ The New Zealand Customs Service currently has two full-time staff members who work in this field and Thurlow confirms that additional staffing in this area would provide a much-needed boost for law enforcement agencies.²⁵⁶²

²⁵⁵⁶ Dunne, Minister of The Department of Internal Affairs of New Zealand, above n 1458, at 2.

²⁵⁵⁷ At 2.

²⁵⁵⁸ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

²⁵⁵⁹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.

²⁵⁶⁰ At 4.

²⁵⁶¹ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 3.

²⁵⁶² At 3.

Tim Houston is also certain that there will need to be more staff involved in the investigation of this material.²⁵⁶³ An increase in investigative ability would result in more detection of offending which would allow for more prosecutions and greater protection to be afforded to children.²⁵⁶⁴ Michael agrees, adding that additional resources would empower law enforcement agencies to undertake further proactive work in terms of investigations and other key areas of prevention, such as education.²⁵⁶⁵ Michael affirms that law enforcement agencies need to be allocated supplementary resources which would assist them to become more proactive and carry out preventative work because child pornography offending on the Internet is a continually growing industry.²⁵⁶⁶ Houston believes that the allocation of more resources will enhance co-operation between the Customs Service, Internal Affairs and the Police.²⁵⁶⁷ As previously noted, the Customs Service works very closely with the other two agencies in a taskforce.²⁵⁶⁸ This taskforce ensures that investigations are more efficient as no agency is working in isolation.²⁵⁶⁹ The allocation of extra resources would ensure that this continues and all three agencies are co-operating, assisting each other with investigations and working towards the same common goal.²⁵⁷⁰

Co-operation among law enforcement agencies is a necessary component of tracking offenders across jurisdictions, as it aids in co-ordinating resources and avoids duplication of effort.²⁵⁷¹ Collaborating with law enforcement partners around the world brings together an array of resources to target child

²⁵⁶³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 10.

²⁵⁶⁴ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640.

²⁵⁶⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 4.

²⁵⁶⁶ At 10.

²⁵⁶⁷ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁶⁸ At 6.

²⁵⁶⁹ At 14.

²⁵⁷⁰ At 6.

²⁵⁷¹ See Yvonne Jewkes and Carol Andrews "Policing the filth: The Problems of Investigating online Child Pornography in England and Wales" (2005) 15 Policing and Society 42.

pornographers.²⁵⁷² This synchronised method of investigating child pornography offending also ensures that corresponding operations in different jurisdictions do not unknowingly target the same offender and as stated above, waste valuable resources.²⁵⁷³ Working closely with other agencies facilitates the prosecution of both New Zealanders who utilise the Internet to trade child pornography and individuals who are also trading within foreign jurisdictions.²⁵⁷⁴ Moreover, Houston confirms that this co-operation between jurisdictions is based on an informal reciprocal agreement.²⁵⁷⁵ Houston states:²⁵⁷⁶

Customs doesn't have any formal agreements, but in the field of child exploitation, I have found in my experience that it is most certainly a reciprocal thing. So, if I identified an offender in the United Kingdom, we would send that information directly to the Police in the United Kingdom. In my experience, there has been no hesitation in doing the same thing and sending the relevant information from the United Kingdom to New Zealand. In fact, this is a key part of being able to investigate these types of offenders. So, it's more of a co-operative common interest arrangement as opposed to any formal agreements with Customs.

Nevertheless, by proactively interacting with foreign agencies and providing evidence to the appropriate authorities through Interpol, New Zealand's Inspectors of Publications are able to thwart the attempts of offenders to avoid prosecution by trading in foreign jurisdictions.²⁵⁷⁷

1.35.4 Recommendations

1.35.4.1 Additional Resources for International Participation

Additional resources must be allocated to law enforcement agencies so that they can actively co-operate through international policing agencies such as Interpol or

²⁵⁷² US Department of Homeland Security, above n 2501.

²⁵⁷³ Wortley and Smallbone, above n 1683, at 2.

²⁵⁷⁴ Ministry of Justice, above n 940.

²⁵⁷⁵ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 16.

²⁵⁷⁶ At 16.

²⁵⁷⁷ Ministry of Justice, above n 940.

directly with other States' law enforcement agencies.²⁵⁷⁸ Enabling New Zealand's law enforcement agencies to become more proactive in the international arena will provide them with invaluable experience and increase their skill at conducting investigations into online child pornography offending.²⁵⁷⁹ This is why New Zealand's law enforcement agencies require the resources to actively participate in training courses and conferences.²⁵⁸⁰ One such conference was the Virtual Global Taskforce's Sixth Biennial International Conference, held in Amsterdam in 2014.²⁵⁸¹ New Zealand's participation at this conference would have been duly noted by other law enforcement agencies.²⁵⁸² Furthermore, additional personnel at the international level of policing will also result in more meaningful interactions that could increase the flow of information between jurisdictions.²⁵⁸³ Most importantly of all, the allocation of more resources for law enforcement agencies to participate at the international level of policing will ensure that the present co-operative approach to investigations is not only maintained but built upon with the assistance of new partners from around the world.²⁵⁸⁴

1.35.4.2 Additional Resources for Domestic Operations

The Government must also become more proactive in its allocation of resources so that domestic law enforcement agencies can operate more effectively within New Zealand.²⁵⁸⁵ The allocation of additional financial and human resources is critical as it would permit law enforcement agencies to dedicate more resources to

²⁵⁷⁸ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.

²⁵⁷⁹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁸⁰ At 6.

²⁵⁸¹ Virtual Global Taskforce "VGT's Sixth Biennial International Conference in Amsterdam" (6 October 2015) <<http://www.virtualglobaltaskforce.com/2014/vgt%e2%80%99s-sixth-biennial-international-conference-in-amsterdam/>>.

²⁵⁸² Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁸³ At 6.

²⁵⁸⁴ At 6.

²⁵⁸⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 4.

investigations.²⁵⁸⁶ Further resources would also enable the Police to carry out additional preventative work in the community.²⁵⁸⁷ The capability to conduct prevention messaging in the community by providing educational programmes is an essential aspect of the Police response to any illegal behaviour such as the dissemination of child pornography on the Internet.²⁵⁸⁸ Enabling staff to participate in consultation events such as the Children in Crisis Conference²⁵⁸⁹ held in conjunction with the University of Waikato in 2013 is also an important part of preventing harm to children. The allocation of extra resources domestically would have a positive impact on the two-tiered approach to enforcement and prevention messaging in the community under which all law enforcement agencies in New Zealand operate.²⁵⁹⁰ Therefore, the significance of these recommendations is their potential to assist law enforcement agencies to provide a more effective response to child pornography offending.

1.35.5 Conclusion

The harm to children from child pornography that is available on the Internet is a constantly escalating problem.²⁵⁹¹ The volume of such material available all over the world indicates that it is a growing phenomenon with no signs of abating.²⁵⁹² The Internet has transformed child pornography from a local issue to a transnational problem.²⁵⁹³ The outcome of this international predicament is that traditional methods of responding to child pornography offending are inadequate to cope with its dissemination on the Internet. Child pornography offending is now an

²⁵⁸⁶ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 3.

²⁵⁸⁷ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 4.

²⁵⁸⁸ At 4.

²⁵⁸⁹ See University of Waikato “Children in Crisis Conference - A National Hui” (6 October 2014) <<http://www.waikato.ac.nz/globalstudies/conferences/children-in-crisis>>.

²⁵⁹⁰ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 4; Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 3; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁹¹ 3News “Child Porn Trading Frequent in NZ” *3news.co.nz* (17 February 2011) <<http://www.3news.co.nz/nznews/child-porn-trading-frequent-in-nz-2011021717>>.

²⁵⁹² Per-Erik Astrom *Beyond all Tolerance* (2004) at 7.

²⁵⁹³ Esposito, above n 650, at 546.

international problem, and any adequate response to it must be based at the international level of policing.²⁵⁹⁴ With Internet investigations involving multiple jurisdictions, continuing co-operation and information-sharing are required to guarantee that law enforcement activities remain effective.²⁵⁹⁵ This co-operative approach to investigations will only be maintained as long as New Zealand's law enforcement personnel can provide the necessary assistance to reciprocate the support given by foreign law enforcement agencies. Without these international relationships New Zealand's capability to reduce the potential harm to its children will be greatly diminished.²⁵⁹⁶ It is the importance of such relationships that justifies the argument for additional resources.²⁵⁹⁷ Further resources would also strengthen New Zealand's international enforcement reputation²⁵⁹⁸ and help provide more prevention messaging to the local community.²⁵⁹⁹

1.36 The Placement of Liaison Officers

1.36.1 Introduction

A critical component of additional resourcing to enable enhanced co-operation between jurisdictions is the placement of Liaison Officers. This section discusses the role of Liaison Officers as part of law enforcement's response to the dissemination of child pornography across the Internet. This discussion will also attempt to ascertain whether the placement of additional Liaison Officers overseas in strategic locations would be beneficial in the fight against child pornography offending on the Internet.

²⁵⁹⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁹⁵ Tony Krone *International Police Operations Against Online Child Pornography* (2005) at 6.

²⁵⁹⁶ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 9.

²⁵⁹⁷ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.

²⁵⁹⁸ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6, 9.

²⁵⁹⁹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 4.

1.36.2 Liaison Officers

1.36.2.1 The Definition of a Liaison Officer

Detective Senior Sergeant John Michael of the New Zealand Police defines a Liaison Officer as a Police Officer whose role is to represent the New Zealand Police in a foreign jurisdiction.²⁶⁰⁰ These Liaison Officers are generally more active at the strategic level of policing but in some jurisdictions they are also operationally focused.²⁶⁰¹ Furthermore, the FBI has various types of Liaison Officers including Legal Attachés.²⁶⁰² The function of the Liaison Officers, is to operate as an intermediary with law enforcement agencies in their host country.²⁶⁰³

1.36.2.2 The Purpose of a Liaison Officer

‘Mr Orange’²⁶⁰⁴ a former Regional and District Commander of the New Zealand Police, confirms that the main role of a Liaison Officer is that of a receptacle of knowledge.²⁶⁰⁵ Liaison Officers are utilised to gather and pass on intelligence about international criminal organisations.²⁶⁰⁶ Steve O’Brien, the National Manager of the Censorship Compliance Unit of the Department of Internal Affairs, confirms this and states that their brief is to work with foreign Governments to prevent crime and also to facilitate the flow of intelligence information for law enforcement agencies.²⁶⁰⁷

²⁶⁰⁰ At 14.

²⁶⁰¹ At 14.

²⁶⁰² FBI “The FBI’s Legal Attaché Program” (4 October 2014) FBI
<<http://www.fbi.gov/news/testimony/the-fbi2019s-legal-attache-program>>.

²⁶⁰³ FBI, above n 2576.

²⁶⁰⁴ Mr Orange is a nom de plume.

²⁶⁰⁵ Interview with Mr Orange, Former Regional and District Commander of the New Zealand Police (6 November 2014) at 3.

²⁶⁰⁶ At 4.

²⁶⁰⁷ O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 23.

1.36.2.3 New Zealand's Liaison Officers

Steve O'Brien revealed during the interview phase of this thesis that the New Zealand Police have Liaison Officers stationed in Bangkok,²⁶⁰⁸ London,²⁶⁰⁹ Washington²⁶¹⁰ and various other locations around the world.²⁶¹¹ Brian Thurlow, Senior Enforcement Advisor for the New Zealand Customs Service discloses that the Customs Service has Liaison Officers in Australia, Thailand, the United States and Europe.²⁶¹² The Customs Service utilises the services of its Liaison Officers when interacting with international partners in investigations.²⁶¹³

In the case of the New Zealand Police, the role of Liaison Officers has been created as a result of international threats to the safety of New Zealand.²⁶¹⁴ These threats resulted in an increased focus on international crime, such as counter terrorism and the drug trade.²⁶¹⁵ Mr Orange confirms that the creation of the Liaison Officer position in London was a direct result of the 9/11 terrorist attack in the United States.²⁶¹⁶ The placement of this Liaison Officer in the London Embassy is intended to increase the flow of information between organisations concerning possible terrorist threats to New Zealand.²⁶¹⁷ Moreover, Mr Orange noted that the Liaison Officer's position in Bangkok is predominantly focused on the drug trade.²⁶¹⁸ This

²⁶⁰⁸ New Zealand Police "New Zealand Police Liaison Officer (Bangkok)" (10 November 2014) New Zealand Police <<http://www.police.govt.nz/contact-us/station/new-zealand-police-liaison-officer-bangkok>>.

²⁶⁰⁹ New Zealand Ministry of Foreign Affairs and Trade "Embassies - New Zealand Representatives Overseas - New Zealand Ministry of Foreign Affairs and Trade" (10 November 2014) <<http://www.mfat.govt.nz/Embassies/1-NZ-representatives-overseas/0-embassies-list.php?country=United+Kingdom>>.

²⁶¹⁰ New Zealand Ministry of Foreign Affairs and Trade "What the Embassy Does" (10 November 2014) <<http://www.nzembassy.com/usa-washington/about-the-embassy/what-the-embassy-does>>.

²⁶¹¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 23.

²⁶¹² Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.

²⁶¹³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 13.

²⁶¹⁴ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 6.

²⁶¹⁵ At 6.

²⁶¹⁶ At 2.

²⁶¹⁷ At 3.

²⁶¹⁸ At 3.

work in Bangkok includes undertaking operational investigations with the local authorities and exchanging information between Thailand and New Zealand.²⁶¹⁹

In contrast to the Police and the Customs Service, the Department of Internal Affairs does not post Liaison Officers overseas due to budgetary restrictions.²⁶²⁰ However, Lloyd Bezett, Senior Policy Analyst for the Department of Internal Affairs acknowledges that Internal Affairs does allocate substantial resources to enhance and maintain relationships with foreign law enforcement agencies.²⁶²¹ This support consists of sending personnel to attend international conferences overseas, which improves New Zealand's intelligence-collecting networks.²⁶²² Bezett is also certain that Internal Affairs has exceptional networking capabilities which is a significant aspect in child pornography investigations.²⁶²³

1.36.2.4 The Importance of Liaison Officers in Criminal Investigations

The importance of Liaison Officers to international criminal investigations is the facilitation of intelligence-rich information between jurisdictions.²⁶²⁴ The New Zealand Police are not always aware of who the main figures are in criminal organisations.²⁶²⁵ The intelligence passed on from Liaison Officers assists the Police to 'red flag' people of interest who might not necessarily have come to the attention of law enforcement agencies without this intelligence-gathering capacity.²⁶²⁶ Mr Orange revealed that on several occasions the Liaison Officer in London has passed on intelligence from the United Kingdom on persons of interest which 'caused alarm bells to ring' for the Police in New Zealand.²⁶²⁷ Mr Orange also clarified the importance of having a Liaison Officer in Washington.²⁶²⁸ This

²⁶¹⁹ At 3.

²⁶²⁰ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 5.

²⁶²¹ At 5.

²⁶²² At 5.

²⁶²³ At 5.

²⁶²⁴ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶²⁵ At 3.

²⁶²⁶ At 3.

²⁶²⁷ At 3.

²⁶²⁸ At 3.

Liaison Officer is able to draw on the vast intelligence-gathering resources of organisations such as the FBI and the Department of Homeland Security.²⁶²⁹ The experience and knowledge that have been gained by the placement of a Liaison Officer in the United States has been invaluable to numerous international investigations undertaken by the New Zealand Police.²⁶³⁰

Thurlow explains that the Liaison Officers in the Customs Service have a dual function.²⁶³¹ Their function is firstly, to promote New Zealand generally from a trade perspective and secondly, to provide assistance to foreign law enforcement agencies with Customs offences in the part of the world they are stationed.²⁶³² Tim Houston, an Investigator with the Child Exploitation Operations Team of the New Zealand Customs Service believes that the importance of having Liaison Officers is their potential for providing additional networking coverage in child pornography investigations.²⁶³³ This is now all the more important as child pornography investigations are now international by nature.²⁶³⁴ Houston asserts that a point of contact or a credible representative in a specific part of the world where an investigation is focused is a substantial advantage for any child pornography investigation.²⁶³⁵ Furthermore, in Houston's experience, investigations often achieve significant results because of the direct point of contact who can liaise with law enforcement agencies in that same part of the world.²⁶³⁶

Tim Houston also explains that when a child pornography investigation is seeking to share information because investigators have detected a child in imminent danger, the Child Exploitation Operations Team in New Zealand will interact directly with the Liaison Officer in a particular foreign country.²⁶³⁷ This mode of

²⁶²⁹ At 3.

²⁶³⁰ At 3.

²⁶³¹ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.

²⁶³² At 7.

²⁶³³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 15.

²⁶³⁴ At 15.

²⁶³⁵ At 15.

²⁶³⁶ At 15.

²⁶³⁷ At 13.

child protection assists in the rapid transmission of information to the appropriate officials in that part of the world in order to afford greater protection to children from harm.²⁶³⁸

Tim Houston is certain that the strategic placement of additional Liaison Officers with specialist information technology expertise overseas would be highly beneficial to international criminal investigations, including child pornography offending over the Internet.²⁶³⁹ Debbi Tohill, the Interim General Manager, of Ecpat New Zealand, agrees with Houston and states that due to the international nature of child pornography offending it is essential that there is adequate communication with other countries' law enforcement agencies.²⁶⁴⁰ Tohill is convinced that New Zealand must seriously consider stationing further Liaison Officers with specialist Internet experience overseas in strategically significant jurisdictions.²⁶⁴¹ These jurisdictions would be countries where there is major capacity to undertake investigations.²⁶⁴² The Liaison Officers would also liaise with authorities in countries known to be a focal point for the consumption and distribution of child pornography.²⁶⁴³ This tactical approach to the placement of additional Liaison Officers has the potential to make a substantial difference to combating the spread of child pornography over the Internet.²⁶⁴⁴ However, Thurlow states that the Customs Service does not have the financial resources to post additional Liaison Officers overseas and that there has to be a major justification to receive additional funding from the Government.²⁶⁴⁵

²⁶³⁸ At 13.

²⁶³⁹ At 13.

²⁶⁴⁰ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 4.

²⁶⁴¹ At 4.

²⁶⁴² Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 13.

²⁶⁴³ At 13.

²⁶⁴⁴ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 4.

²⁶⁴⁵ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.

1.36.3 Recommendations

1.36.3.1 The Placement of Additional Liaison Officers

It is recommended that New Zealand consider posting additional Liaison Officers with specialist information technology training in strategically important foreign jurisdictions.²⁶⁴⁶ This assistance to law enforcement agencies would be invaluable due to the international nature of child pornography offending.²⁶⁴⁷ As previously stated, Liaison Officers are often the first point of contact in child pornography investigations that concern a child believed to be in imminent danger.²⁶⁴⁸

It is also argued that there is no greater justification for extra funding than the protection of children in New Zealand and overseas.²⁶⁴⁹ It must also be remembered that these additional Liaison Officers would not only be in place to respond to child pornography offending but strategically based to investigate other forms of international crime and gain invaluable experience that would be of significant use to law enforcement agencies in New Zealand.²⁶⁵⁰ The importance of this experience to law enforcement agencies is that it will increase their ability to respond to child pornography offending and also ensure that these responses are sufficient to counter child pornography offending over the Internet.

1.36.4 Conclusion

The placement of additional Liaison Officers is critically important to New Zealand's institutional response to Internet child pornography offending. Liaison Officers are able to access highly valuable information²⁶⁵¹ and facilitate the flow of

²⁶⁴⁶ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 13.

²⁶⁴⁷ At 15.

²⁶⁴⁸ At 15.

²⁶⁴⁹ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 5; Chisholm, Operations Manager, NetSafe, New Zealand, above n 1701, at 7.

²⁶⁵⁰ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁵¹ At 3.

criminal intelligence between jurisdictions.²⁶⁵² This intelligence and the experience obtained from interacting with foreign law enforcement agencies is essential to New Zealand as it will guarantee that our responses are concurrent and correlate with advances in technology.²⁶⁵³ It is therefore concluded that the employment of additional Liaison Officers would be highly beneficial to New Zealand's efforts to eliminate child pornography on the Internet.

1.37 The Signing of Additional Memoranda of Understanding

1.37.1 Introduction

One of the vital roles of Liaison Officers discussed in the previous section is to assist with the flow of investigative intelligence. This flow of information between jurisdictions is often assisted by the signing of formal agreements between law enforcement agencies, as illustrated by Memoranda of Understanding. This section of the thesis examines the value of Memoranda of Understanding ('MoU') as part of the law enforcement response to the dissemination of child pornography over the Internet. The importance of additional MoU to law enforcement agencies is that they expedite the flow of investigative information and have the potential to improve co-operation between agencies in other jurisdictions.

1.37.2 Memoranda of Understanding

1.37.2.1 New Zealand's Law Enforcement Agencies and Memoranda of Understanding

In order to enhance co-operation, law enforcement agencies, such as New Zealand's Serious Fraud Office, the New Zealand Police and the New Zealand Customs Service have entered into MoU with each other.²⁶⁵⁴ These MoU are allocation

²⁶⁵² O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 23.

²⁶⁵³ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁵⁴ New Zealand Police and Serious Fraud Office *Memorandums of Understanding between New Zealand Police and Serious Fraud Office* (2011); New Zealand Customs Service and Serious Fraud Office *Memorandum of Understanding between the New Zealand Customs Service and the Serious Fraud Office* (2014).

agreements that facilitate the supply of information²⁶⁵⁵ but have no legal status.²⁶⁵⁶ Moreover, in accordance with the terms of the MoU, signatory agencies agree to proactively assist each other within the limits defined within the agreement.²⁶⁵⁷ This assistance is intended to facilitate the improved allocation of resources and the exchange of investigative information.²⁶⁵⁸ Brian Thurlow, Senior Enforcement Advisor for the New Zealand Customs Service, states that MoU are also utilised by Customs to assist in the sharing of information with other agencies.²⁶⁵⁹ The Department of Internal Affairs has signed a Memorandum of Understanding with the New Zealand Police and with the New Zealand Customs Service to confirm that all three agencies will combine investigative resources to enable the agencies to achieve positive outcomes in child pornography investigations.²⁶⁶⁰

1.37.2.2 MoU with Foreign Law Enforcement Agencies

Lloyd Bezzet, Senior Policy Analyst for the Department of Internal Affairs reveals that the Department sign MoU with foreign law enforcement agencies.²⁶⁶¹ MoU with foreign law enforcement agencies are considerably more robust.²⁶⁶² The Department of Internal Affairs devotes significant resources to establishing personal relationships with law enforcement agencies around the world in accordance with the MoU.²⁶⁶³ Bezzet also contends that these informal interactions tend to produce positive results and are therefore more productive than most other

²⁶⁵⁵ Crown Law Office “Assistance for Foreign Authorities - Police-to-Police Assistance” (8 October 2014) Crown Law Office

<<http://www.crownlaw.govt.nz/pagepub/docs/afa/policetopoliceassistance.asp?print>>.

²⁶⁵⁶ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 5.

²⁶⁵⁷ At 5.

²⁶⁵⁸ O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 23.

²⁶⁵⁹ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 4.

²⁶⁶⁰ O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 23.

²⁶⁶¹ Bezzet, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 6.

²⁶⁶² Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁶³ Bezzet, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 6.

agreements.²⁶⁶⁴ The building of meaningful relationships with other authorities also supports the facilitation of MoU.²⁶⁶⁵ A number of overseas jurisdictions do advocate for MoU as they provide their agencies with the justification for implementing investigative collaboration.²⁶⁶⁶ They also operate as a buffer for their own internal auditing processes which are understood to be beneficial for the allocation of resources.²⁶⁶⁷

These MoU are implemented to establish New Zealand's presence in those foreign countries as a recognised partner in law enforcement.²⁶⁶⁸ The advantage of a Memorandum of Understanding to the New Zealand Police is that it introduces the Police to the foreign law enforcement agency and provides a soft agreement where both agencies agree to assist each other in investigations.²⁶⁶⁹ These agreements detail the scope of the work and intelligence networking that New Zealand expects from that particular country and that country's expectations of our law enforcement personnel residing within their jurisdiction.²⁶⁷⁰ The precise forms of assistance that these agreements promise include details concerning requests for the criminal history of offenders.²⁶⁷¹ Furthermore, Mr Orange a former Regional and District Commander of the New Zealand Police, states that most of the MoU with foreign States allow officers to operate in that particular foreign jurisdiction.²⁶⁷² This consent could result in a New Zealand Police Officer being sworn in as a member of a law enforcement agency in an overseas jurisdiction to engage with joint investigation teams.²⁶⁷³

²⁶⁶⁴ At 6.

²⁶⁶⁵ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁶⁶ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 6.

²⁶⁶⁷ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 5.

²⁶⁶⁸ At 3.

²⁶⁶⁹ At 7.

²⁶⁷⁰ At 3.

²⁶⁷¹ Amy Adams "Australia and New Zealand sign MoU for Criminal History Checks" (28 February 2015) beehive.govt.nz <<https://www.beehive.govt.nz/release/australia-and-new-zealand-sign-mou-criminal-history-checks>>.

²⁶⁷² Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁷³ At 3.

Given the obvious effectiveness of MoU in crime detection, efforts have been directed to utilise these agreements to facilitate the sharing of information in the fight against child pornography offending via the Internet.²⁶⁷⁴ Steve O'Brien, National Manager of the Censorship Compliance Unit, revealed that a number of New Zealand's law enforcement agencies were attempting to sign further MoU with other foreign law enforcement agencies.²⁶⁷⁵ These MoU would aid in the investigation of child pornography offending across the world as this form of criminal behaviour is an international issue.²⁶⁷⁶ Mr Orange also believes that MoU can be a very effective tool in the response of law enforcement agencies to all forms of international crime.²⁶⁷⁷

Mr Orange is aware that these agreements are highly useful in drug importation and child trafficking investigations.²⁶⁷⁸ The vast majority of the information required in international criminal investigations that Mr Orange witnessed was assembled by Liaison Officers in Thailand.²⁶⁷⁹ These Liaison Officers operated in accordance with a Memorandum of Understanding between New Zealand authorities and the Royal Thai Police in Bangkok.²⁶⁸⁰ Mr Orange reveals that the Thai officials appointed their own officers, who had direct contact with the New Zealand Police's Liaison Officers.²⁶⁸¹ These law enforcement personnel operated in collaboration to ensure that there was a free flow of highly valuable information between Thailand and New Zealand.²⁶⁸²

The Customs Service also benefits from its interactions with other law enforcement agencies through MoU.²⁶⁸³ Brian Thurlow notes that the Customs Service interacts

²⁶⁷⁴ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.

²⁶⁷⁵ At 4.

²⁶⁷⁶ At 4.

²⁶⁷⁷ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁷⁸ At 3.

²⁶⁷⁹ At 3.

²⁶⁸⁰ At 3.

²⁶⁸¹ At 3.

²⁶⁸² At 3.

²⁶⁸³ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.

with other customs agencies overseas so there is a mutually beneficial relationship between both agencies.²⁶⁸⁴ Thurlow discloses that there are certain pieces of information, such as travel details, that can be exchanged between agencies for the purposes of investigating offences in each other's jurisdiction.²⁶⁸⁵ However, although the Customs Service can exchange information, the admissibility of that information in a Court of law is not always guaranteed because of the diverse evidentiary standards required by the Courts in contrasting jurisdictions.²⁶⁸⁶

Debbi Tohill, Interim General Manager of Ecpat New Zealand also believes that additional MoU between countries to aid law enforcement agencies in child pornography investigations is an excellent concept.²⁶⁸⁷ These MoU have the potential to demonstrate to the international community that law enforcement agencies are committed to protecting children and prepared to proactively investigate child pornography offending anywhere in the world. It must also be remembered that these MoU are not a comprehensive answer to the problem of child pornography on the Internet. They are nevertheless a critically important component of the arsenal that is available to law enforcement agencies in their fight against the dissemination of child pornography over the Internet.²⁶⁸⁸

1.37.3 Recommendations

1.37.3.1 The Signing of Additional Memoranda of Understanding

It is recommended that any future law enforcement policies should place emphasis on the signing of more MoU with foreign law enforcement agencies.²⁶⁸⁹ Clearly, such agreements would facilitate the flow of investigative intelligence between

²⁶⁸⁴ At 7.

²⁶⁸⁵ At 7.

²⁶⁸⁶ At 8.

²⁶⁸⁷ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 4.

²⁶⁸⁸ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269; Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7; Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁸⁹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.

jurisdictions and thus greatly enhance child pornography investigations.²⁶⁹⁰ The experience of law enforcement personnel confirms that these relationships produce more positive results than most other formal agreements.²⁶⁹¹ The importance of this recommendation is the assistance with investigations that additional MoU will provide for law enforcement agencies.

1.37.4 Conclusion

The signing of MoU with other countries law enforcement agencies has the potential to have a positive effect on international child pornography investigations.²⁶⁹² These agreements with law enforcement agencies in foreign jurisdictions would increase the flow of investigative intelligence which would have a negative effect on trading via the Internet.²⁶⁹³ The signing of additional MoU would also demonstrate to the international community that law enforcement agencies in New Zealand are committed to protecting children and are proactively investigating child pornography offending throughout the world. These MoU are another mechanism that can be utilised to help guarantee that law enforcement in New Zealand is up-to-date with current trends in online child pornography offending.

1.38 Streamlined Mutual Production Orders

1.38.1 Introduction

The enhancement of investigative systems to expedite the flow of information between jurisdictions has been considered in the previous sections of this thesis. An important component of such investigative systems is Streamlined Mutual Production Orders. This section will discuss the implementation of additional

²⁶⁹⁰ Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁹¹ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 6; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4; Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3; Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210.

²⁶⁹² Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.

²⁶⁹³ At 3.

Streamlined Mutual Production Orders. The significance of these orders is that they accelerate the flow of information to assist with child pornography investigations around the world.

1.38.2 The Challenges in Controlling Internet Child Pornography

1.38.2.1 What is Mutual Assistance?

Mutual assistance is the process countries such as New Zealand use to provide and obtain formal requests for help from other governments in criminal investigations and prosecutions.²⁶⁹⁴ In New Zealand, these formal requests are governed by the Mutual Assistance in Criminal Matters Act 1992²⁶⁹⁵ ('Mutual Assistance Act 1992') and its subsequent Amendments.²⁶⁹⁶ The Mutual Assistance Act 1992 has been implemented to allow requests to be made by law enforcement agencies in New Zealand to foreign governments.²⁶⁹⁷ The Act also permits requests from other countries for assistance from New Zealand's law enforcement agencies in criminal investigations.²⁶⁹⁸ Common forms of assistance provided under the Mutual Assistance Act 1992 include:²⁶⁹⁹

The identification and location of persons;

The obtaining of evidence, documents, or other articles;

The production of documents and other articles;

The making of arrangements for persons to give evidence or assist investigations;

The service of documents;

The execution of requests for search and seizure;

The forfeiture or confiscation of tainted property;

²⁶⁹⁴ Crown Law Office "Assistance for Foreign Authorities - Mutual Assistance" (8 October 2014) Crown Law Office <<http://www.crownlaw.govt.nz/pagepub/docs/afa/mutualassistance.asp?print>>.

²⁶⁹⁵ Mutual Assistance in Criminal Matters Act 1992.

²⁶⁹⁶ Crown Law Office, above n 2668.

²⁶⁹⁷ Mutual Assistance in Criminal Matters Act 1992, pt 2.

²⁶⁹⁸ Mutual Assistance in Criminal Matters Act 1992, pt 3.

²⁶⁹⁹ Crown Law Office, above n 2668.

The recovery of pecuniary penalties in respect of offences;

The restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated; and

The location of property that may be forfeited, or used to satisfy penalty orders.

As previously explained in this thesis, organised crime now transcends national borders.²⁷⁰⁰ The capacity for crimes such as the dissemination of child pornography over the Internet²⁷⁰¹ to be conducted on an international scale has transformed international attitudes to the provision of mutual assistance in criminal matters.²⁷⁰² In addition, New Zealand's law enforcement agencies must ensure that child pornographers cannot evade prosecution²⁷⁰³ and confiscation of child pornography even though the evidence or proceeds of their crimes are concealed in diverse countries around the world.²⁷⁰⁴ This stance on child pornography offending requires a responsive, streamlined mutual assistance system.²⁷⁰⁵ Such a streamlined system must be able to effectively combat both domestic and transnational crime,²⁷⁰⁶ including child pornography, while operating within the appropriate safeguards of the law.²⁷⁰⁷

1.38.2.2 The Mutual Assistance in Criminal Matters Act 1992

Section 61(1) of the Mutual Assistance Act 1992 enables a foreign country to request a production order from New Zealand's Attorney-General.²⁷⁰⁸ However,

²⁷⁰⁰ Crown Law Office, above n 2668.

²⁷⁰¹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 6.

²⁷⁰² Crown Law Office, above n 2668.

²⁷⁰³ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 6.

²⁷⁰⁴ Crown Law Office, above n 2668.

²⁷⁰⁵ Crown Law Office, above n 2668.

²⁷⁰⁶ Crown Law Office, above n 2668.

²⁷⁰⁷ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 6.

²⁷⁰⁸ Mutual Assistance in Criminal Matters Act 1992 s 61(1).

Section 10 of the Mutual Assistance Act 2009 has been substituted for Section 61(1) of the Mutual Assistance Act 1992.²⁷⁰⁹ The amended Section 61 states:²⁷¹⁰

61 Request for production order in New Zealand

(1) A foreign country may request the Attorney-General to make an application for a production order in New Zealand.

(2) After a request is made, the Attorney-General may authorise the Commissioner to make an application to a Judge under section 104 of the Criminal Proceeds (Recovery) Act 2009 if the Attorney-General is satisfied that—

(a) the request relates to a criminal investigation that relates to—

(i) tainted property (as defined in relation to Part 3); or

(ii) property that belongs to a person who has unlawfully benefited from significant foreign criminal activity; or

(iii) an instrument of crime (as defined in relation to Part 3); or

(iv) property that will satisfy some or all of a foreign pecuniary penalty order; and

(b) there are reasonable grounds to believe that all or part of the property to which the criminal investigation relates is located in New Zealand.

Section 5(13) of the Mutual Assistance in Criminal Matters Amendment Act 2009 contains the definition of what constitutes a production order under the Act.²⁷¹¹ A production order is an order made under Section 105 of the Criminal Proceeds (Recovery) Act 2009.²⁷¹² Section 105 of the Criminal Proceeds (Recovery) Act 2009 states that a Judge may issue an order²⁷¹³ to recover documentation²⁷¹⁴ when

²⁷⁰⁹ Mutual Assistance in Criminal Matters Amendment Act 2009 s 10.

²⁷¹⁰ Mutual Assistance in Criminal Matters Amendment Act 2009, s 61.

²⁷¹¹ Mutual Assistance in Criminal Matters Amendment Act 2009, s 5(13).

²⁷¹² Mutual Assistance in Criminal Matters Amendment Act 2009, s 5(13).

²⁷¹³ Criminal Proceeds (Recovery) Act 2009 s 105(1).

²⁷¹⁴ Criminal Proceeds (Recovery) Act 2009, s 105(1)(a).

the Judge is satisfied that there are reasonable grounds for applying for such an order.²⁷¹⁵

1.38.3 Making Requests for Mutual Assistance

As previously stated, the Mutual Assistance Act 1992 allows for requests to be made to New Zealand by foreign countries for help with criminal investigations.²⁷¹⁶ However these foreign countries must be ‘prescribed foreign countries’²⁷¹⁷ and ‘convention countries’²⁷¹⁸ as required by Part 3 of the Mutual Assistance Act 1992.²⁷¹⁹ All other foreign countries can also make requests²⁷²⁰ but these are processed on a case-by-case basis.²⁷²¹

1.38.3.1 Prescribed Foreign Countries

The Mutual Assistance Act 1992 identifies prescribed foreign countries as those within the Regulations of the Act.²⁷²² The prescribed foreign countries are currently Australia, Fiji, the Hong Kong Special Administrative Region of the People’s Republic of China, Niue, the Republic of Korea; the United Kingdom; and the United States.²⁷²³

1.38.3.2 Convention Countries

Convention countries are those countries party to certain conventions as listed in accordance with the amended schedule within Section 14(1) of the Mutual Assistance in Criminal Matters Amendment Act 2002.²⁷²⁴

²⁷¹⁵ Criminal Proceeds (Recovery) Act 2009, s 105(1).

²⁷¹⁶ Crown Law Office “Assistance for Foreign Authorities - Making Requests” (8 September 2013) Crown Law Office

<<http://www.crownlaw.govt.nz/pagepub/docs/afa/makingrequests.asp?print>>.

²⁷¹⁷ Mutual Assistance in Criminal Matters Act 1992 s 24(1)(a).

²⁷¹⁸ Mutual Assistance in Criminal Matters Act 1992, s 24(1)(b).

²⁷¹⁹ Crown Law Office, above n 2690.

²⁷²⁰ Mutual Assistance in Criminal Matters Act 1992, s 25A.

²⁷²¹ Crown Law Office, above n 2690.

²⁷²² Crown Law Office, above n 2690.

²⁷²³ Crown Law Office, above n 2690.

²⁷²⁴ Mutual Assistance in Criminal Matters Amendment Act 2002 s 14(1).

1.38.3.3 All other Foreign Countries

New Zealand can make or receive a request for assistance from almost any country around the world.²⁷²⁵ However, whether the request is accepted will depend on the compatibility of the domestic laws of that country with New Zealand's legislation.²⁷²⁶ All such requests are subject to the conditions set out in Section 25A²⁷²⁷ of the Mutual Assistance Act 1992 as inserted by Section 4 of the Mutual Assistance in Criminal Matters Amendment Act 1998.²⁷²⁸ Section 25A of the Mutual Assistance Act 1992 states that the Attorney-General must take into consideration certain provisions before deciding whether a request for assistance should be granted.²⁷²⁹ Once it is confirmed that the request should be considered under this Act, Section 25A also provides the Attorney-General with the authority to attend to that request accordingly.²⁷³⁰

1.38.3.4 The Requirements for New Zealand to make a Request for Mutual Assistance

The Mutual Assistance Act 1992 does not set out the form that responses to New Zealand's mutual assistance requests should take.²⁷³¹ This arrangement is governed by common law rules and a number of statutes, including Part 4 of the Evidence Act 2006.²⁷³² New Zealand's legal system has strict requirements regarding the presentation of documents in order for them to be admissible in Court.²⁷³³ The outcome is that requests from New Zealand specify in some detail the form and procedure that a response should follow.²⁷³⁴

²⁷²⁵ Crown Law Office "Assistance for Foreign Authorities - Other Country Relationships" (8 October 2014) Crown Law Office
<<http://www.crownlaw.govt.nz/pagepub/docs/afa/othercountryrelationships.asp?print>>.

²⁷²⁶ Crown Law Office, above n 2699.

²⁷²⁷ Crown Law Office, above n 2699.

²⁷²⁸ Mutual Assistance in Criminal Matters Amendment Act 1998.

²⁷²⁹ Mutual Assistance in Criminal Matters Act 1992 s 25A(2).

²⁷³⁰ Mutual Assistance in Criminal Matters Act 1992, s 25A(3).

²⁷³¹ Crown Law Office, above n 2690.

²⁷³² Evidence Act 2006 pt 4.

²⁷³³ Crown Law Office, above n 2690.

²⁷³⁴ Crown Law Office, above n 2690.

1.38.3.5 Requests for Assistance to New Zealand from Foreign Countries

Requests for assistance should be made to the Attorney-General as stipulated in Section 8 of the Mutual Assistance Act 1992.²⁷³⁵ Crown Law Office Counsel Jo Mildenhall states that all formal requests for mutual assistance are processed by the Crown Law Office²⁷³⁶ on behalf of the Attorney-General.²⁷³⁷ When a request is received directly by one of New Zealand's law enforcement agencies, this request must be sent directly to the New Zealand Central Authority for Mutual Assistance in Criminal Matters, at the Crown Law Office.²⁷³⁸ Furthermore, Section 26 of the Mutual Assistance Act 1992 requires that all requests made to New Zealand specify certain matters. Section 26 states that every request for assistance from a foreign country must specify the purpose of that request and also the nature of the assistance being sought.²⁷³⁹

1.38.4 The Assistance Offered by New Zealand to other Countries in Internet-based Child Pornography Investigations

New Zealand provides a broad range of assistance to other countries²⁷⁴⁰ and the Mutual Assistance Act 1992 sets out the criteria under which New Zealand can administer this assistance.²⁷⁴¹ Section 5 also allows for other forms of assistance to be arranged on a case-by-case basis.²⁷⁴² Section 5 of the Mutual Assistance Act 1992 states that the Act does not detract from existing forms of co-operation in respect of criminal matters between New Zealand and any other country.²⁷⁴³ This

²⁷³⁵ Mutual Assistance in Criminal Matters Act 1992, s 8.

²⁷³⁶ The Crown Law Office provides legal advice to the government in the areas of criminal, public and administrative law.

²⁷³⁷ Interview with Jo Mildenhall, Crown Counsel, New Zealand (22 November 2014) at 2.

²⁷³⁸ Crown Law Office, above n 2690.

²⁷³⁹ Mutual Assistance in Criminal Matters Act 1992, s 26(a).

²⁷⁴⁰ Crown Law Office "Assistance for Foreign Authorities - Forms of Assistance" (8 October 2014) Crown Law Office

<<http://www.crownlaw.govt.nz/pagepub/docs/afa/formsofassistance.asp?print>>.

²⁷⁴¹ Crown Law Office, above n 2714.

²⁷⁴² Mutual Assistance in Criminal Matters Act 1992, s 5.

²⁷⁴³ Mutual Assistance in Criminal Matters Act 1992, s 5(a).

Section also states that nothing in the Act is intended to prevent the development of other forms of co-operation.²⁷⁴⁴

1.38.4.1 Locating or Identifying Persons

When a request relates to a criminal matter, New Zealand can assist in locating or identifying persons.²⁷⁴⁵ A foreign country may ask the Attorney-General to assist in locating or identifying a person who is believed to be in New Zealand in accordance with Section 30 of the Mutual Assistance Act 1992.²⁷⁴⁶

1.38.4.2 Assistance with Obtaining Evidence

Assistance with obtaining evidence from persons within New Zealand can only be given where Court proceedings have been initiated in the foreign country.²⁷⁴⁷ A foreign country may request the Attorney-General to assist in arranging the production of documents²⁷⁴⁸ or other evidence²⁷⁴⁹ in New Zealand pursuant to Section 31(1) of Mutual Assistance Act 1992.²⁷⁵⁰ However, Section 31(2)(b) contains a rider attached to this form of assistance:²⁷⁵¹ there must be reasonable grounds for believing that the documents can be produced and any evidence does reside within New Zealand.²⁷⁵²

1.38.4.3 Search Warrants

Where items cannot be obtained by consent, Section 43 of the Mutual Assistance Act 1992 enables New Zealand law enforcement agencies to apply to a Court for a search warrant pursuant to a mutual assistance request.²⁷⁵³ Section 43(1) of the Mutual Assistance Act 1992 enables a foreign country to request the assistance of

²⁷⁴⁴ Mutual Assistance in Criminal Matters Act 1992, s 5(b).

²⁷⁴⁵ Crown Law Office, above n 2714.

²⁷⁴⁶ Mutual Assistance in Criminal Matters Act 1992, s 30(1).

²⁷⁴⁷ Mutual Assistance in Criminal Matters Act 1992, s 31(2)(a).

²⁷⁴⁸ Mutual Assistance in Criminal Matters Act 1992, s 31(1)(b).

²⁷⁴⁹ Mutual Assistance in Criminal Matters Act 1992, s 31(1)(b).

²⁷⁵⁰ Mutual Assistance in Criminal Matters Act 1992, s 31(1).

²⁷⁵¹ Mutual Assistance in Criminal Matters Act 1992, s 31(2)(b).

²⁷⁵² Mutual Assistance in Criminal Matters Act 1992, s 31(2)(b).

²⁷⁵³ Crown Law Office, above n 2714.

the Attorney-General in obtaining an article or thing by search and seizure.²⁷⁵⁴ Where such a request transpires, that request must relate to a criminal matter in respect of an offence punishable by imprisonment for a term of at least two years or more.²⁷⁵⁵ Furthermore, there must be reasonable grounds for believing that an article or thing relevant to the proceedings in question is within New Zealand.²⁷⁵⁶ Once the New Zealand Police file the application for a search warrant, the Court under Section 43(1) of the Mutual Assistance Act 1992 determines the final decision as to whether a search warrant should or should not be issued.²⁷⁵⁷ Search warrants for proceeds of crime²⁷⁵⁸ can also be issued and are dealt with under Section 59 of Mutual Assistance Act 1992.²⁷⁵⁹

1.38.5 Police-to-Police Assistance

Police-to-police assistance is a form of informal co-operation provided to the Police in a foreign jurisdiction by New Zealand's Police Force.²⁷⁶⁰ This type of assistance is often undertaken with the aid of Interpol, which is the world's main international policing organisation.²⁷⁶¹ Interpol facilitates mutual police-to-police assistance among all criminal law enforcement authorities.²⁷⁶² Assistance with co-operation is also given by Interpol even where diplomatic relations between particular countries do not exist.²⁷⁶³ Examples of police-to-police assistance include providing general intelligence on child pornography operations²⁷⁶⁴ and operational briefings.²⁷⁶⁵ The arrest of Daniel Moore in 2010 illustrates the importance of police-to-police

²⁷⁵⁴ Mutual Assistance in Criminal Matters Act 1992, s 43(1).

²⁷⁵⁵ Mutual Assistance in Criminal Matters Act 1992, s 43(2)(a).

²⁷⁵⁶ Mutual Assistance in Criminal Matters Act 1992, s 43(2)(b).

²⁷⁵⁷ Mutual Assistance in Criminal Matters Act 1992, s 43(1).

²⁷⁵⁸ New Zealand can also assist in the restraint and recovery of the proceeds of crime. This formal request process is contained in Section 54 Mutual Assistance Act 1992. However, some details of this process are contained within the Criminal Proceeds (Recovery) Act 2009.

²⁷⁵⁹ Mutual Assistance in Criminal Matters Act 1992, s 59.

²⁷⁶⁰ Crown Law Office, above n 2629.

²⁷⁶¹ Crown Law Office, above n 2629.

²⁷⁶² Interpol "Vision and Mission" (10 October 2014) Interpol <<http://www.interpol.int/About-INTERPOL/Vision-and-mission>>.

²⁷⁶³ Crown Law Office, above n 2629.

²⁷⁶⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 12.

²⁷⁶⁵ Crown Law Office, above n 2629.

assistance. Moore controlled access to a network of people distributing child pornography on the Internet.²⁷⁶⁶ This network was discovered by the United States Secret Service, and the US Department of Homeland Security who passed on Moore's IP address to the CCU.²⁷⁶⁷ The CCU was then able to execute a search warrant on an Internet Service Provider which eventually led them to Moore.²⁷⁶⁸

Police-to-police assistance can also be an effective way of determining what material is held by a foreign country in advance of making a mutual assistance request.²⁷⁶⁹ As the Police are usually called upon to assist with executing mutual assistance requests, a good relationship between the Police in different jurisdictions benefits the mutual assistance process.²⁷⁷⁰ Therefore, police-to-police assistance in any law enforcement operation, or any attempt to obtain general intelligence both aids and complements any potential mutual assistance request.²⁷⁷¹

1.38.6 The Implications of Substandard Laws and Agreements for New Zealand's Law Enforcement Agencies

There is a wide variation in the standards of international laws and agreements covering child pornography, and this can have significant implications for law enforcement.²⁷⁷² Steve O'Brien, National Manager of the Censorship Compliance Unit of the Department of Internal Affairs agrees.²⁷⁷³ O'Brien believes that the differences in legislation between jurisdictions are the main reason why law enforcement agencies are arguing for commonality of laws and the introduction of mutual production orders.²⁷⁷⁴ John Michael, Officer in charge of the Online Child Exploitation Unit for the New Zealand Police, considers differences in legislation to be one of the main barriers for law enforcement agencies when policing the

²⁷⁶⁶ Otago Daily Times "To Catch a Corrupt File" *Otago Daily Times Online News* (8 May 2010) <<http://www.odt.co.nz/lifestyle/magazine/104959/to-catch-a-corrupt-file?page=0%2C0>>.

²⁷⁶⁷ Otago Daily Times, above n 2740.

²⁷⁶⁸ Otago Daily Times, above n 2740.

²⁷⁶⁹ Crown Law Office, above n 2629.

²⁷⁷⁰ Crown Law Office, above n 2629.

²⁷⁷¹ Crown Law Office, above n 2629.

²⁷⁷² Wortley and Smallbone, above n 1683, at 1.

²⁷⁷³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.

²⁷⁷⁴ O'Brien, National Manager Censorship Compliance Unit, above n 1494, at 4.

Internet.²⁷⁷⁵ Many of these obstacles, including variances in legislation, are compounded by the Internet being borderless.²⁷⁷⁶ Michael further states:²⁷⁷⁷

Every country has their own domestic legislation that they deal with, and at times trying to get evidence from out of another country where a social network may be based can be difficult, and it can take a long time to get information, if we do get it at all.

This type of difficulty can have serious negative implications for any child pornography investigation.²⁷⁷⁸ In spite of the provisions of the Mutual Assistance Act 1992 Michael considers complications with receiving information from overseas to be one of the most significant impediments for law enforcement.²⁷⁷⁹ This issue is compounded by the fact that any law enforcement investigation often has to source information from a whole range of organisations.²⁷⁸⁰ These organisations include Internet Service Providers, email providers and numerous foreign Government Departments.²⁷⁸¹

Detective Senior Sergeant John Michael would like to see some new initiatives to assist law enforcement agencies to obtain information from other countries.²⁷⁸² Such an innovative initiative would involve capability enhancement at both the international and national levels of policing to accommodate new and flexible partnerships facilitating co-operation and the enforcement of the law.²⁷⁸³ Michael stresses that the international law enforcement agencies do work very well together.²⁷⁸⁴ However, problems arise in terms of the gathering of evidence and the

²⁷⁷⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²⁷⁷⁶ At 5.

²⁷⁷⁷ At 5.

²⁷⁷⁸ At 5.

²⁷⁷⁹ At 5.

²⁷⁸⁰ At 5.

²⁷⁸¹ At 5.

²⁷⁸² At 6.

²⁷⁸³ At 7.

²⁷⁸⁴ At 7.

ability to investigate crimes as some countries²⁷⁸⁵ do not investigate child pornography offending.²⁷⁸⁶ Michael revealed that where an investigation comes across an offender located in one of these countries, there is no point in even sending a referral as there is simply no way that it will be actioned.²⁷⁸⁷ Michael's comments indicate that the provisions of the Optional Protocol are not being adhered to by States and this is having a significant impact on child pornography investigations.

Lloyd Bezett, Senior Policy Analyst for the Department of Internal Affairs supports more streamlined processes to secure evidentiary material from overseas.²⁷⁸⁸ The current formal mechanism for this kind of material, known as the Mutual Legal Assistance Treaty²⁷⁸⁹ ('MLAT'), is actionable under the Mutual Assistance Act 1992.²⁷⁹⁰ Bezett revealed that using the MLAT can be very slow in terms of responding to the dynamic nature of obtaining information from overseas.²⁷⁹¹ In a number of cases where the Department of Internal Affairs is conducting an investigation and requires the identity of a person using a computer overseas, the MLAT process has taken up to 12 months before the Department has received a response.²⁷⁹² Tim Houston, an Investigator with the Child Exploitation Team of the New Zealand Customs Service, has had similar experiences and revealed:²⁷⁹³

Operationally I have been on the receiving end of a MLAT. We had an operation under way with Australian authorities and they made a request through an MLAT. It was a very lengthy process. It has to go through the diplomatic channels, then

²⁷⁸⁵ Tim Houston revealed that one such country is Thailand. In an investigation of a person who returned from Thailand with child pornography, Houston discovered that it is not a criminal offence to possess child pornography. It is only an offence to distribute it.

²⁷⁸⁶ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 7.

²⁷⁸⁷ At 7.

²⁷⁸⁸ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

²⁷⁸⁹ See Michael Cullen "NZ signs Mutual Legal Assistance Treaty with China" The Official website of the New Zealand Government <<http://beehive.govt.nz/release/nz-signs-mutual-legal-assistance-treaty-china>>.

²⁷⁹⁰ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

²⁷⁹¹ At 7.

²⁷⁹² At 7.

²⁷⁹³ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

the Ministry of Justice, Crown law and there are a lot of moving parts to it and it is very, very complex and time consuming. It is a very slow process to get any material through to law enforcement overseas and of course this has to be done within the confines of the law.

Lloyd Brezett and Tim Houston both believe that these international mechanisms are a serious impediment to any investigation as they are far too complex and cumbersome.²⁷⁹⁴ Consequently, Brezett argues for improved and streamlined mechanisms to allow law enforcement agencies to conduct their investigations more effectively.²⁷⁹⁵ However, these streamlined processes should first be implemented on a bilateral basis with major partners in law enforcement such as Australia. This bilateral approach would provide an opportunity to test the mechanisms before they are utilised to develop relationships with other States.

1.38.7 Recommendations

1.38.7.1 The Introduction of Additional Streamlined Mutual Production Orders

New Zealand and the international community must seriously consider the introduction of additional streamlined mutual production orders. The present arrangements between countries are clearly inadequate and enable child pornographers to shelter from prosecution action by being resident in a foreign jurisdiction.²⁷⁹⁶ Therefore, the implementation of further streamlined mutual production orders is so critically important.²⁷⁹⁷ The ability to institute these measures universally will confirm that law enforcement agencies can prosecute child pornographers anywhere in the world.²⁷⁹⁸ This enhanced mutual production procedure will also be a major asset to law enforcement agencies around the world

²⁷⁹⁴ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

²⁷⁹⁵ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

²⁷⁹⁶ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.

²⁷⁹⁷ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

²⁷⁹⁸ At 7.

as it will enable resources to be directed to other child pornography investigations.²⁷⁹⁹

The application of harmonious mutual production orders will not only prevent child pornographers from being transient but would assist law enforcement agencies to remain proactive and investigate offending anywhere in the world. The length of time investigations take to complete is perceived as a serious impediment to those investigations.²⁸⁰⁰ Additional streamlined mutual production orders with updated processes will reduce the time required.²⁸⁰¹ The streamlined processes are sure to result in more successful prosecutions, and will also provide improved protection to children as there will be no place to hide for those who produce child pornography. The importance of these recommendations is their potential to save resources and also guarantee that law enforcement agencies have the ability to adequately prosecute offenders.

1.38.8 Conclusion

In the new information technology age, in which the Internet is a major component of criminal activity, governments must acknowledge that any solution to the problem of reducing crime on the Internet, including the dissemination of child pornography, must be a universal solution.²⁸⁰² This universal solution must be able to respond to the expectations of law enforcement agencies so that traditional notions of jurisdiction are not able to undermine the rights of the young victims of the child pornography trade. The argument for harmonious mutual production orders is in no way founded on any concept of reducing a country's sovereignty or right to administer its own legislation. This request from law enforcement agencies is simply an attempt to enable investigators to have the tools that they require to

²⁷⁹⁹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 18.

²⁸⁰⁰ Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

²⁸⁰¹ At 7.

²⁸⁰² Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 7.

investigate and prosecute child pornography offending anywhere in the world.²⁸⁰³ Streamlined mutual production orders will increase the speed and efficiency of investigations which will reduce the potential for further harm to more children.²⁸⁰⁴

1.39 Overall Conclusion for Chapter 6

The inadequacy of New Zealand's legislation to compel its ISPs to store subscriber information is a serious hindrance to child pornography investigations.²⁸⁰⁵ This situation is unacceptable as mass storage is now relatively inexpensive. New legislation to compel ISPs to retain information would not only assist with investigations but also assist New Zealand to fulfil its obligations to its children in accordance with the Optional Protocol.²⁸⁰⁶ However, the most significant aspect of this proposed amendment is that it will become an important preventative mechanism that will impede the further sexual abuse of children around the world.

Another issue of concern for law enforcement personnel is the existence of new and increasingly powerful encryption software which facilitates the concealment of child pornography offending.²⁸⁰⁷ At present New Zealand's legislation does not provide sufficient safeguards concerning this issue. This problem requires a modulated response that provides agencies with the necessary assistance from both the private sector and the State. However, although it can be argued that companies such as Apple should be more forthcoming in providing assistance to child pornography investigations,²⁸⁰⁸ it is the State which should bear some of the criticism for the present situation. The Government must implement legislation that enables New Zealand's law enforcement agencies to adequately investigate any

²⁸⁰³ At 5,7; O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4; Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.

²⁸⁰⁴ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 18.

²⁸⁰⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.

²⁸⁰⁶ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 9(1).

²⁸⁰⁷ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.

²⁸⁰⁸ At 6.

encrypted data that is suspected of concealing child pornography. Moreover, responsibility for the present situation does not rest solely with the Government of New Zealand; it can also be attributed to the indifference of other States.

This disinterest by some States and the transnational nature of Internet offending requires a new and more flexible approach to the enforcement and investigation of all forms of online criminal activity, including the dissemination of child pornography.²⁸⁰⁹ The traditional notions of domestic enforcement within a specific jurisdiction have been made ineffective by the main medium of supply, the Internet. The international community must therefore commit itself to a co-ordinated approach to enforcement and investigation. Jurisdictions must agree to co-operate to eradicate child pornography on the Internet. The law enforcement personnel interviewed in this research have provided a detailed insight into how a small country such as New Zealand could assist with this new form of improved co-operation between jurisdictions.²⁸¹⁰ These disclosures should act as a model for other jurisdictions to improve their capability to assist with child pornography investigations.²⁸¹¹ However, this improved co-operation and co-ordination of resources should not be limited to the concerns of law enforcement. There must be a comprehensive effort against child pornography offending that recognises other significant concerns, such as the inadequacy of education for children in the online age.²⁸¹²

²⁸⁰⁹ At 11.

²⁸¹⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10; Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 6; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 12.

²⁸¹¹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 6.

²⁸¹² At 13.

Chapter 7

Sentencing for Child Pornography Offending

1.40 Overall Introduction

The concerns of law enforcement, as discussed in the previous chapter, is an important component of the punitive and preventive response to the consumption of child pornography by way of the Internet. Another important aspect of this punitive response is the capability of the Courts to adequately sentence offenders for child pornography offending. This chapter will undertake an examination of the current law and practice regarding the sentencing of offenders in New Zealand. It investigates the proposed changes to sentencing under the Objectionable Publications and Indecency Legislation Bill 2013.²⁸¹³ Sentencing guidelines will also be scrutinised to ascertain whether the enactment of these provisions would positively impact the sentencing of child pornography offenders. This chapter also examines an offender's comments on the punitive and rehabilitative aspects of sentencing and provides recommendations to assist the Courts to appropriately sentence offenders.

1.41 The Optional Protocol and Sentencing of an Offender

Article 3(3) of the Optional Protocol obligates States to implement appropriate sentencing which reflects the seriousness of child pornography offending.²⁸¹⁴ This Article compels New Zealand to address concerns regarding its sentencing regime and to confirm that it affords children the necessary protection to reduce their vulnerability. The Objectionable Publications and Indecency Legislation Bill 2013 and Sentencing Guidelines have been designed to address these concerns as they will significantly reduce the potential risk to children from recidivist offending. The initiatives will demonstrate to the community that any involvement with this type

²⁸¹³ Objectionable Publications and Indecency Legislation Bill 2013 (124-1).

²⁸¹⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 3(3).

of offending will incur severe penalties. A new legislative provision to ensure that offenders receive appropriate treatment services would also assist New Zealand to fulfil its responsibilities in accordance with Article 3(3). This legislative provision has the ability to reduce the potential for recidivist offending by assisting offenders to recognise and respond appropriately to signs of harmful behaviour.²⁸¹⁵

1.42 The Maximum Sentence for Child Pornography Offending in New Zealand

The maximum sentence for child pornography offending in New Zealand is laid down in Section 124(2)(a) of the Films, Videos, and Publications Classification Act 1993. This Section states that an individual is liable to a term of imprisonment not exceeding 10 years for a child pornography offence.²⁸¹⁶ Government statistics demonstrate that between 2004 and 2011, 393 people were convicted for objectionable publication offences.²⁸¹⁷ However, these offences were not limited to child pornography offending because New Zealand does not have a distinct child pornography provision.²⁸¹⁸ Only 131 or 33 percent of these individuals convicted were sentenced to a custodial sentence.²⁸¹⁹ Approximately 50 percent of these offenders had been sentenced to less than 20 percent of the maximum sentence available to the Courts.²⁸²⁰ In all but 14 cases, the offender was sentenced to a term of imprisonment less than 40 percent of the maximum available sentence.²⁸²¹ These statistics indicate that Judges in New Zealand have a propensity to sentence offenders of this kind at the lower end of the sentencing spectrum.²⁸²²

²⁸¹⁵ Blue, *Convicted Child Sexual Offender*, above n 105, at 2.

²⁸¹⁶ Films, Videos, and Publications Classification Act 1993 s 124(2)(a).

²⁸¹⁷ Ministry of Justice, New Zealand “Status Quo” (23 April 2015) <<http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-addressing-child-pornography-and-related-offending/status-quo>>.

²⁸¹⁸ Ministry of Justice, New Zealand, above n 2791.

²⁸¹⁹ Ministry of Justice, New Zealand, above n 2791.

²⁸²⁰ Ministry of Justice, New Zealand, above n 2791.

²⁸²¹ Ministry of Justice, New Zealand, above n 2791.

²⁸²² Ministry of Justice, New Zealand, above n 2791.

1.43 The Purpose of the Sentencing Act 2002

The Sentencing Act 2002²⁸²³ explains the purposes of sentencing of offenders in New Zealand.²⁸²⁴ The Act is premised on a just deserts method of sentencing, commonly referred to as retribution.²⁸²⁵ The foundation stone of retribution is the principle of proportionality.²⁸²⁶ This principle insists that the penalty imposed on the offender must be proportionate to the seriousness of the offence perpetrated against the victim and community.²⁸²⁷ Sentences must also reflect a number of considerations that may be in conflict,²⁸²⁸ such as consistency in sentencing and the interests of the victim.²⁸²⁹ Nevertheless, offenders should be adequately sentenced for their criminal behaviour and should receive their lawful punishment.²⁸³⁰ The principle of proportionality also places a constraint on the *utilitarian*²⁸³¹ notions of deterrence and other forms of punishment.²⁸³²

Section 7 of the Sentencing Act 2002 encapsulates the purposes and principles of sentencing as required by the Act.²⁸³³ The Court is required to hold the offender to account for the harm that they have done to their victims and the community.²⁸³⁴ This accountability is intended to promote a sense of responsibility and acknowledgement of the harm caused by the offender's actions.²⁸³⁵ The Sentencing Act 2002 recognises the interests of the victim of the offence²⁸³⁶ and the requirement for reparation for the harm caused by the offender's actions.²⁸³⁷

²⁸²³ Sentencing Act 2002.

²⁸²⁴ Courts of New Zealand "Sentencing" (2 November 2014) Courts of New Zealand <<https://www.courtsofnz.govt.nz/about/system/role/sentencing>>.

²⁸²⁵ Geoff Hall "Sentencing" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) at 259.

²⁸²⁶ At 259.

²⁸²⁷ At 259.

²⁸²⁸ Courts of New Zealand, above n 2798.

²⁸²⁹ Courts of New Zealand, above n 2798.

²⁸³⁰ Hall, above n 2799, at 259.

²⁸³¹ *Utilitarianism* is a philosophical doctrine which proposes that the best social policy is that which does the most good for the greatest number of people.

²⁸³² Hall, above n 2799, at 259.

²⁸³³ Sentencing Act 2002 s 7.

²⁸³⁴ Sentencing Act 2002, s 7(1)(a).

²⁸³⁵ Sentencing Act 2002, s 7(1)(b).

²⁸³⁶ Sentencing Act 2002, s 7(1)(c).

²⁸³⁷ Sentencing Act 2002, s 7(1)(d).

Section 8 of the Sentencing Act 2002 is also significant as it sets out the principles that Judges must take into account when sentencing offenders.²⁸³⁸ These principles consist of imposing the least restrictive outcome that is appropriate in the circumstances²⁸³⁹ and ensuring this outcome is in accordance with the hierarchy of sentencing and orders.²⁸⁴⁰ Section 8(h) of the Act also mandates that a Judge must take into account the particular circumstances of an offender to ensure that the sentence is not disproportionately severe.²⁸⁴¹ The offender's personal circumstances²⁸⁴² and the requirement for consistency of sentencing must also be acknowledged by the sentencing Judge.²⁸⁴³ However, a significant feature of sentencing in New Zealand is that the Sentencing Act 2002 bestows upon the sentencing Judge the right to exercise discretion.²⁸⁴⁴ Section 16 of the Act also has a strong presumption against imprisonment, and recognises the desirability of keeping offenders in the community.²⁸⁴⁵ This Section also requires that a sentencing Judge *does not* impose a sentence of imprisonment²⁸⁴⁶ unless the purposes²⁸⁴⁷ of the Sentencing Act 2002 *cannot* be achieved by a sentence other than imprisonment.²⁸⁴⁸ Section 16(2)(c) also confirms that in the particular case before the Court, a sentence of imprisonment must be consistent with the principles within Section 8 of the Act.²⁸⁴⁹

²⁸³⁸ Annaliese Johnston "Sentencing the Silent - Children's Rights and the Dilemma of Maternal Imprisonment" (2013) 8 Public Interest Law Journal of New Zealand 120 at ch IV.

²⁸³⁹ Sentencing Act 2002, s 8(g).

²⁸⁴⁰ Sentencing Act 2002, s 8(g).

²⁸⁴¹ Sentencing Act 2002, s 8(h).

²⁸⁴² Sentencing Act 2002, s 8(i).

²⁸⁴³ Sentencing Act 2002, s 8(e).

²⁸⁴⁴ Hall, above n 2799, at 253.

²⁸⁴⁵ Sentencing Act 2002, s 16(1).

²⁸⁴⁶ Sentencing Act 2002, s 16(2)(a).

²⁸⁴⁷ See Sentencing Act 2002, s 7.

²⁸⁴⁸ Sentencing Act 2002, s 16(2)(b).

²⁸⁴⁹ Sentencing Act 2002, s 16(2)(c).

1.44 The Objectionable Publications and Indecency Legislation Bill and Sentencing

1.44.1 Introduction

This section examines the Objectionable Publications and Indecency Legislation Bill 2013 ('the Bill') and the proposed changes to sentencing for child pornography offences under the Bill. It will also scrutinise these amendments to ascertain the efficacy of these changes to the sentencing of child pornographers. This section will also draw attention to any possible detrimental effects that the amendments may have to the operation of the Films, Videos, and Publications Classification Act 1993 ('Classification Act 1993').²⁸⁵⁰ The importance of these amendments is their potential to reduce recidivist offending and also to confirm that the enforcement provisions of the Classification Act 1993 remain current in the online age.

1.44.2 The Purpose of the Objectionable Publications and Indecency Legislation Bill and Sentencing

The primary purpose of this Bill is to implement the Government's plan of action to increase penalties for child pornography offences.²⁸⁵¹ The objective of this Bill is to demonstrate that sentences for child pornography offences must reflect the seriousness of the offending and send a firm message to the community that any interaction with this material will not be tolerated.²⁸⁵² In its submission on the Bill, the Classification Office clearly agrees with the Government and states that the main 'driver' behind the Bill is to discourage New Zealanders from producing, possessing and distributing objectionable publications.²⁸⁵³ The former Minister of Justice Judith Collins also stated in Parliament:²⁸⁵⁴

²⁸⁵⁰ Films, Videos, and Publications Classification Act 1993.

²⁸⁵¹ Objectionable Publications and Indecency Legislation Bill 2013 (124-1), Explanatory Note.

²⁸⁵² Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²⁸⁵³ Office of Film and Literature Classification *Submission on the Objectionable Publications and Indecency Legislation Bill* (2014) at 1.

²⁸⁵⁴ Hansard, above n 2078, at 15102.

To keep pace with this hideous crime the law needs to change too. Increasing the penalties sends a clear message that the possession of, and trade in, child sexual abuse online is an abhorrent act.

This statement indicates that it is the legislation itself which is ineffective and weakening legislative control. This, however, is not the case. It is the advancement of technology which is the main contributing factor to the weakening of legislative control.²⁸⁵⁵ Technology has outstripped the legislative response and as a result it has become easier for paedophiles to contact children. Advances in technology have also significantly increased the availability of objectionable pornography. Nevertheless, the increases in the maximum penalties for creating, possessing and distributing objectionable publications are an attempt by the Government to deter online child pornography offending.²⁸⁵⁶ This response by the Government will not adequately address the impact that technology has had on offending. It is however, an important component in the overall response to child pornography offending via the Internet.

1.44.3 Increasing Penalties for Child Pornography Offences

1.44.3.1 Increases in Penalties

The Bill's increases in penalties are intended to send a clear message to child pornographers that their actions are abhorrent and lead to the sexual abuse of children.²⁸⁵⁷ Therefore, their actions should be treated as in the most serious category of criminal offending.²⁸⁵⁸

²⁸⁵⁵ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 16.

²⁸⁵⁶ 3News, above n 2079.

²⁸⁵⁷ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²⁸⁵⁸ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

1.44.3.2 Offences Involving Knowledge

Clause 4 of the Bill amends Section 124 of the Classification Act 1993 which relates to offences involving knowledge in relation to objectionable publications.²⁸⁵⁹ This Clause increases the maximum term of imprisonment from 10 years to 14 years.²⁸⁶⁰ The Bill acknowledges the increase in the volumes of child pornography now being found in the possession of offenders and also disseminated by them across the Internet.²⁸⁶¹ Moreover, an offence against Section 124 is considered to be a higher-tier offence²⁸⁶² due to the offender's decision to distribute child pornography.²⁸⁶³ The reason for this provision is, as previously noted, that the exchange of images fuels demand for additional child pornography.²⁸⁶⁴ This increase in sentencing will provide the Courts with additional capacity to adequately sentence offenders for this category of serious criminal offending. Therefore, the basic argument for the inclusion of Clause 4 into legislation is twofold. The introduction of heavier sentencing will deter offenders from distributing child pornography and where an offender is found to have been distributing this material they will receive an appropriate punishment when they are sentenced by the Courts to an extended custodial sentence.

1.44.3.3 The Presumption of Imprisonment for Repeat Child Pornography Offenders

The presumption of imprisonment for repeat child pornography offenders under the Bill is intended to be a compelling deterrent.²⁸⁶⁵ This deterrent is anticipated to emphasise the seriousness of such offending, and also discourage recidivism.²⁸⁶⁶ The presumption of imprisonment for repeat offenders could also be seen as a

²⁸⁵⁹ Objectionable Publications and Indecency Legislation Bill, cl 4.

²⁸⁶⁰ Objectionable Publications and Indecency Legislation Bill, cl 4.

²⁸⁶¹ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3; Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 2.

²⁸⁶² *R v Spark*, above n 961, at [16].

²⁸⁶³ *Espinosa v Department of Internal Affairs*, above n 1734, at [15].

²⁸⁶⁴ *R v Oliver & Ors* (2003) 1 CrAppR 28 (gb;england.and.wales) at 467.

²⁸⁶⁵ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²⁸⁶⁶ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

response to community concerns about offenders being released into the community. Addressing this concern is important because the incarceration of an offender incapacitates the offender so they no longer have the ability to harm children in the community. Clause 7 of the Bill will insert a new provision, Section 132B, into the Classification Act 1993.²⁸⁶⁷ Section 132B contains a presumption of imprisonment for certain repeat offenders.²⁸⁶⁸ The former Minister of Justice has stated that this presumption will only permit the Courts to exercise discretion where they are satisfied that mitigating circumstances are present that necessitate that the offender should not be sentenced to a term of imprisonment.²⁸⁶⁹ Thus, Section 132B(4) enables the Court to exercise discretion where the Court considers that the offender should not be so sentenced for a repeat offence.²⁸⁷⁰ The Court must also have regard to the particular circumstances of both the repeat offence and the offender.²⁸⁷¹ These particular circumstances comprise without limitation the age of the offender when they are under 20 years of age.²⁸⁷²

The New Zealand Law Society ('Law Society') has recommended that Clause 7 should be given further consideration.²⁸⁷³ This recommendation has been submitted because the Sentencing Act 2002 already recognises that previous convictions are an aggravating factor²⁸⁷⁴ when determining sentences.²⁸⁷⁵ Nevertheless, the Law Society is doubtful the new proposal would have any efficacy impact in practice.²⁸⁷⁶ The presumption of imprisonment for repeat offenders within Clause 7 of the Bill is triggered by the fact of a previous conviction.²⁸⁷⁷ The Law Society believes Clause 7 would produce the same outcome as the Sentencing Act 2002.²⁸⁷⁸ The

²⁸⁶⁷ Objectionable Publications and Indecency Legislation Bill, cl 7.

²⁸⁶⁸ Objectionable Publications and Indecency Legislation Bill, cl 7.

²⁸⁶⁹ Hansard, above n 2078, at 15102.

²⁸⁷⁰ Objectionable Publications and Indecency Legislation Bill, cl 7.

²⁸⁷¹ Objectionable Publications and Indecency Legislation Bill, cl 7.

²⁸⁷² Objectionable Publications and Indecency Legislation Bill, cl 7.

²⁸⁷³ New Zealand Law Society *Objectionable Publications and Indecency Legislation Bill - Supp 1* (2014) at 2.

²⁸⁷⁴ Sentencing Act 2002 s 9(1)(j).

²⁸⁷⁵ New Zealand Law Society, above n 2847, at 2.

²⁸⁷⁶ At 2.

²⁸⁷⁷ At 3.

²⁸⁷⁸ At 4.

presence of a previous conviction means that a sentencing Judge would already begin with a presumption of imprisonment.²⁸⁷⁹ Even so, the Judge may be required to depart from this method of sentencing after having regard to the particular circumstances of the offence or the offender.²⁸⁸⁰

It is contended that the Law Society has failed to recognise that Clause 7 of the Bill is merely intended to ensure that the Court's acknowledge that repeat offenders *should* be sent to jail. The fact that the Government has decided to implement this amendment is also an indication that the wider community is frustrated with the levels of sentencing that have been handed down by the Courts to offenders who are prosecuted for possessing many thousands of images.²⁸⁸¹ It could also be argued that this is merely posturing intended to offset the inadequacies confronted by law enforcement agencies. Nevertheless, Clause 7 of the Bill will send a clear and undeniable signal to the community that repeat child pornography offending is highly likely to result in a custodial sentence. It will also reduce the potential for children to be harmed, as the worst offenders will be incarcerated and unable to download additional child pornography.

The other concern that must be raised concerning Clause 7 of the Bill is that this new provision within the Classification Act 1993 will enable the Court to recognise that offenders under 20 years of age may be less culpable than older offenders.²⁸⁸² It is contended that this will have no effect on child pornography offending whatsoever. An offender who has been charged under Section 132B has already been convicted for similar offences and would have probably undertaken some form of therapy for sexual offending. This therapy enables an offender to acquire an insight into their offence patterns and most importantly how to interrupt them.²⁸⁸³ As a result, the fact that the offender is under 20 years of age should be irrelevant to Section 132B as the offender has continued to contribute to the sexual abuse of

²⁸⁷⁹ At 3.

²⁸⁸⁰ At 3.

²⁸⁸¹ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 5.

²⁸⁸² Objectionable Publications and Indecency Legislation Bill 2013 (124-1), cl 7.

²⁸⁸³ Blue, Convicted Child Sexual Offender, above n 105, at 7.

children even after being previously convicted and receiving therapy for this same category of offending.

1.44.4 Other Proposed Amendments

1.44.4.1 Indecent Communication with a Young Person

Clause 13 of the Bill creates a new offence of indecent communication with a young person under the age of 16 years.²⁸⁸⁴ This offence is contained within a new section, Section 124A which is punishable by imprisonment for a term not exceeding three years.²⁸⁸⁵ The objective of this new offence is to address ambiguity in New Zealand's legislation.²⁸⁸⁶ The discrepancy occurs between the operational functionality of the objectionable publications offences within the Classification Act 1993²⁸⁸⁷ and the offence of sexual grooming in accordance with the Crimes Act 1961.²⁸⁸⁸ The establishment of this new category of offence is intended to deter adults from engaging in indecent communications with children.²⁸⁸⁹ It is also a response to the increasing use of social networking sites by adolescents²⁸⁹⁰ and the possibility of the medium being utilised by adults to groom children for sexual abuse.²⁸⁹¹ An indecent communication with a child can occur in a variety of forms, including text messaging and social networking communication.²⁸⁹² The Government has therefore determined that a specific offence is required to ensure that this potentially damaging behaviour towards children is criminalised.²⁸⁹³ This provision will be available to law enforcement agencies regardless of whether a

²⁸⁸⁴ Objectionable Publications and Indecency Legislation Bill, cl 13.

²⁸⁸⁵ Objectionable Publications and Indecency Legislation Bill, cl 13.

²⁸⁸⁶ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²⁸⁸⁷ Films, Videos, and Publications Classification Act 1993 pt 8.

²⁸⁸⁸ Crimes Act 1961 (NZ), s 131B.

²⁸⁸⁹ Dunedin Community Law Centre, above n 2107, at 4.

²⁸⁹⁰ At 4.

²⁸⁹¹ See Mitchell and others, above n 2109.

²⁸⁹² Objectionable Publications and Indecency Legislation Bill 2013 (124-1), Explanatory Note.

²⁸⁹³ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

record of communication with a child has been made, or whether measures to physically meet with the child have been undertaken by the offender.²⁸⁹⁴

In its submission on the Bill, the Legislation Advisory Committee has declared that Clause 13 is too broad²⁸⁹⁵ as it has the potential to capture any ‘indecent’ communication.²⁸⁹⁶ This could include images or text messages sent deliberately by a person aged over 16 to another person who is aged under 16.²⁸⁹⁷ For that reason, there is a significant risk that the new offence will capture the sharing of immature and ‘indecent’ jokes or images between adolescent friends, where the sender is over 16 years of age and the intended recipient is under 16.²⁸⁹⁸ The Legislation Advisory Committee believes that the number of potential breaches of the provisions will be substantial, given the high volumes of electronic communications between teenagers.²⁸⁹⁹ This criticism by the legislation Advisory Committee is not unwarranted²⁹⁰⁰ as studies indicate that sexting has now become a normalised part of adolescent sexual development.²⁹⁰¹

It must also be stated that the inclusion of the term ‘indecent’ within Clause 13 of the Bill does seem unexpected. As previously stated in this thesis, the term ‘indecent’ was deliberately excluded from the Classification Act 1993 and replaced with the term ‘objectionable’.²⁹⁰² This is because ‘objectionable’ is considered to more adequately cover the prohibition of material on grounds other than sexual content, such as crime, cruelty and violence.²⁹⁰³ The inclusion of the term ‘indecent’ has the potential to add significant and unwarranted complexity to the application of the Classification Act 1993.

²⁸⁹⁴ Objectionable Publications and Indecency Legislation Bill, Explanatory Note.

²⁸⁹⁵ Legislation Advisory Committee, above n 2113, at 3.

²⁸⁹⁶ At 3.

²⁸⁹⁷ At 3.

²⁸⁹⁸ At 3.

²⁸⁹⁹ At 3.

²⁹⁰⁰ See O’Callaghan, above n 2118; OneNews, above n 2118.

²⁹⁰¹ Temple and Choi, above n 2119, at 5.

²⁹⁰² Greig, above n 866, at [8].

²⁹⁰³ Internal Affairs and Local Government Select Committee, above n 942, at 7.

It must also be reiterated that the Classification Act 1993 was introduced to prevent this type of complexity resulting in inconsistencies in decisions concerning publications.²⁹⁰⁴ As Dr Andrew Jack, the Chief Censor of the Classification Office confirms, one of the key aspects of the Classification Act 1993 that guarantees the Act functions appropriately is that the Act only focuses on objectionable content that is ‘injurious to the public good’.²⁹⁰⁵ Therefore, the decision of the Government to widen the scope of the Classification Act 1993 to incorporate the term ‘indecent’ will have a significant and possibly detrimental effect on the application of the Act.

1.44.5 Recommendations

1.44.5.1 Offences Involving Knowledge

It is recommended that Clause 4 of the Bill should be incorporated into the Classification Act 1993. The proposed increase in sentencing by Clause 4 will enable the Courts to adequately respond to the increase in volumes of child pornography being disseminated across the Internet.²⁹⁰⁶ Furthermore, the advantage of this new provision is that it will act as a deterrent to offenders and also provide an improved institutional response to the Courts. This enhanced response will facilitate more effective sentencing of offenders.

1.44.5.2 The Presumption of Imprisonment for Repeat Child Pornography Offenders

Clause 7 should also be included within the Classification Act 1993. This amendment to the Act will assist in alleviating the frustration in the community concerning the inadequacy of sentencing for offenders who are prosecuted for possessing many thousands of images.²⁹⁰⁷ The effectiveness of Section 132B is that it will sent a clear and undeniable signal to the community that repeat child

²⁹⁰⁴ Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 6.

²⁹⁰⁵ At 6.

²⁹⁰⁶ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 2.

²⁹⁰⁷ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 5.

pornography offending is likely to result in a prison sentence. The importance of this component of Clause 7 is that it will significantly reduce the potential for harm to children as recidivist offenders will be incarcerated and unable to download child pornography.

1.44.5.3 The Recognition of Mitigating Circumstances

It is further recommended that the recognition of mitigating circumstances for offenders under the age of 20 should *not* be included within the Classification Act 1993. Clause 7 of the Bill should *not* provide the Courts with the ability to implement a more lenient sentence on an offender under the age of 20 who is being prosecuted for a *repeat* child pornography offence. It is contended that the proposed inclusion of this provision into Section 132B of the Classification Act 1993 does not sufficiently recognise the seriousness of recidivist offending.²⁹⁰⁸ Consequently, there is no reason to justify the inclusion of this provision into the Classification Act 1993.

1.44.6 Conclusion

The Objectionable Publications and Indecency Legislation Bill 2013 has been introduced by Parliament to amend New Zealand's censorship legislation. The Bill clearly recognises that the present sentencing for child pornography offences is inadequate to appropriately deal with this situation. As a result, the Bill is intended to improve New Zealand's institutional responses by providing more flexible sentencing to counter the dissemination of child pornography over the Internet.

1.45 Sentencing Guidelines for Child Pornography Offending

1.45.1 Introduction

This section discusses sentencing guidelines applied in the United Kingdom which give direction to the Courts on the appropriate sentencing for a range of child pornography offences. It examines these guidelines in an attempt to ascertain

²⁹⁰⁸ At 5.

whether they could be utilised to address concerns regarding the sentencing of offenders in New Zealand. The purpose of this investigation is to determine whether the introduction of similar guidelines would be beneficial to New Zealand's classification and legal systems.

1.45.2 Sentencing Guidelines in the United Kingdom

1.45.2.1 The Protection of Children Act 1978

The United Kingdom's primary legislation concerning child pornography offences is the Protection of Children Act 1978.²⁹⁰⁹ According to Section 1 of the Protection of Children Act 1978, it is an offence to produce an indecent photograph²⁹¹⁰ of a child,²⁹¹¹ to distribute that indecent photograph²⁹¹² and to have in your possession such indecent photographs.²⁹¹³ This Act and a number of amendments such as Section 160(1) of the Criminal Justice Act 1988²⁹¹⁴ which clarified possession of child pornography as an offence,²⁹¹⁵ contain the relevant offences for child pornography offending from the Internet.

1.45.2.2 Sentencing Guidelines in England and Wales

Sentencing guidelines in England and Wales are based on the COPINE (Combating Paedophile Information Networks in Europe) scale.²⁹¹⁶ The COPINE research project was based at the University of Cork in the Republic of Ireland.²⁹¹⁷ This project has made a significant contribution to the knowledge available to law enforcement agencies about child pornography offending²⁹¹⁸ through the establishment of an archive of images to assist with the identification of child

²⁹⁰⁹ Akdeniz, above n 148, at 18.

²⁹¹⁰ Child pornography is referred to in the United Kingdom's legislation as an '*indecent photograph of a child*' as opposed to an 'objectionable' publication in New Zealand.

²⁹¹¹ Protection of Children Act 1978 (gb), s 1(1)(a).

²⁹¹² Protection of Children Act 1978, s 1(1)(b).

²⁹¹³ Protection of Children Act 1978, s 1(1)(c).

²⁹¹⁴ Criminal Justice Act 1988 (gb).

²⁹¹⁵ Criminal Justice Act 1988, s 160(1).

²⁹¹⁶ Akdeniz, above n 148, at 69.

²⁹¹⁷ Kerry Sheldon and Dennis Howitt *Sex Offenders and the Internet* (John Wiley and Sons, Chichester, 2007) at 33.

²⁹¹⁸ At 33.

pornography victims.²⁹¹⁹ The archive from the COPINE project has now been integrated into an Interpol Database known as the International Child Sexual Exploitation Image Database.²⁹²⁰ Furthermore, a modified version of the COPINE scale²⁹²¹ was adopted in 2002²⁹²² by the Sentencing Advisory Panel in the United Kingdom.²⁹²³ The COPINE scale was revised to assimilate the punitive responses required by the legal system.²⁹²⁴ This modified version of the COPINE scale is intended to provide the Courts with guidance on the appropriate sentencing for child pornography offenders.²⁹²⁵

In relation to offences involving child pornography, the Court of Appeal in *R v. Wild*²⁹²⁶ sought the views of the English and Welsh Sentencing Advisory Panel²⁹²⁷ ('the Panel')²⁹²⁸ in relation to the threshold of a custodial sentence for child pornography offenders.²⁹²⁹ The Court of Appeal stated that:²⁹³⁰

In the Court's judgment, a particular difficulty which arose in relation to sentencing for offences of this kind was when and in what circumstances the custody threshold should be passed. In that connection the Court would derive great assistance if the Sentencing Advisory Panel would consider the matter and give the Court the benefit of its advice.

²⁹¹⁹ Anthony R Beech and others "The Internet and Child Sexual Offending: A Criminological Review" (2008) 13 Aggression and Violent Behavior 216 at 219.

²⁹²⁰ Interpol "Victim Identification" (5 November 2014) Interpol <<http://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification>>.

²⁹²¹ To view the COPINE Scale, see Hannah Lena Merdian and others "Assessing the Internal Structure of the COPINE Scale" (2011) 0 Psychology, Crime & Law 1 at 3–4.

²⁹²² The 2002 Guidelines have been updated on several occasions and the latest version came into operation as of 1 April 2014. For more information on the Guidelines, see Sentencing Council *Sexual Offences - Definitive Guidelines* (2014).

²⁹²³ Akdeniz, above n 148, at 69.

²⁹²⁴ Mr White, Registered Psychologist, above n 472, at 10.

²⁹²⁵ See *R v Oliver & Ors*, above n 2838.

²⁹²⁶ *R v Wild* (2002) 1 Cr App R (S) 37 (gb).

²⁹²⁷ The Sentencing Advisory Panel has also been known as the Sentencing Guidelines Council. However, in 2010 the Sentencing Council for England and Wales was established to replace both of these organisations. For ease of reading, the aforementioned organisations will be referred to as the Sentencing Advisory Panel or the Panel.

²⁹²⁸ Bill Heberton, Daniel Shaw and Ken Pease "Offences Involving Indecent Photographs and Pseudo-Photographs of Children: An Analysis of Sentencing Guidelines" (2009) 15 Psychology, Crime & Law 425 at 426.

²⁹²⁹ *R v Wild*, above n 2900, at [4].

²⁹³⁰ At [4].

Following this request for assistance from the Court of Appeal, the Panel published its recommendations²⁹³¹ in 2002.²⁹³² These recommendations comprised sentencing guidelines for child pornographers,²⁹³³ formulated as part of a consultation paper.²⁹³⁴ The Panel concluded that sentencing for child pornography offences must reflect the harm suffered by the children portrayed in the images, including their exploitation and abuse.²⁹³⁵ The Panel endorsed a structured approach to assessing the seriousness of the offence and utilising the seriousness for determining the appropriate penalty.²⁹³⁶ The Court could then focus on the additional aggravating factors found to be relevant.²⁹³⁷ The Panel proposed that the two primary factors for determining the seriousness of an offence should be:²⁹³⁸

1. The nature of the material; and
2. The extent of the offender's involvement with the material.

The Panel also accepted that in cases of distributing child pornography a prison sentence would normally be the appropriate option.²⁹³⁹ However, the Panel believed that community penalties requiring mandatory attendance at a sex offender's treatment programme could be an effective option to reduce recidivism.²⁹⁴⁰ For that reason, the Panel advised that the offender's suitability for treatment should be assessed when the offending is of a less serious nature.²⁹⁴¹ These offences would then be subject to some form of diversion.

²⁹³¹ Sentencing Advisory Panel *Offences Involving Child Pornography* (2002).

²⁹³² Akdeniz, above n 148, at 68.

²⁹³³ At 68.

²⁹³⁴ Gillespie, above n 436, at 243.

²⁹³⁵ Akdeniz, above n 148, at 68.

²⁹³⁶ At 68.

²⁹³⁷ Gillespie, above n 436, at 244.

²⁹³⁸ Sentencing Advisory Panel, above n 2905, at 5.

²⁹³⁹ Akdeniz, above n 148, at 69.

²⁹⁴⁰ At 69.

²⁹⁴¹ At 69.

1.45.2.3 The Application of the Sentencing Guidelines in the English and Welsh Courts

In accordance with Section 172 of the Criminal Justice Act 2003,²⁹⁴² every sentencing Court in England and Wales must have regard to the Sentencing Guidelines for any child pornography offence.²⁹⁴³ The seminal case in this regard is the Court of Appeal case of *R v Oliver & Ors*.²⁹⁴⁴ In this instance, the Court considered the Panel's advice²⁹⁴⁵ and agreed with the Panel that the distinction between a custodial and non-custodial sentence is particularly ambiguous.²⁹⁴⁶ This complication was exacerbated by the increase in penalties by Parliament and the limited availability of sex offender treatment programmes for offenders.²⁹⁴⁷ Nevertheless, the Court of Appeal stressed that the Court's proposals were only intended to be guidelines to assist with sentencing and not intended to bind other Courts.²⁹⁴⁸

The Court of Appeal also agreed with the Panel that the two crucial factors that determine the seriousness of the offence are the nature of the material and the extent of the offender's involvement with it.²⁹⁴⁹ However, the Court disagreed with the Panel's decision that COPINE typologies 2 and 3 are consistent with Level 1.²⁹⁵⁰ According to the Court, neither nakedness in a legitimate setting nor the clandestine procuring of an image, gives rise, to a pornographic image.²⁹⁵¹ As to the nature of the material, the Court of Appeal held that pornographic images were to be categorised by their seriousness based on the following levels:²⁹⁵²

- (1) images depicting erotic posing with no sexual activity;

²⁹⁴² Criminal Justice Act 2003 (gb).

²⁹⁴³ Criminal Justice Act 2003, s 172.

²⁹⁴⁴ *R v Oliver & Ors*, above n 2838.

²⁹⁴⁵ At 465–470.

²⁹⁴⁶ At 467.

²⁹⁴⁷ At 467.

²⁹⁴⁸ At 467.

²⁹⁴⁹ At 466.

²⁹⁵⁰ Akdeniz, above n 148, at 71.

²⁹⁵¹ *R v Oliver & Ors*, above n 2838, at 467.

²⁹⁵² At 466.

(2) sexual activity between children, or solo masturbation by a child; (3) non-penetrative sexual activity between adults and children;

(4) penetrative sexual activity between children and adults, and

(5) sadism or bestiality.

As to the offender's involvement, the Court of Appeal found that the seriousness of an individual offence increased with the offender's proximity to, and responsibility for, the original abuse of the child in the images.²⁹⁵³ This position on the seriousness of an offence indicates that where an offender has requested a child to be subjected to some form of specific sexual abuse on a live webcam feed, their offending is far more serious than that of an offender who downloads this material at a later date. Furthermore, the Court established that improved access to the Internet has greatly aggravated the issue of child pornography offending.²⁹⁵⁴ The Internet has made child pornography more easily accessible and amplified the likelihood that others will accidentally come across the material and subsequently become corrupted by it.²⁹⁵⁵ The Court found that this additional threat adds to the culpability of offenders who disseminate material of this kind, particularly where they post such material on publicly accessible areas of the Internet.²⁹⁵⁶

The Court of Appeal held that a custodial sentence was appropriate where an offender was in possession of a large amount of Level 2 material or a small amount of Level 3 material.²⁹⁵⁷ The Court also recommended an increase in the degree of sentencing for the possession of higher-level material.²⁹⁵⁸ Sentences approaching the ten-year maximum would be appropriate where the defendant has a previous conviction for dealing in child pornography.²⁹⁵⁹ The maximum sentence would also be applicable for sexually abusing children, or where the accused is recognised to

²⁹⁵³ At 466.

²⁹⁵⁴ At 466.

²⁹⁵⁵ At 466.

²⁹⁵⁶ At 466.

²⁹⁵⁷ At 468.

²⁹⁵⁸ At 468–469.

²⁹⁵⁹ At 469.

have used violence in the commission of the offence.²⁹⁶⁰ The Court of Appeal also found that the presence of specific factors is capable of aggravating the seriousness of an offence.²⁹⁶¹ The Court identified these factors as follows:²⁹⁶²

- (i) If the images have been shown or distributed to a child.
- (ii) If there are a large number of images.
- (iii) The way in which a collection of images is organised.
- (iv) Images posted on a public area of the Internet, or distributed in a way making it more likely they will be found accidentally by computer users not looking for pornographic material.
- (v) The offence will be aggravated if the offender was responsible for the original production of the images.
- (vi) The age of the children involved may be an aggravating feature.

The Court of Appeal argued that these offences should very rarely result in the prosecution of offenders under the age of 18.²⁹⁶³ For under 18-year-olds the appropriate sentence is likely to be a supervision order within a designated treatment programme.²⁹⁶⁴ Finally, in terms of mitigation, the Court agreed with the Panel that some, but not much, weight should be attached to the good character of an offender.²⁹⁶⁵

1.45.2.4 Criticism of the Sentencing Guidelines

The sentencing guidelines have also been the subject of criticism. The difficulty with directly transplanting the COPINE scale from the therapeutic psychological perspective to the punitive focus of the legal system is that some crucial issues have

²⁹⁶⁰ At 469.

²⁹⁶¹ At 469.

²⁹⁶² At 469.

²⁹⁶³ At 470.

²⁹⁶⁴ At 470.

²⁹⁶⁵ At 470.

been disregarded.²⁹⁶⁶ The original COPINE Scale was only designed to categorise child pornography for research.²⁹⁶⁷ It was never intended to offer any indication of the severity of contrasting categories of pornography.²⁹⁶⁸ Moreover, the five-level scale adopted by the Panel is based on what an offender has in their possession.²⁹⁶⁹ ‘Mr White’,²⁹⁷⁰ a Registered Psychologist with eight years’ experience dealing with child pornographers, states:²⁹⁷¹

If they happen to have a few images at the steeper end that will whack up their rating when that may not be what they are interested in. I have also had clients who told me that their computer had been destroyed but there was a lot worse stuff that they never found. It is a very accurate indicator of public disgust but it is not a good indicator of the severity of the problem, or intention, or motivation.

Therefore, the present scale utilised by the Courts in England, Wales and New Zealand is not a truly accurate indicator of the risk to the community of an offender.²⁹⁷² The other issue of concern for Mr White is that the sentencing guidelines have been criticised in England because people assume that they are indicative of the risk to the community of an offender.²⁹⁷³ Mr White is certain that the risk to the community is actually inverse.²⁹⁷⁴ Where the COPINE scale is employed as an indicator of the sexual interest of an offender, the actual chance of an offence being committed is at the lower level and less likely at the higher levels.²⁹⁷⁵ Mr White also states:²⁹⁷⁶

Let’s say that a person has a sexual interest in taking pictures up children’s skirts with a camera on their phone, this is a lot easier to achieve than it is to get involved

²⁹⁶⁶ Gillespie, above n 436, at 246.

²⁹⁶⁷ Mr White, Registered Psychologist, above n 472, at 10.

²⁹⁶⁸ At 10.

²⁹⁶⁹ At 10.

²⁹⁷⁰ Mr White is a nom de plume.

²⁹⁷¹ Mr White, Registered Psychologist, above n 472, at 10.

²⁹⁷² At 10.

²⁹⁷³ At 11.

²⁹⁷⁴ At 11.

²⁹⁷⁵ At 11.

²⁹⁷⁶ At 11.

in bestiality or torture at the steep end. So who do you think that we should be worrying about more?

However, Mr White does uneasily concede that the sentencing guidelines which have been adopted in New Zealand are a useful tool because, as lawyers have informed Mr White, until an alternative is produced there is no substitute available to the Courts in New Zealand.²⁹⁷⁷ Therefore, the obvious alternative to this situation is the implementation of New Zealand's own sentencing guidelines.

1.45.3 The Sentencing of Child Pornography Offenders in New Zealand

1.45.3.1 *R v Oliver & Ors* and the Sentencing of an Offender in New Zealand

The New Zealand Court of Appeal case of *R v Zhu*²⁹⁷⁸ was an appeal against sentencing for supplying and possessing child pornography.²⁹⁷⁹ The appellant in this case had been supplying DVDs of children engaging in sexual acts which resulted in his arrest by Police.²⁹⁸⁰ The appeal was based on the contention that a lesser sentence was justified given the circumstances of the appellant's offending²⁹⁸¹ which was rejected by the Court of Appeal.²⁹⁸² However, the Judge of first instance referred to the 1992 report of the Sentencing Advisory Board in England and Wales to assist in sentencing the appellant.²⁹⁸³ The Court of Appeal agreed with the Judge's sentencing and stated in relation to the report.²⁹⁸⁴

Without necessarily adopting in full these categorisations or sentencing levels as appropriate for New Zealand, we think the analysis of seriousness and general sentencing levels in the report of the Sentencing Advisory Panel are a useful guide for New Zealand.

²⁹⁷⁷ At 11.

²⁹⁷⁸ *R v Zhu* [2007] NZCA 470 (NZ Court of Appeal).

²⁹⁷⁹ At [1].

²⁹⁸⁰ At [2].

²⁹⁸¹ At [7, 20].

²⁹⁸² At [20, 25].

²⁹⁸³ At [12].

²⁹⁸⁴ At [15].

This statement by the Court of Appeal is important as it has created a precedent which enables other Courts to utilise the report of the Sentencing Advisory Board as an aid to sentence child pornography offenders in New Zealand.

The High Court case of the *Department of Internal Affairs v Wigzell*²⁹⁸⁵ involved an appeal against the sentencing of an offender. The appeal was brought by the Crown, with leave of the Solicitor General, on the grounds that the sentence imposed in the District Court was manifestly inadequate.²⁹⁸⁶ The respondent in this case pleaded guilty to charges of possessing objectionable publications contrary to Section 131A of the Films, Videos, and Publications Act 1993.²⁹⁸⁷ The material in question included over 200,000 images and films portraying bestiality and the sexual abuse of children.²⁹⁸⁸ The Judge in the District Court described this case as being close to the worst, if not the worst, case of possession to come before the New Zealand Courts.²⁹⁸⁹ There was a clear commercial element to the offending by the respondent due to the fact that he was an active member of over 25 news groups specifically designed for the sharing of child sexual abuse images.²⁹⁹⁰ The respondent had also been convicted of a similar offence but had not been imprisoned because the respondent had voluntarily undertaken a treatment programme designed for individuals who have committed sexual offences.²⁹⁹¹ The Crown argued that, because of the scale of the offending and the respondent's previous conviction for similar offending, an imprisonment period of four years was appropriate.²⁹⁹² The Crown and the District Court Judge examined material from England and Wales for analogous sentencing levels.²⁹⁹³

A review of this material revealed that because of the considerable volume of material the respondent possessed, and its nature, were the respondent to be

²⁹⁸⁵ *Department of Internal Affairs v Wigzell*, above n 190.

²⁹⁸⁶ At [36].

²⁹⁸⁷ At [1].

²⁹⁸⁸ At [1].

²⁹⁸⁹ At [10].

²⁹⁹⁰ At [13].

²⁹⁹¹ At [6].

²⁹⁹² At [14].

²⁹⁹³ At [14].

sentenced in England and Wales a starting point of four years would be warranted.²⁹⁹⁴ The Judge identified that the maximum penalty for the offence in New Zealand was the same as the maximum penalty in the England and Wales and nothing had been placed before the Judge to suggest a different approach was warranted in New Zealand.²⁹⁹⁵ Although there was little doubt that the Courts in New Zealand would be inclined to adopt the sentencing levels from England and Wales, the Judge was reluctant to do the same as the Judge considered that the District Court was not the place to establish a precedent for offending of this nature.²⁹⁹⁶ Accordingly, the Judge adopted a starting point of three years, which the Court observed was significantly sterner than previous sentences imposed in New Zealand.²⁹⁹⁷

The Crown's appeal was brought before Justice Clifford in the High Court. The Crown first set out the legislative history of Section 131A of the Films, Videos, and Publications Classification Act 1993 and emphasised the need to provide strenuous sanctions against the production, trading and possession of child pornography.²⁹⁹⁸ The appellant then presented the current position in England and Wales and referred in some detail to the advice of their Court of Appeal in *R v Oliver & Ors*.²⁹⁹⁹ As previously stated, the United Kingdom's Court of Appeal identified two primary factors that determined the seriousness of the offence: the nature of the indecent material and the extent of the offender's involvement with the material.³⁰⁰⁰

The Crown then referred to the different levels of classification that related to the seriousness of the offending that had been adopted by the Court of Appeal. The approach recommended by the Panel and adopted by the Court of Appeal to sentencing for offences involving objectionable publications was consistent with

²⁹⁹⁴ At [16].

²⁹⁹⁵ At [17].

²⁹⁹⁶ At [18].

²⁹⁹⁷ At [18].

²⁹⁹⁸ At [20].

²⁹⁹⁹ At [22].

³⁰⁰⁰ At [23].

Sections 131A and 124 of New Zealand's Classification Act 1993.³⁰⁰¹ The English Court of Appeal also noted that the presence of large numbers of images, the way in which images were stored and organised, and the ages of the children depicted were all relevant aggravating features.³⁰⁰² Finally, it was determined that where an offender had a previous conviction involving child pornography that conviction should place the offender at least one level higher than would otherwise be appropriate.³⁰⁰³ With guidance from the English and Welsh material, Justice Clifford was of the view that having taken into consideration the significant amount of material and the aggravating aspect of the way in which the respondent collected and organised this material, a slightly longer sentence was permissible.³⁰⁰⁴ Although Justice Clifford may have been inclined to enforce a slightly longer sentence, it was held that the sentence imposed by the District Court Judge was not manifestly inadequate and the appeal was accordingly dismissed.³⁰⁰⁵

1.45.3.2 New Zealand Law Enforcement Agencies' Perceptions of Sentencing Guidelines

The introduction of sentencing guidelines for child pornography offending has not been welcomed by law enforcement personnel in New Zealand because of the potential for this type of provision to be manipulated to downplay the seriousness of an offender's conduct.³⁰⁰⁶ Steve O'Brien, the National Manager of the Censorship Compliance Unit, prefers a case to be dealt with on its own merits as opposed using criteria contained within a set of guidelines.³⁰⁰⁷

Detective Senior Sergeant John Michael, Officer in charge of the Online Child Exploitation Unit of the New Zealand Police, agrees with O'Brien and confirms

³⁰⁰¹ At [25].

³⁰⁰² At [26].

³⁰⁰³ At [26].

³⁰⁰⁴ At [55].

³⁰⁰⁵ At [58].

³⁰⁰⁶ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 11.

³⁰⁰⁷ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.

that there is substantial resistance from law enforcement agencies to the implementation of guidelines for child pornography offending.³⁰⁰⁸ In supporting this view, Michael referred to the New Zealand Court of Appeal's decision in *R v Zhu*, which set out a guideline for sentencing based on the aforementioned levels of one to five. Furthermore, when the Police conduct a child pornography investigation they must utilise the five-tier system because of the precedent set in *Zhu*.³⁰⁰⁹ Nevertheless, Michael insists that law enforcement agencies require submissions that are broader than those five levels, based the manner in which the offender has interacted with the images.³⁰¹⁰ Philip Hamlin, a Barrister and former Crown Prosecutor with 23 years' experience of prosecuting sexual offending against children agrees.³⁰¹¹ Hamlin confirms that the most important aspects in a prosecution are the category and the amount of material that the accused is found to have in their possession.³⁰¹² Another important aspect in a prosecution is demonstrating to the Court the level of the offender's involvement with the material.³⁰¹³ Michael also further states:³⁰¹⁴

There may only be a small amount of images that the offender is consistently using. So, it's important that we don't just look at the number or type of images because this is only one factor. We need to look at all of the factors that might be relevant in terms of sentencing.

Tim Houston, an Investigator with the Child Exploitation Operations Team at the New Zealand Customs Service, also agrees with Michael and confirms that the Courts in New Zealand have referred to the English and Welsh sentencing guidelines.³⁰¹⁵ Houston is not an enthusiast of these guidelines and believes.³⁰¹⁶

³⁰⁰⁸ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 10.

³⁰⁰⁹ At 10.

³⁰¹⁰ At 5.

³⁰¹¹ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 7.

³⁰¹² At 7.

³⁰¹³ At 7.

³⁰¹⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 10.

³⁰¹⁵ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 11.

³⁰¹⁶ At 11.

...an objectionable image is just that and I don't think an offender should be sentenced differently because they had a thousand images of level one and three of level two.

Houston contends that a publication is simply either objectionable or not and there is no requirement to ascertain anything beyond that determination.³⁰¹⁷ Moreover, Houston reveals that there have been occasions where an offender's Defence Counsel has attempted to minimise their client's offending by manipulating the guidelines.³⁰¹⁸ Instead of the Court focusing on the fact that these images are of child sexual abuse, the Defence Counsel attempts to present the images in a positive manner because they are not as horrific as those in levels four or five.³⁰¹⁹ Houston states that this is irrelevant as they are clearly images of the sexual exploitation of a child.³⁰²⁰

1.45.3.3 Responding to Criticisms from Law Enforcement Agencies of the Sentencing Guidelines

These criticisms of the inclusion of the sentencing guidelines into New Zealand's common law jurisprudence by the abovementioned law enforcement personnel can be easily addressed. It is argued that O'Brien's belief that each case should be dealt with on its own merits is correct.³⁰²¹ This proposition is based on the fact that the more control an offender has over an objectionable publication, the more value there is in prosecuting that offender.³⁰²² The sentencing guidelines in fact support this stance as they recognise various aspects of child pornography offending.³⁰²³ Furthermore, the guidelines also recognise commercial gain as an offence at the higher level of seriousness³⁰²⁴ because the trading of images fuels demand for such

³⁰¹⁷ At 11.

³⁰¹⁸ At 11.

³⁰¹⁹ At 11.

³⁰²⁰ At 11.

³⁰²¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.

³⁰²² At 9.

³⁰²³ *R v Oliver & Ors*, above n 2838, at 466–470.

³⁰²⁴ At 467.

material.³⁰²⁵ Merely locating an image on the Internet is considered to be less serious than downloading it.³⁰²⁶ Therefore, these cited aspects of the guidelines are in no way designed to interfere with the merits of a case before the Courts. This claim is supported by the comments of Lord Justice Rose of the English Court of Appeal in *R v Oliver & Ors* where Lord Justice Rose states:³⁰²⁷

We stress that the proposals we make are guidelines intended to help sentencers. They are not to be construed as providing sentencers with a straightjacket from which they cannot escape.

The underlying purpose of the guidelines is, as previously stated, simply to provide guidance to the Court on where a custodial sentence is appropriate.³⁰²⁸ They provide the Courts with a degree of flexibility so that sentencing adequately reflects the merits of a case. The guidelines also provide the Court with direction as to the appropriate sentence to impose on an offender that recognises and distinguishes the elements of an offender's interaction with the material.³⁰²⁹

John Michael's assertion that law enforcement agencies require submissions focused on how the offender has interacted with the images is also a valid point.³⁰³⁰ This requirement however, has been recognised by the English and Welsh Sentencing Advisory Panel and the English Court of Appeal in *R v Oliver & Ors*, as previously explained.³⁰³¹ Michael's other assertion that law enforcement agencies require recognition of submissions that encompass more than those five levels may also be a valid criticism.³⁰³² O'Brien explained during the interview phase of this thesis that psychological supervision and mental health interventions

³⁰²⁵ At 467.

³⁰²⁶ At 467.

³⁰²⁷ At 467.

³⁰²⁸ At 467.

³⁰²⁹ At 468–469.

³⁰³⁰ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

³⁰³¹ Akdeniz, above n 148, at 68; *R v Oliver & Ors*, above n 2838, at 466.

³⁰³² Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

would be a more constructive alternative to prison for some younger offenders.³⁰³³ Consequently, in order to address this issue it is argued that the present sentencing guidelines in *R v Oliver & Ors* should be amended by the addition of an extra level.

This additional level would recognise that in some cases younger offenders should be given a *one off chance* of receiving psychological treatment in a relevant sexual offender programme.³⁰³⁴ This proposition is supported by the Court of Appeal in *R v Oliver & Ors*. As previously explained, the Court held that when a person under the age of 18 has been sentenced for child pornography offending, the appropriate sentence is likely to be a supervision order with a relevant treatment programme.³⁰³⁵ Hamlin also believes that this is a very useful notion.³⁰³⁶ Moreover, in Hamlin's view any action that deters and reforms an offender should be utilised because punishment is only part of the remedy and society must employ every relevant alternative first.³⁰³⁷ Brandon Wilson, a Registered Psychologist with the Stop Adolescent Programme, agrees with Hamlin.³⁰³⁸ Wilson believes that it is important in the case of young offenders to focus on programmes that deter and reform adolescent offenders because they require specialist psychological supervision.³⁰³⁹ This stance is based on the understanding that with adolescents, behaviour is less entrenched than with adults.³⁰⁴⁰ Accordingly, Wilson contends that generally with adolescents, there are fewer victims, and less practised behaviour, which increases optimism about their well-being and that they will eventually be successfully rehabilitated back into society.³⁰⁴¹

³⁰³³ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.

³⁰³⁴ For an illustration of the types of sexual offender programmes available to adolescents in New Zealand, see Stop Trust "Who is the STOP Adolescent Programme for?" (3 November 2014) Stop Trust <http://www.stop.org.nz/main/adolescent_who_for/>; Safe "Youth and Adolescents" (3 November 2014) Safe <<http://www.safenetwork.org.nz/home/youth-and-adolescents>>.

³⁰³⁵ *R v Oliver & Ors*, above n 2838, at 470.

³⁰³⁶ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 8.

³⁰³⁷ At 8.

³⁰³⁸ Interview with Brandon Wilson, Regional Team leader, STOP Adolescent Programme (12 July 2014) at 9.

³⁰³⁹ At 9.

³⁰⁴⁰ At 9.

³⁰⁴¹ At 9.

Tim Houston's statement that Defence Counsels have attempted to minimise their clients' offending by manipulating the sentencing guidelines is an unexpected disclosure.³⁰⁴² Nevertheless, this issue can be partially addressed by permitting the Classification Office to generate a sentencing report on the nature of the offending compared to other instances of child pornography offending. This sentencing report should contain recommendations which are *not* binding upon the Court and are, consequently, designed to assist the Court with the application of the appropriate sentencing guidelines. Although this sentencing report would still be exposed to criticism by Defence Counsels throughout the trial process, the ability to challenge the contents of this report is a necessary component of New Zealand's judicial system as an important component of a valid democracy.

It is contended that the Classification Office has the necessary jurisdiction, expertise and experience to assist the Courts to determine the relevant level of offending. The Classification Office is, as explained, the recognised expert authority on publications in New Zealand³⁰⁴³ which indicates that the Office is well suited to construct recommendations to assist the Courts to categorise the appropriate level of offending.³⁰⁴⁴ These recommendations by the Classification Office would be based on both the quality and quantity of objectionable material found in the suspect's possession. Hamlin supports this concept and states:³⁰⁴⁵

I think that they could have some input into the categorising of the type of objectionable image. Is it a five or a ten out of ten, based on what they see? That could be helpful, in other words is it bad or really bad?

Hamlin also believes that the Classification Office is in the best position to classify the level of offending of a publication because it is judging this content to be objectionable and could make an appropriate assessment of its content.³⁰⁴⁶ As a

³⁰⁴² Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 95.

³⁰⁴³ Films, Videos, and Publications Classification Act 1993 s 4(1).

³⁰⁴⁴ Films, Videos, and Publications Classification Act 1993, s 4(1).

³⁰⁴⁵ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 7.

³⁰⁴⁶ At 7.

result, the allocation of the levels within the sentencing guidelines would remain within the Court's jurisdiction and, consequently, available for debate in Court proceedings. The significance of permitting the contents of the sentencing report to be challenged in a Court of law is that the ability to contest these recommendations assist the proposal to accommodate the rights of an offender in accordance within Sections 22 – 27 of the New Zealand Bill of Rights Act 1990.

1.45.3.4 The Introduction of New Zealand's own Sentencing Guidelines

The introduction of New Zealand's own sentencing guidelines does appear to have some benefits as such guidelines would address the aforementioned concerns of New Zealand's law enforcement personnel. The guidelines would have the added advantage of drawing on established case law to establish a robust sentencing system.³⁰⁴⁷ Moreover, comments from the Judiciary in the Republic of Ireland also provide support for the introduction of sentencing guidelines in New Zealand.³⁰⁴⁸ The vast majority of Judges in Ireland were in favour of introducing a set of guidelines similar to those in England and Wales.³⁰⁴⁹ Judicial experience with such cases was very limited, particularly on the issue of the threshold for a custodial sentence for downloading child pornography from the Internet.³⁰⁵⁰ One Judge in the Republic of Ireland stated:³⁰⁵¹

I am in favour of it. They're guidelines only, not prescriptive. They're very useful. They help to clarify one's thinking regarding the tipping point between custody and non-custody.

There is also another issue that these guidelines may well have the potential to address. Hamlin disclosed that under the Films, Videos, and Publications Classification Act 1993 there is obvious inconsistency in the application of

³⁰⁴⁷ *R v Toomer* (2001) 2 CrAppR(S) 8 (gb); *R v Oliver & Ors*, above n 2838; *Department of Internal Affairs v Wigzell*, above n 190; *R v Zhu*, above n 2952.

³⁰⁴⁸ O'Donnell and Milner, above n 124, at 147.

³⁰⁴⁹ At 147.

³⁰⁵⁰ At 147.

³⁰⁵¹ At 147.

sentencing by the Courts from region to region.³⁰⁵² An offender is noticeably more likely to go to prison for their first child pornography offence in Christchurch than in Auckland.³⁰⁵³ The Courts in Auckland are considerably more liberal than elsewhere in New Zealand.³⁰⁵⁴ This alarming situation provides fuel for the argument that sentencing guidelines would not only be beneficial to the sentencing of offenders but would also aid in providing consistency in the application of the law. Such sentencing guidelines should be placed within the Classification Act 1993 so that they can then work in conjunction with Section 9 and 9A of the Sentencing Act 2002.³⁰⁵⁵

1.45.4 Recommendations

1.45.4.1 New Zealand should implement Sentencing Guidelines

It is recommended that New Zealand adopt sentencing guidelines for child pornography offending similar to those referred to in *R v Oliver & Ors*. These sentencing guidelines would clarify not only to the Judiciary but also to the public where the appropriate threshold for a custodial sentence has been set down by the law. Such guidelines would also ensure that the Courts consider each case on its own merits³⁰⁵⁶ and accord due recognition to how the offender has interacted with the objectionable publication.³⁰⁵⁷ Moreover, these sentencing guidelines would also provide certainty in the law. They would also assist in reducing the present discrepancies in the application of sentencing by the Courts from region to region.³⁰⁵⁸

³⁰⁵² Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 3.

³⁰⁵³ At 3.

³⁰⁵⁴ At 3.

³⁰⁵⁵ Sentencing Act 2002.

³⁰⁵⁶ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.

³⁰⁵⁷ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

³⁰⁵⁸ Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 3.

1.45.4.2 The Assistance of a Sentencing Report

Implementing sentencing guidelines within the Classification Act 1993 and permitting the Classification Office to construct a sentencing report to assist the Courts to allocate the appropriate level of sentencing would also have potential benefits. Although the recommendations within the sentencing report would not prevent lawyers from attempting to minimise the harm that their clients have caused children, they would, nevertheless, assist the Courts with sentencing for this form of offending.³⁰⁵⁹

1.45.4.3 The Introduction of a New Level of Offending within the Guidelines

The employment of *New Zealand's own* sentencing guidelines would enable a new proactive and responsive level of sentencing to be incorporated within the guidelines. This would be able to address the concerns of law enforcement agencies and provide psychological supervision and mental health interventions as a constructive alternative to prison for adolescent first-time offenders.³⁰⁶⁰ The significance of these recommendations is that they will confirm to the community that the Classification Act 1993 has the capability to adequately respond to the sentencing of offenders in the online age.

1.45.5 Conclusion

The English and Welsh sentencing guidelines for child pornography offending provide New Zealand with an example of how the operation of guidelines can be utilised to afford greater protection to children and also adequately sentence offenders. The introduction of New Zealand's own sentencing guidelines would be beneficial both to the classification and legal systems as they would increase the effectiveness of these systems and assist law enforcement agencies to respond more adequately to offending. Such sentencing guidelines would also send a clear

³⁰⁵⁹ Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 95.

³⁰⁶⁰ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.

message to the community that this type of offending will not be tolerated and will be punished accordingly.

1.46 The Following up of Psychological Orders by the Courts

1.46.1 Introduction

This section examines an offender's criticisms of both the punitive and rehabilitative aspects of offending. It will also discuss whether it is necessary for the Courts to ensure that sentencing orders for sex offender treatment programmes have been adequately implemented by the Department of Corrections.

1.46.2 The Sentencing Act 2002

As previously stated in this thesis, the Sentencing Act 2002³⁰⁶¹ defines the principles of sentencing offenders in New Zealand.³⁰⁶² Section 7 contains the philosophy and fundamental principles of sentencing as required by the Act.³⁰⁶³ This Section also contains other reasoning such as denunciation,³⁰⁶⁴ deterrence³⁰⁶⁵ and rehabilitation.³⁰⁶⁶ However, the Court may impose special conditions, such as ordering the offender to undertake a specified programme if the Court believes there is a significant risk of further offending by the offender.³⁰⁶⁷ These specified programmes include attendance at a psychological or therapeutic programme as required by Section 54H(b) of the Sentencing Act 2002³⁰⁶⁸ and as amended by Section 24 of the Sentencing Amendment Act 2007.³⁰⁶⁹

³⁰⁶¹ Sentencing Act 2002.

³⁰⁶² Courts of New Zealand, above n 2798.

³⁰⁶³ Sentencing Act 2002, s 7.

³⁰⁶⁴ Sentencing Act 2002, s 7(1)(e).

³⁰⁶⁵ Sentencing Act 2002, s 7(1)(f).

³⁰⁶⁶ Sentencing Act 2002, s 7(1)(h).

³⁰⁶⁷ Sentencing Act 2002, s 54G(a).

³⁰⁶⁸ Sentencing Act 2002, s 54H(b).

³⁰⁶⁹ Sentencing Amendment Act 2007.

1.46.3 The Reality of Psychological Programmes for Convicted Child Sexual Offenders

1.46.3.1 Targeted Treatment Programmes in New Zealand Prisons

There are a number of targeted treatment programmes for sexual offenders who have been given a custodial sentence in New Zealand. These programmes include the *Kia Marama*³⁰⁷⁰ and the *Te Piriti*³⁰⁷¹ Special Treatment Programmes.³⁰⁷² *Kia Marama*, a 60-bed unit at Rolleston prison near Christchurch, takes offenders who have been convicted and imprisoned for child sexual offences.³⁰⁷³ Attendance at *Kia Marama* is voluntary and some offenders choose not to participate.³⁰⁷⁴ *Kia Marama* was established in 1989 as the first specialist prison treatment programme for child sexual offenders in New Zealand.³⁰⁷⁵ The programme is based on the Atascadero Sex Offender Treatment and Evaluation Programme in the United States.³⁰⁷⁶ *Kia Marama* is established as a therapeutic community that provides group-based interventions to convicted child sexual offenders.³⁰⁷⁷

The *Te Piriti* Programme was established at Auckland prison in 1994.³⁰⁷⁸ Although this programme is closely modelled on the *Kia Marama* Programme,³⁰⁷⁹ it is specifically designed for Maori offenders convicted of sexual offences against children.³⁰⁸⁰ *Te Piriti* can be distinguished from most other Department of Corrections (‘Corrections’) initiatives as it has seen a concentrated effort by staff to

³⁰⁷⁰ *Kia Marama* means insight or let there be light.

³⁰⁷¹ *Te Piriti* means the bridge or the crossing over to a better life.

³⁰⁷² Department of Corrections “The *Kia Marama* Sex Offender Treatment Programme” (11 November 2014) Department of Corrections <<http://www.corrections.govt.nz/resources/the-effectiveness-of-correctional-treatment/2-kia-marama-sex-offender-treatment-programme.html>>; Department of Corrections “The *Te Piriti* Sex Offender Treatment Programme” (11 November 2014) Department of Corrections <<http://www.corrections.govt.nz/resources/the-effectiveness-of-correctional-treatment/5-the-te-piriti-sex-offender-treatment-programme.html>>.

³⁰⁷³ Blue, Convicted Child Sexual Offender, above n 105, at 7.

³⁰⁷⁴ At 7.

³⁰⁷⁵ Department of Corrections, above n 3046.

³⁰⁷⁶ Department of Corrections, above n 3046.

³⁰⁷⁷ Department of Corrections, above n 3046.

³⁰⁷⁸ Lavinia Nathan, New Zealand *Te Whakakotahitanga* (Department of Corrections, Wellington, NZ, 2003) at 12.

³⁰⁷⁹ Department of Corrections, above n 3046.

³⁰⁸⁰ Blue, Convicted Child Sexual Offender, above n 105, at 12.

develop and promote a therapeutic environment within a *Tikanga Maori*³⁰⁸¹ framework.³⁰⁸²

The programmes provide professional counselling services to individuals who are imprisoned for sexual offences against children³⁰⁸³ that aim to prevent relapses by teaching offenders that their offending is the result of connected steps of thought and behaviour.³⁰⁸⁴ ‘Mr Blue’,³⁰⁸⁵ a convicted child sexual offender and graduate of the Kia Marama Programme, states that the aim of the programmes is to provide offenders with the skills to recognise the interlinked patterns of behaviour that lead to offending.³⁰⁸⁶ Once these patterns or processes are identified, the programme provides opportunities to change the behaviour of an offender through targeted treatment initiatives.³⁰⁸⁷ The targeted treatment initiatives begin with the initial assessment of the offender and can continue through to post release.³⁰⁸⁸

1.46.3.1.1 Concerns about the Implementation of Court Orders by the Department of Corrections

Mr Blue discloses that numerous younger offenders have serious concerns regarding the application of Court-ordered treatment programmes by Corrections.³⁰⁸⁹ Generally, the prison sentences for younger offenders are less severe and Judges usually mandate some rehabilitation programme for them.³⁰⁹⁰ The concern about this method of sentencing is its implementation by Corrections.³⁰⁹¹ Mr Blue believes that the Court orders are intended to ensure that the offender addresses any issue that may be a contributing factor in their offending

³⁰⁸¹ *Tikanga Maori* means the Maori way of doing things.

³⁰⁸² Nathan, New Zealand, above n 3052, at 12.

³⁰⁸³ Blue, Convicted Child Sexual Offender, above n 105, at 12.

³⁰⁸⁴ Jane Westaway *And there was light-* (Psychological Service, Dept of Corrections, Christchurch [NZ], 1998) at 3.

³⁰⁸⁵ Mr Blue is a nom de plume.

³⁰⁸⁶ Blue, Convicted Child Sexual Offender, above n 105, at 12.

³⁰⁸⁷ At 12.

³⁰⁸⁸ At 12.

³⁰⁸⁹ At 3.

³⁰⁹⁰ At 3.

³⁰⁹¹ At 7.

so that when they are released they are no longer a threat to the community.³⁰⁹² However, the application of the orders by Corrections can be very erratic.³⁰⁹³ Several offenders known to Mr Blue informed him that they were placed into treatment programmes towards the end of their custodial sentence.³⁰⁹⁴ These placements were perceived by these offenders as an afterthought by Corrections and resulted in no efficacy for the offenders whatsoever.³⁰⁹⁵ Mr Blue also states that this is not at all uncommon.³⁰⁹⁶

Bronwyn Rutherford, the Chief Psychologist for Corrections, responds to this criticism by stating that Corrections prioritises the treatment of offenders.³⁰⁹⁷ The priority is determined by an offender's level of risk to the community and their intended release date.³⁰⁹⁸ Sexual offenders who are considered to be the highest risk to the community receive treatment first.³⁰⁹⁹ Rutherford also stated that an offender whose treatment has been delayed towards the end of their sentence has often been the subject of complications which have prevented them from entering an appropriate treatment programme.³¹⁰⁰ These obstacles include offenders being reluctant to undertake treatment and Corrections also have offenders who are prevented from entering therapy because of their security classification.³¹⁰¹

Nevertheless, Mr Blue regards the employment of some form of legislative confirmation mechanism by the Courts to ensure that Corrections has adequately implemented the treatment component of a sentence as a much-required necessity.³¹⁰² The application of such as legislative mechanism would ensure that the Court's sentencing orders are being given due and meaningful consideration by

³⁰⁹² At 12.

³⁰⁹³ At 14.

³⁰⁹⁴ At 14.

³⁰⁹⁵ At 14.

³⁰⁹⁶ At 14.

³⁰⁹⁷ Interview with Bronwyn Rutherford, Chief Psychologist, Department of Corrections, New Zealand at 1.

³⁰⁹⁸ At 1.

³⁰⁹⁹ At 1.

³¹⁰⁰ At 2.

³¹⁰¹ At 2.

³¹⁰² Blue, Convicted Child Sexual Offender, above n 105, at 15.

Corrections.³¹⁰³ This mechanism would also provide greater protection to the community from the harm associated with the recidivism of child sexual offenders.³¹⁰⁴

1.46.4 Recommendations

1.46.4.1 The Placement of a Child Sexual Offender into an Appropriate Treatment Programme

It is recommended that a legislative mechanism be implemented to confirm that the Court's placement of a child sexual offender into an appropriate treatment programme is adequately carried through by Corrections.³¹⁰⁵ The implementation of such a provision would ensure that Corrections provides adequate treatment services to offenders so that their risk of recidivism is reduced.³¹⁰⁶ A reduced threat to the community would also decrease the potential risk of harm to New Zealand's children. Therefore, the importance of this recommendation is that it will ensure that offenders receive specialist therapy intended to reduce their risk of recidivism.

1.46.5 Conclusion

The disclosure by Mr Blue that Corrections does not always provide offenders with the adequate services necessary to fully realise the sentencing of the Courts indicates a significant risk to New Zealand's children.³¹⁰⁷ Sentencing orders by the Courts are intended to reduce the risk of reoffending against children and other vulnerable members of society as required by the Sentencing Act 2002.³¹⁰⁸ However, this critical component of the sentencing regime is a contentious issue and any inability of Corrections to provide adequate treatment to *all* child sexual

³¹⁰³ At 15.

³¹⁰⁴ At 15.

³¹⁰⁵ At 15.

³¹⁰⁶ At 15.

³¹⁰⁷ At 15.

³¹⁰⁸ Sentencing Act 2002 ss 54G(a), 54H(b).

offenders is a significant risk to the community.³¹⁰⁹ Any inadequacy in sentencing has the potential to greatly increase the risk of harm to New Zealand's children.

1.47 Overall Conclusion for Chapter 7

The concerns regarding sentencing discussed within this chapter emphasise the necessity of reviewing New Zealand's censorship legislation in the online age. The Classification Act 1993 must be continually examined to ensure that the Act and its subsequent institutional responses are sufficient to respond to the changing nature of Internet offending. This legislation will need to be *constantly critiqued* to guarantee that it is conversant with technology and also that it provides law enforcement agencies with the ability to *appropriately respond* to the dissemination of child pornography on the Internet. The significance of providing appropriate sentencing for child pornography offending is that it will demonstrate to the public that any interaction with this content will not be tolerated and will be sentenced accordingly. It will also demonstrate to the international community that New Zealand considers that all forms of child pornography must be prohibited because of its potential to cause harm to children and society. However, the most important reason for this discussion on the adequacy of sentencing is that the present sentencing of offenders is very lenient.³¹¹⁰ Some offenders are being caught with hundreds of thousands of images³¹¹¹ and do not receive a custodial sentence.³¹¹² It is contended that this manner of sentencing does not sufficiently acknowledge the suffering of the children abused in the images and also serves no efficacy as there is no tangible punishment for this type of conduct.

³¹⁰⁹ Blue, Convicted Child Sexual Offender, above n 105, at 14.

³¹¹⁰ Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 5.

³¹¹¹ O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.

³¹¹² Jamie Morton "Child Porn Offender wants Name Suppression" *New Zealand Herald* (26 January 2012) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10781234>.

Chapter 8

Conclusions

1.48 Introduction

This thesis has critically examined New Zealand's legal and institutional responses to the availability of child pornography on the Internet. It has scrutinised New Zealand's classification system which censors child pornography and has also described this system in great detail. The quality of this system has also been assessed, as has how the system has been utilised to restrict the dissemination of child pornography on the Internet. The variety of official responses undertaken suggests that there is no single measure available that can regulate the flow of child pornography across the Internet.

A specific focus of this thesis has been the particular care that must be afforded to children by the law and its institutional responses. In assessing these principles and the methods utilised to protect children from child pornography, this thesis has identified that children require additional protections. The protections need to be flexible so they can respond to the reality that children require different protections from adults because of their increased vulnerability to the harm associated with child pornography offending. These protections must also evolve with the autonomy of the child. Furthermore, this issue is complicated by the fact that this phenomenon is now an international issue requiring a concerted effort by the international community to protect children and prevent their victimisation. The case law and empirical research within this thesis refers to some of the competing interests to children's rights, such as freedom of expression and the commercial reality confronting international corporations such as Apple. Any limitations to these conflicting rights should be determined by the importance of children to our

society and the reality that the State must always over-ride the interests of commerce in recognition of children's rights to dignity and equality.³¹¹³

New Zealand's legislative and institutional responses have been critiqued in order to determine the degree to which these responses recognise and respond to children as full rights holders before the law. It is evident that children's rights to protection from child pornography on the Internet must be amplified to respond to this threat which law enforcement agencies are struggling to combat. It is the Internet itself as the main medium of supply rather than the applicable legislation which, surprisingly, is identified as the most significant contributing factor to this issue. Moreover, New Zealand's obligations to children have been analysed at both the international and domestic levels to emphasise the special requirements of children and also to ascertain whether the State's response adequately recognises and responds to this duty. Although this research has demonstrated that the Films, Videos, and Publications Classification Act 1993³¹¹⁴ and its subsequent classification system are very robust, the research has also demonstrated that the law's institutional responses to concerns regarding child pornography on the Internet have been found to be wanting.

The introduction of amended legislation and resourcing to enhance children's rights to dignity and equality is dependent on the Government's recognition of its obligations in accordance with the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000.³¹¹⁵ The political will to address concerns about child pornography on the Internet is influenced by the public's awareness of this concern. This thesis has verified this threat to children and provides a platform to invigorate efforts and demand stronger action to recognise and protect children before the law. This thesis, therefore, provides an additional contribution to children's rights as it focuses attention on law enforcement agencies concerns and suggests potential remedies which also contribute to the academic and legal

³¹¹³ Universal Declaration of Human Rights 1948 (un.org), art 1.

³¹¹⁴ Films, Videos, and Publications Classification Act 1993.

³¹¹⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN).

environments. This enhancement of children's rights will be accomplished by raising the visibility of children, providing in-depth academic content and identifying potential gaps in the law.

The demands for consistency in the legislation of all States and in the ability law enforcement agencies to assist with investigations have been emphasised to draw attention to the reality that child pornography is no longer a domestic concern. The international nature of the Internet has revolutionised the dissemination of child pornography which accentuates the necessity for a response based on the Optional Protocol. The capacity of this internationally recognised instrument to be used to effectively direct efforts at a State level, which is dependent upon it being properly implemented, is a theme that recurs throughout this thesis. In particular, Chapters 6 to 11 draw attention to the manner in which New Zealand's responses to this instrument are deficient in that respect. Focusing on the obligations within the Optional Protocol and comparing the data exposed by empirical research has drawn attention to these deficiencies. The decision to focus on children's rights to protection and acknowledging that they have special needs because of their vulnerability also brings to light inconsistencies with these rights within New Zealand's legislation.

This discussion of these concerns is followed by a number of constructive conclusions intended to enhance New Zealand's legislative and institutional responses to child pornography offending. However, the decision to strengthen the law and its responses to reduce the vulnerability of children will also be dependent upon the willingness of other jurisdictions to afford their own children these same heightened protections. In acknowledgement of this problem, the members of the international community are urged to co-operate with each other to stem the tide of child pornography on the Internet. In addition, these recommendations advocate for the introduction of amendments to strengthen New Zealand's classification system which pertains to child pornography. The significance of these amendments is their capacity to reduce the vulnerability of children and provide law enforcement agencies with the capacity to effectively respond to the dissemination of child pornography on the Internet. The following conclusions are intended to empower

New Zealand's law enforcement agencies to adequately respond to this concern. These conclusions detail concerns regarding the law and New Zealand's institutional responses to child pornography offending. They will also attempt to suggest meaningful solutions to these concerns.

1.49 Conclusions

1.49.1 The Harm of Child Pornography

This thesis has established that the dissemination of child pornography on the Internet is harmful to children and society. This stance is founded on Feinberg's theory of harm which also justifies the complete censorship of child pornography. It has also been demonstrated that the Internet has compounded the problem of child pornography and is indirectly assisting to facilitate the sexual abuse of children around the world. This thesis has confirmed that empirical research is required to expand New Zealand's pool of information about this problem and thereby provide more targeted protection initiatives for children.

1.49.2 The International Legal Framework

It has been established that children are rights holders under international law and that this fundamental human right is mirrored within New Zealand's domestic legislation. The theoretical challenges to bestowing legal rights upon children have been considered and this thesis has demonstrated that such criticisms do not reflect the status of children in New Zealand or any other modern democratic society. It has also been recognised that New Zealand does have an obligation in accordance with the Convention on the Rights of the Child 1989³¹¹⁶ to respond appropriately to concerns with the dissemination of child pornography through the Internet. Concerns regarding the limitations of this Convention have been discussed to draw attention to the need for the introduction of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000³¹¹⁷ to assist the international community to respond to this concern. The Optional Protocol expands

³¹¹⁶ Convention on the Rights of the Child 1989 (UN).

³¹¹⁷ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000.

the duties of signatories to ensure that the distribution of child pornography via the Internet is completely prohibited.

This thesis has confirmed that the adoption of universal standards would not only assist with online child pornography investigations but would also assist the international community's efforts to prevent the dissemination of child pornography across the Internet. The Convention and the Optional Protocol offer a framework for implementing universal standards around the world, as both of these instruments address concerns regarding child pornography at the international level. The significance of this new normative foundation is that it will guide the international community and direct efforts to eradicate child pornography.³¹¹⁸

1.49.3 New Zealand's Censorship Legislation

This thesis has confirmed that New Zealand has a classification system governed by its own censorship legislation, the Films, Videos, and Publications Classification Act 1993.³¹¹⁹ It has demonstrated that this Act completely prohibits all forms of child pornography, including content downloaded from the Internet. This thesis also establishes that New Zealand has an appeal process which balances the right to freedom of expression with the need to censor objectionable content. New Zealand's legislation and case law concerning child pornography also refer to the right of freedom of expression which confirms the importance of this concept in a modern democracy. However, in no way does this precedent over-ride the right of children to be protected from the harms associated with child pornography. It is evident that the classification system in New Zealand is exemplary and robust which indicates that the State is fulfilling its obligations in accordance with the Optional Protocol.

³¹¹⁸ Santos Pais, above n 650, at 564.

³¹¹⁹ Films, Videos, and Publications Classification Act 1993.

1.49.4 New Zealand's Filtering System

This thesis has demonstrated that New Zealand's Filtering System is a unique response to concerns regarding child pornography on the Internet which is not seen in other jurisdictions. However, the operational effectiveness of this protective system is seriously limited by the absence of similar systems in other jurisdictions. Inconsistency and exclusion are not uncommon characteristics of international efforts to stem the tide of child pornography as each jurisdiction caters to the complexities of its own legislation. Although filtering systems do have the potential to be misused and utilised to silence political dissent, such systems also provide a feasible way to significantly reduce the availability of child pornography on the Internet. This thesis establishes, however, that children would benefit from a more consistent approach by the international community to filtering of the Internet. Therefore, New Zealand's Filtering System offers a useful model of how the introduction of filtering in other jurisdictions could operate. Nevertheless, it is evident that filtering is only one aspect of the solution that law enforcement agencies must employ to reduce the availability of child pornography on the Internet.

1.49.5 Crimes and Law Enforcement

Another significant aspect of law enforcement agencies response to the dissemination of child pornography across the Internet is their capability to prosecute online offending. This thesis has acknowledged the capacity of New Zealand's law enforcement agencies to respond to concerns regarding child pornography offending on the Internet. The Classification Act 1993 administers the operation of these specialist agencies which have highly developed processes that recognise children's rights to protection before the law. However, it is evident that various aspects of New Zealand's law enforcement regime are not able to respond sufficiently to the dissemination of child pornography on the Internet. The absence of strong substantive provisions which address the complexity of online investigations significantly weakens the ability of law enforcement agencies to respond to content offending from the Internet. This thesis establishes that law enforcement investigations would benefit from the inclusion of these substantive

provisions within the Objectionable Publications and Indecency Legislation Bill 2013 ('the Bill').³¹²⁰

This Bill facilitates the Act to provide law enforcement agencies with the means to respond to advances in technology³¹²¹ and increase the effectiveness of the enforcement provisions of the Classification Act 1993. In particular, the efficiency of law enforcement agencies response to child pornography offending will be assisted by no longer having to seek the Attorney-General's consent to prosecute an offender for a child pornography offence. The delegation of the authority to prosecute an offender will be assigned to the District Commanders of the New Zealand Police and will improve law enforcement agencies ability to investigate and respond to online child pornography offending.³¹²² Moreover, the use of the generic term 'objectionable publication' increases the effectiveness of New Zealand's classification legislation and its ability to censor harmful content. Therefore, the term 'indecent' should *not* be included within the Classification Act 1993. Any broadening of the scope of the Act could have a seriously detrimental effect on the operation and enforcement provisions within the Act. The efficacy of this conclusion is that it would ensure that the term 'objectionable' remains the cornerstone of censorship in New Zealand.

1.49.6 Mandatory Data Retention Periods for Internet Service Providers in New Zealand

This thesis has demonstrated that the ability of law enforcement agencies to sufficiently investigate child pornography offending is limited by the inability to access the subscriber information of New Zealand's Internet Service Providers ('ISPs'). It is confirmed that law enforcement investigations would be enhanced by the introduction of a mandatory data retention period that compels ISPs to retain subscriber information. The retention of data would permit improved tracking of

³¹²⁰ Objectionable Publications and Indecency Legislation Bill 2013 (124-1).

³¹²¹ Hansard, above n 2078, at 15102.

³¹²² Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 5.

child pornography offenders and also assist with investigations of other online criminal activities.³¹²³ It would provide an enhanced form of protection for children by providing them with an additional layer of protection. Moreover, this provision would assist New Zealand to achieve its obligations to protect children in accordance with the Optional Protocol.

1.49.7 The Challenges for Law Enforcement Agencies from Advancements in Technology

This thesis has established that advancements in information technology pose significant challenges for law enforcement investigations. Any remedy to the inability of law enforcement agencies to counter concerns such as encryption will require a concerted effort by both the private sector and the State. The absence of sufficient support for law enforcement investigations from the private sector and the inability to compel a suspected child pornographer to decrypt software are serious deficiencies in law enforcement agencies capacity to respond to child pornography offending. This thesis confirms that law enforcement investigations would be enhanced by more assistance from the private sector and the introduction of a new legislative provision to require an offender within this jurisdiction to decrypt software. This confirmation by law enforcement personnel that encryption is a serious concern not only justifies this amendment but is also recognition that it will assist New Zealand to achieve its international obligations.

1.49.8 Co-operation with other Jurisdictions

Co-operation with other jurisdictions has been identified as essential for advancing efforts to prevent the dissemination of child pornography on the Internet. Ways to enhance the capacity of law enforcement agencies to access further resources could include critical components such as the placement of additional Liaison Officers, the signing of additional Memoranda of Understanding and the introduction of streamlined mutual production orders. Empirical research demonstrates that the

³¹²³ Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 5.

lack of ability to offer adequate assistance to child pornography investigations seriously weakens the ability of law enforcement agencies to respond to online offending. In recognition of this concern, these conclusions are intended to assist with the facilitation of co-operation between New Zealand's law enforcement agencies and their partner organisations in foreign jurisdictions.

1.49.9 Sentencing for Child Pornography Offending

New Zealand's classification system is restricted in its response to child pornography offending by the limitations of the provisions within the law to adequately sentence offenders. This problem regarding sentencing is important to this thesis as it draws attention to the inability of the sentencing regime to discourage recidivist offending. New Zealand's responses to child pornography offending on the Internet will be enhanced by the introduction of new legislative provisions which respond sufficiently to the current nature of online child pornography offending. This thesis has confirmed that an increase in sentencing by the Bill would assist the Courts to respond to the escalation in the volume of child pornography being disseminated across the Internet.³¹²⁴

To further assist the Courts with the sentencing of child pornographers, the Government should implement its own sentencing guidelines for child pornography offending. These sentencing guidelines should be modelled on those in the United Kingdom as they clarify where the appropriate threshold for a custodial sentence has been defined by the law. Sentencing guidelines will also ensure that the Courts administer each case on its own merits. Furthermore, a new legislative mechanism should be implemented to ensure that the Court's placement of a child sexual offender into a treatment programme is adequately administered by Corrections.³¹²⁵ The enforcement of such a provision would ensure that Corrections provides appropriate treatment services to offenders so that their risk of recidivism is

³¹²⁴ Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 2.

³¹²⁵ Blue, Convicted Child Sexual Offender, above n 105, at 15.

reduced.³¹²⁶ This reduced threat to the community would also decrease the potential risk of harm to New Zealand's children from child pornographers and assist to fulfil the State's obligations in accordance with the Optional Protocol. These conclusions are intended to assist New Zealand to implement sentencing which reflect the concerns of society and the reality of modern child pornography offending.

1.50 Overall Conclusion

A simple solution for controlling the dissemination of child pornography within New Zealand would be to terminate access to the Internet. It is the unregulated nature of the Internet that is playing a critical role in the consumption and distribution of child pornography. However, this is unrealistic as the world is now dependent on the Internet for commercial and economic reasons. This thesis has shown that the dissemination of child pornography on the Internet is a complex issue which has to be addressed with a multifaceted response that attempts to balance the rights of children with the competing interests of adults and the commercial sector. This intricate response must comprise modifications to legislation, alterations to the allocation of resourcing and a significant amount of collaboration within the international community. The conclusions and recommendations set out above have the potential to provide additional protection to children. Nevertheless, they merely partially respond to the issue of downloading and disseminating child pornography on the Internet. It will be exceedingly arduous to counter this concern with the mechanisms that law enforcement agencies currently have at their disposal. This is due to the nature of the Internet, which enables people to access and consume content within seconds from anywhere in the world that has an Internet connection.

The realistic solution to this issue is to develop a comprehensive globally co-ordinated system of control in which New Zealand would play a *small* but hopefully *important* role. In essence, New Zealand is a small country trying to control an entire ocean of information. Without assistance from the international community

³¹²⁶ At 15.

and complete global co-ordination, it will be impossible to control the spread of child pornography over the Internet. Such a comprehensive and globally co-ordinated system of control would have to be designed so that it can *respond rapidly* to the changing nature of information technology and the Internet. The capability of the law and its enforcement agencies to respond promptly to this issue will substantially restrict the online mechanisms employed to disseminate child pornography. Furthermore, Law enforcement agencies in New Zealand are in a position to make a substantial contribution to the global efforts to suppress child pornography on the Internet. The New Zealand Police, the Customs Service and Internal Affairs have accumulated significant expertise on this topic. It is accordingly contended, that these agencies have the specialist knowledge to take a leading role, and to advise other jurisdictions in the fight against the distribution and consumption of child pornography by way of the Internet. The significance of this suggestion, as explained within this thesis, is that it will assist other jurisdictions to recognise children as rights holders before the law and reduce their vulnerability to child pornography offending.

This thesis has demonstrated the vulnerability of children and established that they are rights holders before the law. It has identified a range of measures that could significantly reduce the vulnerability of children around the world if they were to be employed universally by the international community. Consideration of the law and its impact on children and the Internet has provided the perspective essential to comprehend the necessary modifications required to completely eradicate child pornography from the Internet. A key component in the response to the problem is the acknowledgement of the international nature of this concern and the need for co-operation between jurisdictions. This is a simple observation which is understood by law enforcement agencies and recognised at law by the Convention and its Optional Protocol. Currently, however, this thesis confirms that the complexity of both investigations and legislation between jurisdictions conspire against the protection of children from child pornography. Improving the protection of children and reducing their vulnerability by developing consistent legal measures, as recommended by this thesis, is a means to reduce the harm to children from the availability of child pornography on the Internet. The successful

eradication of child pornography from the Internet is dependent upon the contribution of every member of the international community to sufficiently protect its children from the harm associated with the consumption of child pornography through the Internet.

Bibliography

1.51 Secondary Materials

1.51.1 Books and Chapters in Books

Aftab, Parry *The Parent's Guide to Protecting Your Children in Cyberspace* (McGraw-Hill, New York, 2000).

Akdeniz, Yaman *Internet child pornography and the law* (Ashgate, Burlington, VT, 2008).

Benninger-Budel, Carin *Due Diligence and Its Application to Protect Women from Violence* (BRILL, Netherlands, 2008).

Butler, Andrew "Regulatory Offences and the Bill of Rights" in Paul Rishworth and Grant Huscroft (eds) *Rights and Freedoms -The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995).

Calder, Martin (ed) *Child sexual abuse and the Internet* (Russell House Publishing, 2004).

Campbell, T "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights, and the Law* (Oxford University Press, Oxford, 1992).

Carr, John and Hilton, Zoe "Combating Child Abuse Images on the Internet" in Julia Davidson and Petter Gottschalk (eds) *Internet Child Abuse: Current Research and Policy* (Routledge-Cavendish, New York, 2011).

Cohen, Stanley *Folk Devils and Moral Panics* (2nd ed, St. Martin's Press, New York, 1972).

Committee on the Internet in the Evolving Information Infrastructure and others *The Internet's Coming of Age* (1st edition ed, National Academies Press, Washington, D.C, 2001).

Cooper, Al *Sex and the Internet a Guidebook for Clinicians* (Brunner-Routledge, New York, 2002).

Crowdson, John *By Silence Betrayed* (Little Brown, New York, 1988).

Cruz, Peter De Comparative Law in a Changing World (3 edition ed, Routledge-Cavendish, London, 2006).

Davidson, Alan The Law of Electronic Commerce (Cambridge University Press, Cambridge, 2009).

Davidson, Julia C and Gottschalk, Petter Internet child abuse (Routledge, New York, 2011).

Dworkin, Gerald "Paternalism" in Edward N Zalta (ed) The Stanford Encyclopedia of Philosophy (Summer 2014 ed, 2014).

Dworkin, Ronald A Matter of Principle (Harvard University Press, Cambridge, Mass, 1985).

Dworkin, Ronald M Freedom's Law (Oxford University Press, Oxford, 1996).

Feinberg, Joel Freedom and Fulfillment (Princeton University Press, 1994).

Feinberg, Joel Harm to Others (Oxford University Press, USA, Oxford, 1984).

Feinberg, Joel Harmless Wrongdoing (Oxford University Press, Oxford, 1988).

Feinberg, Joel Offense to Others (Oxford University Press, Oxford, 1985).

Ferraro, Monique Mattei, Casey, Eoghan and McGrath, Michael Investigating child exploitation and pornography (Elsevier/Academic, Amsterdam [etc.], 2008).

Fortin, Jane Children's Rights and the Developing Law (Cambridge University Press, London, 2003).

Freeman, Michael DA The Rights and Wrongs of Children (F. Pinter, London; Dover, N.H., 1983).

French, Carl Data Processing and Information Technology (Cengage Learning EMEA, London, 1996).

Gillespie, Alisdair Child pornography (Routledge, Abingdon, Oxon; New York, 2011).

Goode, Erich Moral panics (Blackwell, Oxford, UK ; Cambridge, USA, 1994).

Green, Lelia Communication, Technology and Society (SAGE, 2002).

Hall, Geoff “Sentencing” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007).

Harlow, Elizabeth and Webb, Stephen A *Information and Communication Technologies in the Welfare Services* (Jessica Kingsley Publishers, London; Philadelphia, Pa., 2003).

Hart, Herbert Lionel Adolphus *Law, Liberty, and Morality* (Stanford University Press, California, 1963).

Hart, Herbert Lionel Adolphus *The Concept of Law* (Clarendon Press, Oxford, 1961).

Hart, HLA “Prolegomenon to the Principles of Punishment” in H L A Hart (ed) *Punishment and Responsibility: Essays in the Philosophy of Law* (2 edition ed, Oxford University Press, Oxford, 2008).

Harvey, David *internet.law.nz* (LexisNexis, Wellington, 2005).

Henaghan, Mark *Care of Children* (LexisNexis, Wellington, N.Z, 2005).

Hervey, Tamara and others *Research Methodologies in EU and International Law* (Bloomsbury Publishing, Oxford, 2011).

Hood, Dale La “The Principles Applicable to s 21 Challenges in a Regulatory Enforcement Context” in *Using the Bill of Rights in Civil and Criminal Litigation* (New Zealand Law Society, Wellington, 2008).

Huscroft, Grant “The Right to Justice” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003).

Indecent Publications Tribunal, *New Submission of the Indecent Publications Tribunal to the Select Committee on Internal Affairs and Local Government on the Films, Videos and Publications Classification Bill* (Department of Justice, Tribunals Division, Wellington, N.Z, 1993).

Jenkins, Philip *Beyond Tolerance - Child Pornography on the Internet* (New York University Press, New York, 2001).

Jenkins, Philip *Intimate Enemies* (Transaction Publishers, 1992).

Jenkins, Philip *Moral panic* (Yale University Press, New Haven, CT, 1998).

Kenyon, Andrew T and Richardson, Megan *New Dimensions in Privacy Law* (Cambridge University Press, Cambridge, 2006).

Krinsky, Charles *Moral Panics Over Contemporary Children and Youth* (Ashgate Publishing, Ltd., 2008).

Krotoszynski, Ronald J *The First Amendment in Cross-cultural Perspective* (NYU Press, New York, 2006).

Lewis, Jane and Ritchie, Jane “Generalising from Qualitative Research” in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (1 edition ed, SAGE Publications Ltd, London, 2003).

Locke, John and Macpherson, CB *Second Treatise of Government* (Hackett Pub. Co., Indianapolis, Ind., 1980).

MacCormick, Neil “Children’s Rights: A Test-Case for Theories of Rights” in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford University Press, Oxford, 1982).

MacCormick, Neil *Legal Right and Social Democracy Essays in Legal and Political Philosophy* (Oxford University Press, Oxford, 1982).

MacVean, Allyson and Spindler, Peter *Policing Paedophiles on the Internet* (New Police Bookshop, London, 2003).

Mahoney, Richard “Arbitrary Arrest and Detention” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003).

Mahoney, Richard “Concepts of Arrest and Detention” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003).

Mahoney, Richard “Other Rights of Persons Arrested or Detained Under any Enactment” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003).

Mahoney, Richard “The Right to Counsel” in Paul Rishworth and Grant Huscroft (eds) *The New Zealand Bill of Rights* (Oxford University Press, Wellington, 2003).

Martellozzo, Elena *Online child sexual abuse* (Routledge, Milton Park, Abingdon, Oxon ; New York, 2012).

Middleton, David “Internet Sex Offenders” in Anthony R Beech, Leam A Craig and Kevin D Browne (eds) *Assessment and Treatment of Sex Offenders* (John Wiley & Sons, Ltd., 2009) 199.

Milanovic, Marko Extraterritorial Application of Human Rights Treaties (OUP Oxford, Oxford, 2011).

Mill, John Stuart J. S. Mill, Stefan Collini (ed) (Cambridge University Press, Cambridge, 1989).

Mill, John Stuart On Liberty (Penguin Books, London, 1974).

Miller, Marc L Reliability and Validity in Qualitative Research (SAGE Publications, 1986).

Mimi, Halper Silbert “The Effects on Juveniles of Being Used for Pornography and Prostitution” in Dolf Zillmann and Jennings Bryant (eds) Pornography: Research Advances and Policy Considerations (L. Erlbaum Associates, London, 1989).

Mizera, Steve A From a Dime a Dozen to Priceless (CreateSpace Independent Publishing Platform, 2012).

Murray, Andrew The Regulation of Cyberspace (Routledge-Cavendish, New York, 2006).

Nathan, Lavinia, New Zealand Te Whakakotahitanga (Department of Corrections, Wellington, N.Z., 2003).

New Zealand Ministerial Committee of Inquiry into Pornography Pornography : Report of the Ministerial Committee of Inquiry into Pornography. (The Committee, Wellington, N.Z., 1989).

O'Donnell, Ian and Milner, Claire Child Pornography Crime, Computers and Society (Willan Publishing, Devon, 2007).

Optican, Scott “Retroactive Penalties and Double Jeopardy” in Paul Rishworth and Grant Huscroft (eds) The New Zealand Bill of Rights (Oxford University Press, Wellington, 2003).

Optican, Scott “Search and Seizure” in Paul Rishworth and Grant Huscroft (eds) The New Zealand Bill of Rights (Oxford University Press, Wellington, 2003).

Ost, Suzanne Child Pornography and Sexual Grooming - Legal and Societal Responses (Cambridge University Press, New York, 2009).

Print, B and Morrison, T “Treating Adolescents who Sexually Abuse Others” in Catherine Itzin (ed) Home Truths about Child Sexual Abuse: A Reader (Psychology Press, London, 2000).

Putman, William Legal Research (Cengage Learning, New York, 2009).

Quayle, Ethel “The Impact of Viewing an Offending Behavior” in Martin Calder (ed) *Child Sexual Abuse and the Internet: Tackling the New Frontier* (Russell House Publishing, 2004).

Quayle, Ethel and Ribisl, Kirt M (eds) *Understanding and Preventing Online Sexual Exploitation of Children* (Routledge, Abingdon, Oxon ; New York, 2012).

Quayle, Ethel and Sinclair, Roberta “An Introduction to the Problem” in Ethel Quayle and Kurt M Ribisl (eds) *Understanding and Preventing Online Sexual Exploitation of Children* (Routledge, Abingdon, Oxon ; New York, 2012).

Quayle, Ethel and Taylor, Maxwell (eds) *Viewing child pornography on the Internet* (Russell House, Lyme Regis, 2005).

Rashid, Awais and others “Technological Solutions to Offending” in Ethel Quayle and Kurt M Ribisl (eds) *Understanding and Preventing Online Sexual Exploitation of Children* (Routledge, Abingdon, Oxon ; New York, 2012).

Raz, Joseph *The Morality of Freedom* (Oxford University Press, Oxford, 1986).

Richards, David “Liberalism, Free Speech, and Justice for Minorities, in In Harm’s Way” in Jules L Coleman and Allen Buchanan (eds) *In Harm’s Way: Essays in Honor of Joel Feinberg* (Cambridge University Press, Cambridge, 1994).

Rishmawi, M “Article 4 : Nature of States Parties’ Obligations” in A Alen and others (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, NLD, 2005).

Rishworth, Paul “Affirming the Fundamental Values of the Nation - How the Bill of Rights and the Human Rights Act affect New Zealand” in Paul Rishworth and Grant Huscroft (eds) *Rights and Freedoms -The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995).

Rishworth, Paul “Interpreting Enactments – Section 4, 5, and 6” in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003).

Russell, Diana EH and Purcell, Natalie J “Exposure to Pornography as a Cause of Child Sexual Victimization” in Nancy E Dowd, Dorothy G Singer and Robin Fretwell Wilson (eds) *Handbook of Children, Culture, and Violence* (SAGE Publications, Inc, Thousand Oaks, Calif, 2006).

Russell, Diana EH Making Violence Sexy (Teachers College Press, Buckingham, 1993).

Saleh, Fabian M and others Sex Offenders (Oxford University Press, Oxford, 2009).

Sandoval, Terrell G (ed) Adam Walsh Child Protection and Safety Act (Nova Science Publishers, Incorporated, New York, 2010).

Seto, Michael C, American Psychological Association Pedophilia and Sexual Offending Against Children Theory, Assessment, and Intervention (American Psychological Association, Washington, 2008).

Shanty, Frank and Mishra, Patit Paban Organized Crime (ABC-CLIO, Santa Barbara, 2007) vol 1.

Sheldon, Kerry and Howitt, Dennis Sex Offenders and the Internet (John Wiley and Sons, Chichester, 2007).

Sher, Julian Caught in the web (Carroll & Graf, New York, 2007).

Spiller, Peter Butterworths New Zealand Law Dictionary (6th ed ed, LexisNexis NZ, Wellington, [N.Z.], 2005).

Stone, Sophia A “Harm Principle” in Deen K Chatterjee (ed) Encyclopedia of Global Justice (Springer Netherlands, 2011) 472.

Suen, Anastasia Downloading and Online Shopping Safety and Privacy (The Rosen Publishing Group, New York, 2013).

Tate, Tim Child pornography (Methuen, London, 1990).

Taylor, Maxwell and Quayle, Ethel Child pornography (Brunner-Routledge, Hove [u.a.], 2004).

Thomas, Terry Sex Crime (Willan Pub, Cullompton, Devon, UK, 2000).

Thompson, Kenneth, ebrary, Inc Moral Panics (Routledge, London ; New York, 1998).

Thornton, Margaret Dissonance and Distrust (Oxford University Press, Melbourne ; New York, 1996).

Tobin, Rosemary “Privacy and Freedom of Expression in New Zealand” in Madeleine Colvin (ed) Developing Key Privacy Rights (Bloomsbury Publishing, Oxford, 2002).

Toope, E “The Convention on the Rights of the Child: Implications for Canada” in Michael D A Freeman (ed) *Children’s Rights: a Comparative Perspective* (Dartmouth, Aldershot; Brookfield, USA, 1996).

United Nations *The Globalization of Crime* (United Nations Publications, New York, 2010).

Villeneuve, Nart “Barriers to Cooperation - An Analysis of the Origins of International Efforts to Protect Children Online” in Ronald Deibert and others (eds) *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (MIT Press, United States of America, 2010).

Watson, Chris and Shuker, Roy *In the Public Good? Censorship in New Zealand* (Dunmore Press, Palmerston North, N.Z, 1998).

Webley, Lisa “Qualitative Approches to Empirical Legal Research” in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford, 2010).

Weiss, Robert Stuart *Learning from Strangers* (Free Press, New York, 1994).

Westaway, Jane (ed) *And there was light-* (Psychological Service, Dept. of Corrections, Christchurch [N.Z.], 1998).

Willems, Jan CM *Developmental and autonomy rights of children* (Intersentia ; Distribution for North America [by] Transnational Publishers, Antwerpen; New York; New York, 2002).

Woodford, Chris *Digital Technology* (Evans Brothers, London, 2006).

Wortley, Richard *Internet child pornography* (Praeger, Santa Barbara, Calif, 2012).

Zittrain, Jonathan and Palfrey, John “Internet Filtering: The Politics and Mechanisms of Control” in Ronald Deibert and others (eds) *Access Denied: The Practice and Policy of Global Internet Filtering* (The MIT Press, Cambridge, Mass, 2008).

1.51.2 Documents, Conference Papers and Academic Works

Dunedin Community Law Centre *Objectionable Publications and Indecency Legislation Bill*(2014).

Eneman, M “A Critical Study of ISP Filtering of Child Pornography” (paper presented to European Conference on Information Systems, 2006).

Fournier de Saint Maur, A “The Sexual Abuse of Children via the Internet: A New Challenge for Interpol” (paper presented to Combating Child Pornography on the Internet, Vienna, 1999).

Greig, Justice Censorship(LexisNexis, 2012).

Hamilton, Stuart “To What Extent can Libraries Ensure Free, Equal and Unhampered Access to Internet-accessible Information Resources from a Global Perspective?” (PhD Thesis, Royal School of Library and Information Science, Copenhagen, 2004).

Joseph, Philip and McHerron, Jason LexisNexis®: Document - (6) Determination of Classification(LexisNexis, 2012).

Joseph, Philip and McHerron, Jason LexisNexis®: Document - Criminal Offences(LexisNexis, 2012).

Joseph, Philip and McHerron, Jason LexisNexis®: Document - New Zealand Bill of Rights Act 1990(LexisNexis, 2012).

Legislation Advisory Committee Objectionable Publications and Indecency Legislation Bill(2013).

New Zealand Customs Service and Serious Fraud Office Memorandum of Understanding between the New Zealand Customs Service and the Serious Fraud Office(2014).

New Zealand Law Society Objectionable Publications and Indecency Legislation Bill - Supp 1(2014).

New Zealand Police and Serious Fraud Office Memorandums of Understanding between New Zealand Police and Serious Fraud Office(2011).

Office of Film and Literature Classification Submission on the Objectionable Publications and Indecency Legislation Bill(2014).

Smyth, Sara M “Child Pornography on the Internet : An International ‘Crisis’ from a Canadian perspective” (PhD Thesis, York University, 2008).

Taylor, Max “The Nature and Dimensions of Child Pornography on the Internet” (paper presented to Combating Child Pornography on the Internet, Vienna, 1999).

1.51.3 Interview Participants and Emails

Email from Alan Bell (National Director Ecpat Child Alert New Zealand) “Child Pornography Research Questions” (27 October 2011).

Email from Brandon Wilson “Victim Impact Statement of Girl in Misty Series” (15 July 2014).

Email from Jeremy Finn (Professor of Law, University of Canterbury) “Section 123 - Strict Liability or Absolute Liability” (1 September 2014).

Email from John Michael (Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand)) “Annual Statistics” (28 November 2013).

Email from Steve O’Brien (National Manager Censorship Compliance Unit) “Digital Child Exploitation Filtering System” (16 March 2010).

Email from Steve O’Brien (National Manager Censorship Compliance Unit) “Filtering of the Internet” (17 March 2015).

Email from Steve O’Brien (National Manager Censorship Compliance Unit) “Prosecutions at DIA” (12 October 2016).

Email from Tim Houston (Investigator, Child Exploitation Operations Team, Intelligence, Investigations and Enforcement, New Zealand Customs Service) “The Child Exploitation Operations Team” (21 July 2014).

Interview with Brandon Wilson, Regional Team leader, STOP Adolescent Programme (12 July 2014).

Interview with Brian Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service (30 June 2014).

Interview with Bronwyn Rutherford, Chief Psychologist, Department of Corrections, New Zealand.

Interview with Debbi Tohill, Interim General Manager, Ecpat Child Alert New Zealand (11 June 2014).

Interview with Dr Andrew R Jack, Chief Censor, Office of Film and Literature Classification, New Zealand (9 June 2014).

Interview with John Hope, Associate Dean International Programmes for the Faculty of Education, University of Auckland.

Interview with John Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand) (10 June 2014).

Interview with Lee Chisholm, Operations Manager, NetSafe, New Zealand (1 April).

Interview with Lloyd Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand (2 July 2014).

Interview with Mr Black, Former Member of the Film and Literature Board of Review, New Zealand (30 May 2014).

Interview with Mr Blue, Convicted Child Sexual Offender (12 June 2014).

Interview with Mr Orange, Former Regional and District Commander of the New Zealand Police (6 November 2014).

Interview with Mr Red, Former School Principal (7 March 2015).

Interview with Mr White, Registered Psychologist (23 June 2014).

Interview with Nic McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand (5 June 2014).

Interview with Peter Dunne, Minister of the Department of Internal Affairs of New Zealand (3 July 2014).

Interview with Philp Hamlin, Barrister and former Crown Prosecutor, New Zealand (25 June 2014).

Interview with Steve O'Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand (22 May 2014).

Interview with Steve Rickards, Senior Constable and Iwi Liaison Officer, New Zealand Police.

Interview with Tim Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service (6 June 2014).

1.51.4 Journal Articles

Adiele, Ikenna and Olatokun, Wole "Prevalence and Determinants of Internet Addiction Among Adolescents" (2014) 31 Computers in Human Behavior 100.

Arneson, Richard J "Liberalism, Freedom, and Community" (1990) 100 Ethics 368.

Back, Les "Aryans Reading Adorno: Cyber-Culture and Twenty-First Century Racism" (2002) 25 Ethnic and Racial Studies 628.

Bakan, Joel "Pornography, Law and Moral Theory" (1985) 17 Ottawa L Rev 1.

Bambauer, Derek E "Filtering in Oz: Australia's Foray into Internet Censorship" (2009) 31 U Pa J Int'l L 493.

Barnidge, Robert "The Due Diligence Principle Under International Law" (2006) 8 International Community Law Review 81.

Barrett, J and Strongman, L "The Internet, the Law, and Privacy in New Zealand: Dignity with Liberty?" (2012) 6 International Journal of Communication 127.

- Bedau, Hugo Adam "Feinberg's Liberal Theory of Punishment" (2001) 5 Buff Crim L Rev 103.
- Beech, Anthony R and others "The Internet and Child Sexual Offending: A Criminological Review" (2008) 13 Aggression and Violent Behavior 216.
- Benassi, Paola "TRUSTe: An Online Privacy Seal Program" (1999) 42 Communications of the ACM 56.
- Bensimon, Philippe "The Role of Pornography in Sexual Offending" (2007) 14 Sexual Addiction & Compulsivity 95.
- Berson, Ilene R and Berson, Michael J "Challenging Online Behaviors of Youth Findings from a Comparative Analysis of Young People in the United States and New Zealand" (2005) 23 Social Science Computer Review 29.
- Bourke, Michael L and Hernandez, Andres E "The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders" (2009) 24 J Fam Viol 183.
- Briken, Peer and others "Diagnosis and Treatment of Sexual Addiction: A Survey among German Sex Therapists" (2007) 14 Sexual Addiction & Compulsivity 131.
- Broadhurst, Roderic "Developments in the Global Law Enforcement of Cyber-Crime" (2006) 29 Policing: Int'l J Police Strat & Mgmt 408.
- Bueren, Geraldine Van "Child Sexual Abuse and Exploitation: A Suggested Human Rights Approach" (1994) 2 Int'l J Child Rts 45.
- Butler, Petra "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 New Zealand Journal of Public and International Law 213.
- Cavanagh, Allison "Taxonomies of Anxiety: Risks, Panics, Paedophilia and the Internet" [2007] Electronic Journal of Sociology 1.
- Chapman, Audrey R "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 Hum Rts Q 23.
- Cochrane, Tim "Protecting Digital Privacy at the New Zealand Border" (2015) 4 New Zealand Law Journal 138.
- Cody, Jonathan P "Protecting Privacy over the Internet: Has the Time Come to Abandon Self-Regulation" (1998) 48 Cath U L Rev 1183.
- Cohen, Stan "Downloading Evil" (2007) 36 Index on Censorship 111.

Critcher, Chas "Media, Government and Moral Panic: the Politics of Paedophilia in Britain 2000-1" (2002) 3 Journalism Studies 521.

Cullen, Rowena and Reilly, Patrick "Information Privacy and Trust in Government: A Citizen-Based Perspective from New Zealand" (2008) 4 Journal of Information Technology & Politics 61.

Davies, Jessica "Untapped Potential: Rethinking the Human Rights Defence in International Child Abduction" [2013] New Zealand Family Law Journal 235.

Demetriou, Christina and Silke, Andrew "A Criminological Internet 'Sting'. Experimental Evidence of Illegal and Deviant Visits to a Website Trap" (2003) 43 Br J Criminol 213.

DeYoung, Mary "The World According to NAMBLA: Accounting for Deviance" (1989) 16 J Soc & Soc Welfare 111.

Diamond, Milton "Pornography, Public Acceptance and Sex Related Crime: A review" (2009) 32 International Journal of Law and Psychiatry 304.

Doek, Jaap E "The CRC 20 Years: An Overview of Some of the Major Achievements and Remaining Challenges" (2009) 33 Child Abuse & Neglect 771.

Doek, Jaap E "What Does the Children's Convention Require?" (2006) 20 Emory Int'l L Rev 199.

Dripps, Donald A "The Liberal Critique of the Harm Principle" (1998) 17 Criminal Justice Ethics 3.

Dubber, Markus "Critical Analysis of Law Interdisciplinarity, Contextuality, and the Future of Legal Studies" (2014) 1 Critical Analysis of Law: An International & Interdisciplinary Law Review 1.

Dugan, Meghann J "Megan's Law or Sarah's Law - A Comparative Analysis of Public Notification Statutes in the United States and England" (2001) 23 Loy LA Int'l & Comp L Rev 617.

Durkin, Keith F "Misuse of the Internet by Pedophiles: Implications for Law Enforcement and Probation Practice" (1997) 61 Fed Probation 14.

Dworkin, Gerald "Devlin Was Right: Law and the Enforcement of Morality" (1998) 40 Wm & Mary L Rev 927.

Endrass, Jérôme and others "The Consumption of Internet child Pornography and Violent and Sex Offending" (2009) 9 BMC Psychiatry 43.

Eneman, Marie "Internet Service Provider (ISP) Filtering of Child-abusive Material: A Critical Reflection of its Effectiveness" (2010) 16 Journal of Sexual Aggression 223.

Esposito, Lesli C "Regulating the Internet: The New Battle Against Child Pornography" (1998) 30 Case Western Reserve Journal of International Law 541.

Farrior, Stephanie "The Historical and Theoretical Foundations of International Law Concerning Hate Speech" (1996) 14 Berkeley Journal of International Law 1.

Federle, Katherine Hunt "Looking Ahead: An Empowerment Perspective on the Rights of Children" (1995) 68 Temple L Rev 1585.

Federle, Katherine Hunt "Rights Flow Downhill" (1994) 2 Int'l J Child Rts 343.

Feinberg, Joel "Duties, Rights, and Claims" (1966) 3 American Philosophical Quarterly 137.

Feinberg, Joel "Pornography and the Criminal Law" (1978) 40 U Pitt L Rev 567.

Ferguson, Christopher J and Hartley, Richard D "The Pleasure is Momentary...the Expense Damnable?: The Influence of Pornography on Rape and Sexual Assault" (2009) 14 Aggression and Violent Behavior 323.

Fergusson, David M, Boden, Joseph M and Horwood, L John "Exposure to Childhood Sexual and Physical Abuse and Adjustment in Early Adulthood" (2008) 32 Child Abuse Negl 607.

Filler, Daniel M "Making the Case for Megan's Law: A Study in Legislative Rhetoric" (2001) 76 Ind LJ 315.

Flowers, R Barri "The Sex Trade Industry's Worldwide Exploitation of Children" (2001) 575 The ANNALS of the American Academy of Political and Social Science 147.

Freeman, Michael DA "Taking Children's Rights More Seriously" (1992) 6 Int'l JL & Fam 52.

Frei, Andreas and others "Paedophilia on the Internet - A Study of 33 Convicted Offenders in the Canton of Lucerne" (2005) 135 Swiss Med Wkly 488.

Galeste, Marcus A, Fradella, Henry F and Vogel, Brenda "Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers" (2012) 13 Western Criminology Review.

Gendreau, Paul, Little, Tracy and Goggin, Claire “A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!” (1996) 34 *Criminology* 575.

George, Robert P “The Concept of Public Morality” (2000) 45 *Am J Juris* 17.

Gillespie, Alisdair “Legal Definitions of Child Pornography” (2010) 16 *Journal of Sexual Aggression* 19.

Gillespie, Alisdair A “Defining Child Pornography: Challenges For The Law” (2010) 22 *Child & Fam L Q* 200.

Goodman, Elga A “Megan’s Law: The New Jersey Supreme Court Navigates Uncharted Waters” (1995) 26 *Seton Hall L Rev* 764.

Griffiths, Mark “Sex Addiction on the Internet” (2004) 7 *Journal of Interdisciplinary Studies in Literature, Continental Philosophy, Phenomenological Psychology and the Arts* 189.

Griffiths, Mark “Sex on the Internet: Observations and Implications for Internet Sex Addiction” (2001) 38 *The Journal of Sex Research* 333.

Groarke, Leo “Pornography, Censorship, and Obscenity Law in Canada” (1990) 2 *Windsor Rev Legal & Soc Issues* 25.

Grubbs, Joshua B and others “Internet Pornography Use: Perceived Addiction, Psychological Distress, and the Validation of a Brief Measure” (2015) 41 *Journal of Sex & Marital Therapy* 83.

Hall, Ryan CW and Hall, Richard CW “A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues” (2007) 82 *Mayo Clin Proc* 457.

Hansard (16 February 2005) 623 *New Zealand Parliamentary Debates* 18704.

Hansard (17 August 1993) 537 *New Zealand Parliamentary Debates* 17491.

Hansard (2 December 1992) 532 *12757*.

Hansard (22 June 1993) 536 *15985*.

Hansard (29 July 1993) 573 *17051*.

Hansard (5 March 2003) 606 *New Zealand Parliamentary Debates* 3978.

Hansard (8 February 2005) 623 New Zealand Parliamentary Debates 18428.

Hansard “Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill - Second Reading” (2001) 590 New Zealand Parliamentary Debates 8224.

Hansard “Objectionable Publications and Indecency Legislation Bill - First Reading” (2013) 695 New Zealand Parliamentary Debates 15101.

Harcourt, Bernard E “The Collapse of the Harm Principle” (1999) 90 The Journal of Criminal Law and Criminology (1973-) 109.

Hasselbacher, Lee “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection” (2009) 8 Nw U J Int’l Hum Rts 190.

Hebenton, Bill, Shaw, Daniel and Pease, Ken “Offences Involving Indecent Photographs and Pseudo-Photographs of Children: An Analysis of Sentencing Guidelines” (2009) 15 Psychology, Crime & Law 425.

Henzey, Michael J “Going on the Offensive: a Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action” (2011) 11 Appalachian Journal of Law.

Hick, Steven and Halpin, Edward “Children’s Rights and the Internet” (2001) 575 The ANNALS of the American Academy of Political and Social Science 56.

Hinds, Lyn and Daly, Kathleen “The War on Sex Offenders: Community Notification in Perspective” (2001) 34 Australian & New Zealand Journal of Criminology (Australian Academic Press) 256.

Hinkelman, Lisa and Bruno, Michelle “Identification and Reporting of Child Sexual Abuse: The Role of Elementary School Professionals” (2008) 108 The Elementary School Journal 376.

Hirschl, Ran “‘Negative’ Rights vs. ‘Positive’ Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order” (2000) 22 Human Rights Quarterly 1060.

Hopbell, Maureen S “Balancing the Protection of Children against the Protection of Constitutional Rights: The Past, Present and Future of Megan’s Law” (2003) 42 Duq L Rev 331.

House of Representatives “Report of the Attorney - General Under the New Zealand Bill of Rights Act 1990 on the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill” (2000) 260 Standing Order.

Internal Affairs and Local Government Committee “Report of the Internal Affairs and Local Government Committee on the Films, Videos, and Publications Classification Bill” (1991) XXIII 1 Appendix to the Journals of the House of Representatives 1. 7A.

Jewkes, Yvonne “Much Ado About Nothing? Representations and Realities of Online Soliciting of Children” (2010) 16 Journal of Sexual Aggression 5.

Jewkes, Yvonne and Andrews, Carol “Policing the filth: The Problems of Investigating online Child Pornography in England and Wales” (2005) 15 Policing and Society 42.

Johnston, Annaliese “Sentencing the Silent - Children’s Rights and the Dilemma of Maternal Imprisonment” (2013) 8 Public Interest Law Journal of New Zealand 120.

Jones, Kathryn E and Hertlein, Katherine M “Four Key Dimensions for Distinguishing Internet Infidelity From Internet and Sex Addiction: Concepts and Clinical Application” (2012) 40 American Journal of Family Therapy 115.

Katyal, Neal Kumar “Criminal Law in Cyberspace” (2001) 149 University of Pennsylvania Law Review 1003.

Kelly, Liz and Regan, Linda “Sexual Exploitation of Children in Europe: Child Pornography” (2000) 6 Journal of Sexual Aggression 6.

Kendler, KS and others “Childhood Sexual Abuse and Adult Psychiatric and Substance Use Disorders in Women: An Epidemiological and Cotwin Control Analysis” (2000) 57 Arch Gen Psychiatry 953.

King, Margaret L “Concepts of Childhood: What We Know and Where We Might Go” (2007) 60 Renaissance Quarterly 371.

Kingston, Drew A and others “Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography use on Recidivism Among Sexual Offenders” (2008) 34 Aggressive Behavior 341.

Kortlander, Jenny “Is Filtering the New Silver Bullet in the Fight Against Child Pornography on the Internet? A Legal Study into the Experiences of Australia and Germany” (2011) 17 Computer and Telecommunications Law Review 199.

Kreimer, Seth F “Allocational Sanctions: The Problem of Negative Rights in a Positive State” (1984) 132 University of Pennsylvania Law Review 1293.

Kruttschnitt, Candace, Uggen, Christopher and Shelton, Kelly “Predictors of Desistance among Sex Offenders: The Interaction of Formal and Informal Social Controls” (2000) 17 Justice Quarterly 61.

Laaser, Mark and Gregoire, Louis "Pastors and Cybersex Addiction" (2003) 18 Sexual and Relationship Therapy 395.

Landau, Judith, Garrett, James and Webb, Robert "Assisting a Concerned Person to Motivate Someone Experiencing Cybersex into Treatment" (2008) 34 Journal of Marital and Family Therapy 498.

Leary, Mary Graw "Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation" (2007) 15 Va J Soc Pol'y & L 1.

Levenson, Jill S and Cotter, Leo P "The Effect of Megan's Law on Sex Offender Reintegration" (2005) 21 Journal of Contemporary Criminal Justice 49.

Levenson, Jill S and others "Public Perceptions About Sex Offenders and Community Protection Policies" (2007) 7 Analyses of Social Issues and Public Policy 137.

Levenson, Jill S, D'Amora, David A and Hern, Andrea L "Megan's Law and its Impact on Community Re-entry for Sex Offenders" (2007) 25 Behav Sci Law 587.

Levine, Stephen B "What is Sexual Addiction?" (2010) 36 Journal of Sex & Marital Therapy 261.

Levy, Neil "Virtual Child Pornography: The Eroticization of Inequality" (2002) 4 Ethics and Information Technology 319.

Long, Matthew L, Alison, Laurence A and McManus, Michelle A "Child Pornography and Likelihood of Contact Abuse A Comparison Between Contact Child Sexual Offenders and Noncontact Offenders" (2013) 25 Sex Abuse 370.

Lucker-Babel, Marie-Francoise "The Right of the Child to Express Views and to Be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child" (1995) 3 Int'l J Child Rts 391.

Mains, Benjamin "Virtual Child Pornography, Pandering, and the First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence Have Affected the Criminalization of Child Pornography" (2010) 37 Hastings Constitutional Law Quarterly 809.

Marshall, William L "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Non Offenders" (1988) 25 The Journal of Sex Research 267.

Martin, Robert J "Pursuing Public Protection through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megans' Law" (1996) 6 BU Pub Int LJ 29.

McBride, Tim “NZ’s Privacy Act 1993 – Part 1” (1994) 2 Privacy Law & Policy Reporter 4.

Merdian, Hannah Lena and others “Assessing the Internal Structure of the COPINE Scale” (2011) 0 Psychology, Crime & Law 1.

Merdian, Hannah Lena and others “The Three Dimensions of Online Child Pornography Offending” (2013) 19 Journal of Sexual Aggression 121.

Middleton, David and others “An Investigation into the Applicability of the Ward and Siegert Pathways Model of Child Sexual Abuse with Internet Offenders” (2006) 12 Psychology, Crime & Law 589.

Mirkin, Harris “The Social, Political, and Legal Construction of the Concept of Child Pornography” (2009) 56 Journal of Homosexuality 233.

Mitchell, Kimberly J and others “Use of Social Networking Sites in Online Sex Crimes against Minors: An Examination of National Incidence and Means of Utilization” (2010) 47 J Adolesc Health 183.

Mitchell, Kimberly J, Finkelhor, David and Wolak, Janis “The Exposure Of Youth To Unwanted Sexual Material On The Internet A National Survey of Risk, Impact, and Prevention” (2003) 34 Youth Society 330.

Nagle, John Copeland “Moral Nuisances” (2001) 50 Emory L J 265.

Nunziato, Dawn “The Beginning of the End of Internet Freedom” (2014) 45 Georgetown Journal of International Law 383.

O’Hare, Ursula “Equality and Affirmative Action in International Human Rights Law and its Relevance to the European Union” (2000) 4 International Journal of Discrimination and the Law 3.

O’Reilly, Laurie “Look Back - Step Forward: Everyone an Advocate for Children” (1998) 2 New Zealand Family Law Journal 213.

Ost, Suzanne “Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society” (2002) 29 Journal of Law and Society 436.

Ost, Suzanne “Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?” (2010) 30 Legal Studies 230.

Paolucci, Elizabeth Oddone, Genuis, Mark L and Violato, Claudio "A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse" (2001) 135 *The Journal of Psychology* 17.

Potter, Roberto Hugh and Potter, Lyndy A "The Internet, Cyberporn, and Sexual Exploitation of Children: Media Moral Panics and Urban Myths for Middle-class Parents?" (2001) 5 *Sex Cult* 31.

Prichard, Jeremy and others "Young People, Child Pornography, and Subcultural Norms on the Internet" (2013) 64 *Journal of the American Society for Information Science and Technology* 992.

Prichard, Jeremy, Watters, Paul A and Spiranovic, Caroline "Internet Subcultures And Pathways To The Use Of Child Pornography" (2011) 27 *Computer Law & Security Review* 585.

Quayle, E and others "The Internet and Offending Behaviour: A Case Study" (2000) 6 *Journal of Sexual Aggression* 78.

Quayle, Ethel and Taylor, Max "Child Pornography and the Internet: Perpetuating a Cycle of Abuse" (2002) 23 *Deviant Behavior* 331.

Quayle, Ethel and Taylor, Max "Child Seduction and Self-Representation on the Internet" (2001) 4 *CyberPsychology & Behavior* 597.

Quayle, Ethel and Taylor, Max "Paedophiles, Pornography and the Internet - Assessment Issues" (2002) 32 *British Journal of Social Work* 863.

Report of the Government Administration Committee "Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and Related Issues" (2003) I Appendix to the Journals of the House of Representatives I.5A.

Report of the Government Administration Committee "Report on the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill" (2001) VIII Appendix to the Journals of the House of Representatives 565.

Riegel, David L "Effects on Boy-attracted Pedosexual Males of Viewing Boy Erotica" (2004) 33 *Arch Sex Behav* 321.

Rogers, Audrey "Child Pornography's Forgotten Victims" (2007) 28 *Pace L Rev* 847.

Ryder, Bruce "The Harms of Child Pornography Law" (2003) 36 *University of British Columbia Law Review* 101.

Santos Pais, Marta “The Protection of Children From Sexual Exploitation - Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography” (2010) 18 International Journal of Children’s Rights 551.

Santos Pais, Marta and Bissell, Susan “Overview and implementation of the UN Convention on the Rights of the Child” (2006) 367 The Lancet 689.

Schutter, Olivier De and others “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (2012) 34 Human Rights Quarterly 1084.

Sedler, Robert A “An Essay on Freedom of Speech: The United States versus the Rest of the World” (2006) 2006 Mich St L Rev 377.

Seto, Michael C and Eke, Angela W “The Criminal Histories and Later Offending of Child Pornography Offenders” (2005) 17 Sex Abuse 201.

Seto, Michael C and Lalumière, Martin L “What Is So Special About Male Adolescent Sexual Offending? A Review and Test of Explanations Through Meta-Analysis” (2010) 136 Psychological Bulletin 526.

Seto, Michael C, Cantor, James M and Blanchard, Ray “Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia” (2006) 115 J Abnorm Psychol 610.

Seto, Michael C, Maric, Alexandra and Barbaree, Howard E “The Role of Pornography in the Etiology of Sexual Aggression” (2001) 6 Aggression and Violent Behavior 35.

Seto, Michael C, Reeves, Lesley and Jung, Sandy “Explanations Given by Child Pornography Offenders for Their Crimes” (2010) 16 Journal of Sexual Aggression 169.

Seto, Michael C, Williams, Jennette and Eke, Angela W “Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study” (2001) 35 Law and Human Behavior 466.

Simon, Jonathan “Megan’s Law: Crime and Democracy in Late Modern America” (2000) 25 Law & Social Inquiry 1111.

Skorzewska-Amberg, Malgorzata “Pornography in Cyberspace - European Regulations” (2011) 5 Masaryk University Journal of Law and Technology 261.

Slaughter, Anne-Marie and Burke-White, William “The Future of International Law Is Domestic (or, The European Way of Law)” (2006) 47 Harvard International Law Journal 327.

Sloth-Nielsen, Julia “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” (1995) 11 S Afr J on Hum Rts 401.

Smith, Steven D “Is the Harm Principle Illiberal” (2006) 51 Am J Juris 1.

Soma, John T, Muther, Thomas F Jr and Brissette, Heidi ML “Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed” (1997) 34 Harv J on Legis 317.

Sommerlad, Hilary “Researching and Theorizing the Processes of Professional Identity Formation” (2007) 34 Journal of Law and Society 190.

Stewart, Hamish “Harms, Wrongs, and Set-Backs in Feinberg’s Moral Limits of the Criminal Law” (2001) 5 Buff Crim L Rev 47.

Taylor, Max, Holland, Gemma and Quayle, Ethel “Typology of Paedophile Picture Collections” (2001) 74 Police J 97.

Temple, Jeff R and Choi, HyeJeong “Longitudinal Association between Teen Sexting and Sexual Behavior” [2014] Pediatrics peds.2014.

Vanzile-Tamsen, Carol, Testa, Maria and Livingston, Jennifer A “The Impact of Sexual Assault History and Relationship Context on Appraisal of and Responses to Acquaintance Sexual Assault Risk” (2005) 20 J Interpers Violence 813.

Webb, L, Craissati, J and Keen, S “Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters” (2007) 19 Sex Abuse 449.

Weiser, Philip J “Internet Governance, Standard Setting, and Self-Regulation” (2001) 28 N Ky L Rev 822.

Weissbrodt, David, Hansen, Joseph C and Nesbitt, Nathaniel H “The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law” (2001) 24 Harvard Human Rights Journal 115.

Weitzer, Ronald “The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade” (2007) 35 Politics Society 447.

Wilson, David “Censorship in New Zealand: The Policy Challenges of New Technology” (2002) 19 Soc Policy J N Z 1.

Wilson, David “Responding to the Challenges: Recent Developments in Censorship Policy in New Zealand - Ministry of Social Development” [2007] 30 Social Policy Journal of New Zealand 65.

Wolak, Janis and others “Online ‘Predators’ and Their Victims Myths, Realities, and Implications for Prevention and Treatment” (2008) 63 American Psychologist 111.

Wolak, Janis, Mitchell, Kimberly and Finkelhor, David “Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users” (2007) 119 Pediatrics 247.

Young, Kimberly S “Internet Addiction a New Clinical Phenomenon and its Consequences” (2004) 48 American Behavioral Scientist 402.

Young, Kimberly S “Internet Sex Addiction: Risk Factors, Stages of Development, and Treatment” (2008) 52 American Behavioral Scientist 21.

1.51.5 Magazine Articles

Serrill, Michael S “Defiling the Children” [2001] Time Magazine World.

1.51.6 Reports

Abdul Aziz, Zarizana and Moussa, Janine The Due Diligence Principle and the Role of the State – Discrimination against Women in Family and Cultural Life (2015).

Allen, Ernie Statement of Ernie Allen President and CEO National Centre for Missing and Exploited Children (2009).

Anderson, Jeff Child Pornography Initiative Masha’s Law (2010).

Astrom, Per-Erik Beyond all Tolerance (2004).

Australian Communications and Media Authority Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety (2008).

Boyd, Danah Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life (2007–16 2007).

Burns, Arnold I Remarks of Arnold I Burns Before the Florida Law Enforcement Committee on Obscenity, Organized Crime and Child Pornography (NCJ 109133 1987).

Butterfield, Liz NetSafe: The New Zealand Model for Internet (ICT) Safety Education (2002).

Calcetas-Santos, Ofelia Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography (E/CN.4/1997/95 1997).

Calcetas-Santos, Ofelia Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography (A/50/456 1995).

Calcetas-Santos, Ofelia Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography (A/51/456 1996).

Calcetas-Santos, Ofelia Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography (A/52/482 1997).

Carr, Angela Internet Traders of Child Pornography and Other Censorship Offenders in New Zealand (2004).

Carr, John Child Abuse, Child Pornography and the Internet (2004).

Carr, John Child Pornography (2008).

Carter, Ross Films, Videos, and Publications Classification Amendment Bill (PCO 5406/13 2003).

Cassell, Justine and Cramer, Meg High Tech or High Risk: Moral Panics about Girls Online (2008).

Cellentano, Leslie Z and others Computer Crime A Joint Report (2000).

Christoffel, Paul Censored - A Short History of Censorship in New Zealand (12 1989).

Committee on the Rights of the Child General Comment No 16 on State Obligations Regarding the Impact of Business on Children's Rights (CRC/C/GC/16 2013).

Committee on the Rights of the Child The Right of the Child to Freedom From All Forms of Violence (13 2011).

Cooman, Fons Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013).

Corley, Deborah M Cybersex Addiction as Lethal as Crack Cocaine (2002).

Court of Justice of the European Union The Court of Justice Declares the Data Retention Directive to be Invalid (54/14 2014).

Coutin, Susan Bibler Qualitative Research in Law and Social Sciences (2012).

Department of Corrections Keeping Communities Safe (2014).

Department of Justice Report on the Films, Videos, and Publications Classification Bill to the Internal Affairs and Local Government Committee (1993).

Division of Criminal Justice A Citizen's Guide to Megan's Law Brochure (2007).

Education Review Office Hill Top School Private School Education Review (2004).

ETO Consortium Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013).

Europol High Tech Crimes within the EU: Old Crimes New Tools Threat Assessment 2007 (247781 2007).

Fenrich, Jeanmarie and Contesse, Jorge "It's Not OK' :New Zealand's Efforts to Eliminate Violence Against Women (2008).

Fisher, Nikki Local Government: Respecting the Rights of Our Children (2010).

Goff, Phil Films, Videos, and Publications Classification Amendment Bill (Occasional Paper 92–2, 2005).

Goldscheid, Julie and Liebowitz, Debra Due Diligence and State Responsibility to Eliminate Violence Against Women (2014).

Government Administration Committee Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993 and Related Issues (2001).

Government Administration Select Committee Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993 and Related Issues (2001).

Hodgkin, Rachel and Newell, Peter Implementation Handbook for the Convention on the Rights of the Child (2007).

Hope, John Internet Safety: Issues for New Zealand Primary Schools (2003).

House of Representatives Government Response to Government Administration Committee Report on Its Inquiry into The Operation of the Films, Videos, And Publications Classification Act 1993 and Related Issues (2003).

Human Rights Watch No Easy Answers Sex Offender Laws in the US (19, No. 4(G) 2007).

Internal Affairs and Local Government Select Committee Films, Videos, And Publications Classification Bill Report of The Department of Justice (Official Information Act 1982 Release 1993).

International Centre for Missing and Exploited Children Child Pornography - Model Legislation and Global Review (2013).

International Conference on Combating Child Pornography on the Internet
International Conference on Combating Child Pornography on the Internet -
Conclusions and Recommendations (1999).

Jack, Andrew R, Office of Film and Literature Classification Annual Report of the Office of Film and Literature Classification 2012 (2012).

Kemshall, Hazel and others Child Sex Offender Review (CSOR) Public Disclosure Pilots: a Process Evaluation - 2nd Edition (32 2010).

Kim, Candice From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children (2004).

Krone, Tony International Police Operations Against Online Child Pornography (2005).

Lanning, Kenneth V A Behavioral Analysis For Professionals Investigating the Sexual Exploitation of Children (2010).

Law Commission Protecting Personal Information from Disclosure (2002).

Lynn, Roberta and Sinclair, Daniel Sugar Internet Based Sexual Exploitation of Children and Youth Environmental Scan (2005).

Manch, Keith and Wilson, David Objectionable Material on the Internet: Developments in Enforcement (2003).

McPherson, Lori Practitioner's Guide to the Adam Walsh Act (2007).

McSoriley, John Films, Videos, and Publications Classification Amendment Bill 2003 - Bills Digest No 1054 (2003).

Middleton, David The Requirement for Notification by Sexual Offenders in England and Wales (Known as the "Sex Offender Register") (72 2014).

Ministry of Justice Protecting Our Innocence - New Zealand's National Plan of Action Against the Commercial Sexual Exploitation of Children (2002).

Ministry of Justice Te Toiora Mata Tauherenge (2009).

Muntarbhorn, Vitit Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography (E/CN.4/1991/51 1991).

Muntarbhorn, Vitit Special Rapporteur Report of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography (E/CN.4/1994/84 1994).

Netsafe Digital Citizenship in New Zealand Schools; Overview (2013).

New Zealand Government Initial Report on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2014).

New Zealand Police New Zealand Police -Illicit Drug Strategy to 2010 (2009).

O'Connell, Rachel Untangling the Complexities of Combating Paedophile Activities in Cyberspace (1999).

Office of Film and Literature Classification, Colmar Brunton's Social Research Agency Understanding the Classification System New Zealanders' Views (2011).

Office of the Federal Ombudsman for Victims of Crime Internet-Facilitated Child Sexual Abuse in Canada (2007).

Oliveira, Jorge Menezes Harm and Offence in Mill's Conception of Liberty (2012).

Raymond Choo, Kim-Kwang Online Child Grooming: A Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences (103 2009).

Reporters without Borders Internet Enemies (2009).

Rue, Frank La Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (A/HRC/17/27 2001).

Sentencing Advisory Panel Offences Involving Child Pornography (2002).

Sentencing Council Sexual Offences - Definitive Guidelines (2014).

Shelley, Louise Transnational Crime The Case of Russian Organised Crime and the Role of International Cooperation in Law Enforcement (2002).

Snyder, Howard and Sickmund, Melissa Juvenile Offenders and Victims: 2006 National Report (2006).

Stanley, Janet Child Abuse and the Internet (15 2001).

Stephen Conroy Child Abuse Material Blocked Online, Removing Need for Legislation (2012).

Stephen Conroy Labor's Plan For Cyber Safety (2007).

Stephen Conroy Minister Welcomes Advances in Internet Filtering Technology (2008).

Strategic Police Matters Unit Improving Law Enforcement's Response to Combat Sexual Exploitation of Children on the Internet (2007).

Taylor, Max, Quayle, Ethel and Holland, Gemma Child Pornography, the Internet and Offending (2001).

Thames Valley Police Keeping Children Safe - Your Right to Ask (2010).

The Department of Internal Affairs The Digital Child Exploitation Filtering System (Official Information Act 1982 Release 2012).

UNICEF A Summary of the United Nations Convention on the Rights of the Child (2015).

UNICEF Fact Sheet: A Summary of the Rights Under the Convention on the Rights of the Child (2015).

UNICEF Innocenti Research Centre Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2009).

UNICEF Innocenti Research Centre The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child Prostitution and Child Pornography and the Jurisprudence of the Committee on the Rights of the Child (03 2009).

United Nations High Commissioner for Human Rights Need to Adopt Effective International Measures for the Prevention and Eradication of the Sale of Children, Child Prostitution and Child Pornography (1994/90 1994).

United Nations The Due Diligence Standard as a Tool for the Elimination of Violence Against Women (E/CN.4/2006/61 2006).

United States General Accounting Office Child Pornography is Readily Accessible Over Peer-to-Peer Networks (GAO-03-537T).

US Department of Justice The National Strategy for Child Exploitation Prevention and Interaction (2010).

West Yorkshire Police Child Sex Offenders Disclosure Scheme - Sarah's Law (43 2014).

Wolak, Janis, Mitchell, Kimberly and Finkelhor, David Internet Sex Crimes Against Minors: The Response of Law Enforcement (2003).

World Conference on Human Rights Vienna Declaration and Plan of Action (A/CONF.157/23 1993).

World Congress Declaration and Agenda for Action - 1st World Congress against Commercial Sexual Exploitation of Children (1996).

Wortley, Richard and Smallbone, Stephen Child Pornography on the Internet (41 2006).

Zgoba, Kristen and others Megan's Law: Assessing the Practical and Monetary Efficacy (225370 2008).

1.52 Internet Resources

1.52.1 Media Reports

“Porn On The Brain - Channel 4 documentary” (2 October 2013)
<http://www.youtube.com/watch?v=VOMtXa3vScY&feature=youtube_gdata_player>.

3News “Child Porn Trading Frequent in NZ” 3news.co.nz (17 February 2011)
<<http://www.3news.co.nz/nznews/child-porn-trading-frequent-in-nz-2011021717>>.

3News “Child Sex Offenders Face Legal Crackdown” 3news.co.nz (27 May 2013)
<<http://www.3news.co.nz/politics/child-sex-offenders-face-legal-crackdown-2013052716>>.

3News “Judge Horrified by Child Pornography” 3news.co.nz (26 March 2010)
<<http://www.3news.co.nz/Judge-horrified-by-child-pornography/tabid/423/articleID/148303/Default.aspx>>.

AdelaideNow “Police Fear Child Porn Epidemic in Australia” AdelaideNow (Australia, 8 February 2012) <<http://www.adelaidenow.com.au/child-porn-epidemic-in-australia/story-e6freol3-1226265498601>>.

Audrey Gillian “Race to Save New Victims of Child Porn” The Guardian (4 November 2003)
<<http://www.guardian.co.uk/society/2003/nov/04/childrensservices.childprotection>>.

Backhouse, Matthew “Cabinet Signs off First Sex Offenders Register” New Zealand Herald (4 August 2014)
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11303639>.

Backhouse, Matthew “NZ Helps Bring Down Child Porn Ring” New Zealand Herald (22 May 2012)
<http://www.nzherald.co.nz/indonesia/news/article.cfm?l_id=50&objectid=10807635>.

BBC “BT Default ‘Porn Filter’ Switched on” BBC (16 December 2013)
<<http://www.bbc.co.uk/news/technology-25400009>>.

BBC “Industry Vows Fight on Child Porn” BBC (UK, 28 June 2006)
<<http://news.bbc.co.uk/2/hi/technology/5123936.stm>>.

BBC “Q&A: UK Filters on Legal Pornography” BBC (22 July 2013)
<<http://www.bbc.co.uk/news/technology-23403068>>.

BBC “Sky Bocks Pornography ‘by Default’” BBC (20 January 2015)
<<http://www.bbc.co.uk/news/technology-30896813>>.

Bennett, Adam “Key Not Sure if US Spy Agency Has Role Here” New Zealand Herald (18 September 2014)
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11326648>.

Booth, Robert “EU Fights Huge Increase in Web Child Abuse” The Guardian (4 March 2009) <<http://www.guardian.co.uk/society/2009/mar/04/child-sex-abuse-websites-increase>>.

Bright, Martin and Editor, Home Affairs “BT puts Block on Child Porn Sites” The Guardian (2004)
<<http://www.theguardian.com/technology/2004/jun/06/childrensservices.childprotection>>.

Brockman, Joshua “Child Sex as Internet Fare, Through Eyes of a Victim” The New York Times (5 April 2006)
<<http://www.nytimes.com/2006/04/05/washington/05porn.html>>.

Chalabi, Mona “Porn Filters - 12 Reasons Why They Won’t Work (and 3 Reasons Why They Might)” The Guardian (8 August 2012)
<<http://www.theguardian.com/politics/reality-check/2013/aug/08/porn-filters-evidence-for-against>>.

Chapman, Paul “Australia Plans Chinese-style Internet Filtering” The Telegraph (2009) <<http://www.telegraph.co.uk/technology/news/6818010/Australia-plans-Chinese-style-internet-filtering.html>>.

Cheng, Adam Bennett, Rebecca Quilliam, Derek “US Spies have two Bases in New Zealand: Snowden” New Zealand Herald (16 September 2014)
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11325214>.

Clabur, Thomas “Study: Child Porn Isn’t Illegal In Most Countries” InformationWeek (U.S.A., April 2006)
<http://www.canadiancsrc.com/Newspaper_Articles/InformationWeek_Study_Child_Porn_Isnt_Illegal_Most_Countries_06APR06.aspx>.

Cooper, Charlie “David Cameron’s Plan for Internet-Porn Filters ‘Risks Hurting LGBT Community’” The Independent (21 August 2013)
<<http://www.independent.co.uk/news/uk/politics/david-camersons-plan-for-internetporn-filters-risks-hurting-lgbt-community-8778956.html>>.

DW “Top Cop: New Laws Needed to Fight Organized Crime, Child Porn” DW (2008) <<http://www.dw.de/dw/article/0,,3598040,00.html>>.

Ensor, Blair "Frustration at Repeated Sexual Predator Warnings" Stuff.co.nz (1 December 2011) <<http://www.stuff.co.nz/dominion-post/news/6065187/Frustration-at-repeated-sexual-predator-warnings>>.

Garside, Juliette "Internet Filters Blocking one in five Most-Popular Websites" The Guardian (2 July 2014) <<http://www.theguardian.com/technology/2014/jul/02/internet-filters-blocking-popular-websites-guido-jezebel>>.

Gay, Edward "Legal Threat over Paedophile Database" New Zealand Herald (25 June 2007) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10447763>.

Greenwald, Glenn, MacAskill, Ewen and Poitras, Laura "Edward Snowden: the Whistleblower Behind the NSA Surveillance Revelations" The Guardian (10 June 2013) <<http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>>.

Ihaka, James "Sharp Cop Spots NZ Link in Italian Child-Porn Case" New Zealand Herald (7 July 2012) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10817981>.

Kitchin, Phil "Sensible Sentencing Trust Abandons Name Suppression Appeal" Stuff.co.nz (New Zealand, 5 August 2014) <<http://www.stuff.co.nz/national/crime/10350377/Sensible-Sentencing-Trust-abandons-name-suppression-appeal>>.

Leaman, Aaron "Te Awamutu Man Sentenced for Role in Global Child Pornography Ring" Stuff.co.nz (26 April 2013) <<http://www.stuff.co.nz/waikato-times/news/8600745/Te-Awamutu-man-sentenced-for-role-in-global-child-pornography-ring>>.

Manning, Brenden "Spy Caims: Cunliffe checks with former Labour Leaders" New Zealand Herald (17 September 2014) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11326495>.

Morton, Jamie "Child Porn Offender wants Name Suppression" New Zealand Herald (26 January 2012) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10781234>.

New Zealand Herald "Secret Locations for Paroled Sex Offenders 'Big Trouble'" New Zealand Herald (28 December 2005) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10361645>.

New Zealand Herald "Sex Offender Website Defiant" New Zealand Herald (27 June 2007)

<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10448081>.

New Zealand Herald “Teens Top Viewers of Child Porn” New Zealand Herald (New Zealand, 14 January 2005) <http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=10006544>.

O’Callaghan, Jody “‘Sexting’ Growing Issue for Kiwi Teens” Stuff.co.nz (5 July 2012) <<http://www.stuff.co.nz/life-style/parenting/big-kids/tweens-to-teens/behaviour/7225686/Sexting-growing-issue-for-Kiwi-teens>>.

OneNews “Concerns over Kiwi Teens ‘Sexting’” TVNZ (28 December 2009) <<http://tvnz.co.nz/technology-news/concerns-over-kiwi-teens-sexting-3319447>>.

OneNews “Work Begins on Child Sex Offenders Register” TVNZ (14 August 2014) <<http://tvnz.co.nz/national-news/work-begins-child-sex-offenders-register-6057147>>.

Otago Daily Times “To Catch a Corrupt File” Otago Daily Times Online News (8 May 2010) <<http://www.odt.co.nz/lifestyle/magazine/104959/to-catch-a-corrupt-file?page=0%2C0>>.

Press Association “Details of 700 Paedophiles Disclosed Since Sarah’s Law launched” The Guardian (23 December 2013) <<http://www.theguardian.com/society/2013/dec/23/paedophiles-sarahs-law-disclosure-figures>>.

Robbins, Martin “Cameron’s Internet Filter goes far Beyond Porn - and that was Always the Plan” NewStatesman (23 December 2013) <<http://www.newstatesman.com/politics/2013/12/camerons-internet-filter-goes-far-beyond-porn-and-was-always-plan>>.

Sabin, Brook “Search for Child Pornography Becoming ‘Normalised’” 3news.co.nz (13 November 2011) <<http://www.3news.co.nz/Search-for-child-pornography-becoming-normalised/tabid/423/articleID/232604/Default.aspx#.UpZuYjc3V8E>>.

Sears, Neil “‘What I did was Insane’: The Who’s Pete Townshend Breaks Nine Year Silence on Child Pornography Scandal” Mail Online (28 September 2012) <<http://www.dailymail.co.uk/news/article-2209821/The-Whos-Pete-Townshend-breaks-year-silence-child-pornography-scandal.html>>.

Tapaleao, Vaimoana “Paedophile Ring Bust Nets NZ Offenders” New Zealand Herald (18 March 2011) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10713172>.

The Telegraph “Australia Scraps Plan to ‘Filter’ Internet” The Telegraph (2012) <<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/9665983/Australia-scraps-plan-to-filter-internet.html>>.

Timberg, Craig “Newest Androids will Join iPhones in Offering Default Encryption, Blocking Police” Washington Post (18 September 2014) <<http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/18/newest-androids-will-join-iphones-in-offering-default-encryption-blocking-police/>>.

Timberg, Craig and Miller, Greg “FBI blasts Apple, Google for Locking Police out of Phones” Washington Post (25 September 2014) <http://www.washingtonpost.com/business/technology/2014/09/25/68c4e08e-4344-11e4-9a15-137aa0153527_story.html>.

Timm, Trevor “Your iPhone is now Encrypted. The FBI says it’ll help Kidnappers. Who do you Believe?” The Guardian (30 September 2014) <<http://www.theguardian.com/commentisfree/2014/sep/30/iphone-6-encrypted-phone-data-default>>.

TVNZ “NZ Included in International Child Porn Ring” TVNZ (New Zealand, 15 December 2010) <<http://tvnz.co.nz/world-news/nz-included-in-international-child-porn-ring-3974291>>.

TVNZ Close Up “Stronger Powers to Catch Online Paedophiles” (New Zealand, 12 January 2012) <<http://tvnz.co.nz/national-news/police-investigate-men-in-online-sex-grooming-sting-4699087/video?vid=4699300>>.

Vance, Andrea “Sarah’s Law Name and Shame Sex Register Rejected” Stuff.co.nz (New Zealand, 3 August 2010) <<http://www.stuff.co.nz/national/politics/3985100/Sarabs-Law-name-and-shame-sex-register-rejected>>.

Vance, Andrea “Sex Offender Registry to Open” Stuff.co.nz (New Zealand, 6 March 2014) <<http://www.stuff.co.nz/national/9798751/Sex-offender-registry-to-open>>.

Ward, Mark “UK Government Tackles Wrongly-Blocked Sites” BBC (31 January 2014) <<http://www.bbc.co.uk/news/technology-25962555>>.

1.52.2 Websites and Blog Post

3News “Search 3News Child Pornography” (6 December 2013) 3News
<<http://www.3news.co.nz/3SearchResults.aspx?q=child%20pornography&ie=UTF-8&cof=FORID%3A10&cx=partner-pub-0784612283000026:7425741258>>.

Adams, Amy “Australia and New Zealand sign MoU for Criminal History Checks”
(28 February 2015) beehive.govt.nz
<<https://www.beehive.govt.nz/release/australia-and-new-zealand-sign-mou-criminal-history-checks>>.

ALERT - Alberta Law Enforcement Response Teams “Edmonton Man Arrested in Child Sex Abuse Case” (6 November 2014) ALERT - Alberta Law Enforcement Response Teams
<<http://www.alert-ab.ca/newsreleases/78-news-releases/2014/360-edmonton-man-arrested-in-child-sex-abuse-case>>.

Anne Tolly “Minister Announces Child Protection Offender Register” (14 August 2014) beehive.govt.nz - The Official Website of the New Zealand Government
<<http://www.beehive.govt.nz/release/minister-announces-child-protection-offender-register>>.

APC “Hockey Slams ‘Unworkable’ Internet Filter” (12 March 2012) APC
<<http://apcmag.com/hockey-slams-unworkable-internet-filter.htm/>>.

Apple “Apple - iPhone 6” (17 October 2014) Apple
<<https://www.apple.com/nz/iphone-6/>>.

Apple “Apple - Privacy - Government Information Requests” (18 October 2014) Apple
<<https://www.apple.com/privacy/government-information-requests/>>.

Apple “Apple - Privacy - Privacy Built In” (17 October 2014) Apple
<<https://www.apple.com/privacy/privacy-built-in/>>.

Australian Federal Police “Child Protection Operations” (1 October 2014)
<<http://www.afp.gov.au/policing/child-protection-operations.aspx>>.

Australian Federal Police “Online Child Exploitation” (30 September 2014)
<<http://www.afp.gov.au/en/policing/child-protection-operations/online-exploitation.aspx>>.

Barrett, Devlin “FBI Chief Warns Against Phone Encryption” (16 October 2014)
The Wall Street Journal <<http://online.wsj.com/articles/fbi-chief-warns-phone-encryption-may-have-gone-too-far-1413489352>>.

Brennan, Davinia “President Signs Communications (Retention of Data) Act 2011
into Law” (11 February 2011)
<<http://www.irelandip.com/2011/02/articles/privacy-1/president-signs-communications-retention-of-data-act-2011-into-law/>>.

Briggs, Michael “Android L Update To Encrypt Data By Default, Says Google :
Tech : Design & Trend” (21 September 2014)
<<http://www.designntrend.com/articles/19845/20140919/android-l-update-encrypt-data-default-google.htm>>.

Caproni, Valerie “Going Dark: Lawful Electronic Surveillance in the Face of New
Technologies” (20 October 2014) FBI <<http://www.fbi.gov/news/testimony/going-dark-lawful-electronic-surveillance-in-the-face-of-new-technologies>>.

Comey, James “Going Dark: Are Technology, Privacy, and Public Safety on a
Collision Course?” (16 October 2014) FBI
<<http://www.fbi.gov/news/speeches/going-dark-are-technology-privacy-and-public-safety-on-a-collision-course>>.

Community Law: Free legal help throughout Aotearoa “Codes of Practice”
Community Law: Free legal help throughout Aotearoa
<<http://www.communitylaw.org.nz/community-law-manual/chapter-6-privacy/codes-of-practice/>>.

Courts of New Zealand “Sentencing” (2 November 2014) Courts of New Zealand
<<https://www.courtsofnz.govt.nz/about/system/role/sentencing>>.

Crown Law Office “Assistance for Foreign Authorities - Forms of Assistance” (8 October 2014) Crown Law Office
<<http://www.crownlaw.govt.nz/pagepub/docs/afa/formsofassistance.asp?print>>.

Crown Law Office “Assistance for Foreign Authorities - Making Requests” (8 September 2013) Crown Law Office
<<http://www.crownlaw.govt.nz/pagepub/docs/afa/makingrequests.asp?print>>.

Crown Law Office “Assistance for Foreign Authorities - Mutual Assistance” (8 October 2014) Crown Law Office
<<http://www.crownlaw.govt.nz/pagepub/docs/afa/mutualassistance.asp?print>>.

Crown Law Office “Assistance for Foreign Authorities - Other Country Relationships” (8 October 2014) Crown Law Office
<<http://www.crownlaw.govt.nz/pagepub/docs/afa/othercountryrelationships.asp?print>>.

Crown Law Office “Assistance for Foreign Authorities - Police-to-Police Assistance” (8 October 2014) Crown Law Office
<<http://www.crownlaw.govt.nz/pagepub/docs/afa/policetopoliceassistance.asp?print>>.

Cullen, Michael “NZ signs Mutual Legal Assistance Treaty with China” The Official Website of the New Zealand Government
<<http://beehive.govt.nz/release/nz-signs-mutual-legal-assistance-treaty-china>>.

Department of Corrections “Introduction to Notification for CSO’s” (7 March 2012) <<http://www.corrections.govt.nz/policy-and-legislation/cpps-operations-manual/volume-4/part-1---management-of-risk/chapter-14---notifying-specified-individuals-about-child-sex-offenders/introduction-to-notification-for-csos.html>>.

Department of Corrections “Legal Considerations” (7 March 2012) <<http://www.corrections.govt.nz/policy-and-legislation/cpps-operations-manual/volume-4/part-1---management-of-risk/chapter-14---notifying-specified-individuals-about-child-sex-offenders/legal-considerations.html>>.

Department of Corrections “Notifying Affected Neighbours and Other Individuals” (7 March 2012) <<http://www.corrections.govt.nz/policy-and-legislation/cpps-operations-manual/volume-4/part-1---management-of-risk/chapter-14---notifying-specified-individuals-about-child-sex-offenders/notifying-affected-neighbours-and-other-individuals.html>>.

Department of Corrections “Planning Notification” (7 March 2012) <<http://www.corrections.govt.nz/policy-and-legislation/cpps-operations-manual/volume-4/part-1---management-of-risk/chapter-14---notifying-specified-individuals-about-child-sex-offenders/planning-notification.html>>.

Department of Corrections “The Kia Marama Sex Offender Treatment Programme” (11 November 2014) Department of Corrections <<http://www.corrections.govt.nz/resources/the-effectiveness-of-correctional-treatment/2-kia-marama-sex-offender-treatment-programme.html>>.

Department of Corrections “The Te Piriti Sex Offender Treatment Programme” (11 November 2014) Department of Corrections <<http://www.corrections.govt.nz/resources/the-effectiveness-of-correctional-treatment/5-the-te-piriti-sex-offender-treatment-programme.html>>.

ECPAT Child Alert “Digital Filtering of Child Exploitation” (27 June 2014) <<http://www.ecpat.org.nz/Projects/Internet-Digital-Filtering.aspx>>.

FBI “The FBI’s Legal Attaché Program” (4 October 2014) FBI <<http://www.fbi.gov/news/testimony/the-fbi2019s-legal-attache-program>>.

Federal Bureau of Investigation “FBI — Sex Offender Registry” (2 September 2014) <<http://www.fbi.gov/scams-safety/registry>>.

Government of Canada, Royal Canadian Mounted Police “Internet Based Sexual Exploitation of Children and Youth Environmental Scan” (17 November 2008) <<http://www.rcmp-grc.gc.ca/ncecc-cncee/factsheets-fichesdocu/enviroscan-analyseenviro-eng.htm>>.

Harmon, Bill “Microsoft PhotoDNA Technology to Help Law Enforcement Fight Child Pornography” (19 March 2012) Microsoft on the Issues <<http://blogs.microsoft.com/on-the-issues/2012/03/19/microsoft-photodna-technology-to-help-law-enforcement-fight-child-pornography/>>.

Healy, Margaret A “Child Pornography: An International Perspective” (2 August 2004) Computer Crime Research Center <<http://www.crime-research.org/articles/536>>.

Home Office “Greater Protection for Children as Sex Offender Disclosure Scheme goes National” (27 March 2011) <<https://www.gov.uk/government/news/greater-protection-for-children-as-sex-offender-disclosure-scheme-goes-national>>.

Human Rights Commission “Human Rights in New Zealand Today: Chapter 8 The Right to Freedom of Opinion and Expression” (2013) <<http://www.hrc.co.nz/report/chapters/chapter08/expression01.html>>.

Human Rights Watch “U.S. Sex Offender Laws May Do More Harm Than Good” (12 September 2007) <<http://www.hrw.org/news/2007/09/11/us-sex-offender-laws-may-do-more-harm-good>>.

Humberside Police “Child Sex Offender’s Disclosure Scheme: Sarah’s Law” (19 September 2014) <<http://www.humberside.police.uk/advice-and-information/child-sex-offenders-disclosure-scheme-sarahs-law>>.

ICUK “ICUK.net” (19 March 2015) ICUK.net <<https://www.icuk.net/>>.

Internet Watch Foundation “Microsoft and NetClean Provide PhotoDNA Technology to Help Law Enforcement Fight Online Child Sexual Exploitation” (19 March 2012) <<https://www.iwf.org.uk/about-iwf/news/post/320-microsoft-and-netclean-provide-photodna-technology-to-help-law-enforcement-fight-online-child-sexual-exploitation>>.

Interpol “Victim Identification” (5 November 2014) Interpol <<http://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification>>.

Interpol “Vision and Mission” (10 October 2014) Interpol <<http://www.interpol.int/About-INTERPOL/Vision-and-mission>>.

Kobie, Nicole “Smaller ISPs Refuse Cameron’s Calls for Porn Filters” (22 July 2013) PC Pro <<http://www.pcpro.co.uk/news/broadband/383176/smaller-isps-refuse-camerons-calls-for-porn-filters>>.

LawAccess “Codes of Practice for Particular Areas of Life” (16 October 2014) LawAccess <<http://www.lawaccess.govt.nz/Chapter/110-Mental-Health/46-Privacy/9-Codes-of-Practice>>.

Los Angeles County Sheriff’s Department “‘Lost Boy’ Internet Child Ring Dismantled” (2012) Los Angeles County Sheriff’s Department <http://sheriff.lacounty.gov/wps/portal/lasd!/ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hLAWMDd3-nYCN3M19LA0_nEDPvMJMAQ39jA_2CbEdFAFVdgp4!/?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/lasd+content/lasd+site/home/home+top+stories/lost_boys_ring_busted>.

McCarthy, John “Sex Offenders & the Net - Questions & Answers” (2013) Netsafe <http://www.netsafe.org.nz/archive/offenders/sex_offenders_the_net_questions_and_answers.html>.

Microsoft “PhotoDNA Newsroom” (17 October 2014) News Center
<<http://news.microsoft.com/presskits/photodna/>>.

Ministry of Education “Digital Citizenship and Cyber-safety in Schools” (24 September 2014) <<http://elearning.tki.org.nz/Teaching/Digital-citizenship>>.

Ministry of Education “Issue No 7 2014 May 19 - Ministry Bulletin for School Leaders” (23 September 2014)
<<http://www.minedu.govt.nz/NZEducation/MinistryBulletinSchoolLeaders/Issue7.aspx#Safe>>.

Ministry of Education “Ministry of Education - Search Results - Internet Safety” (23 September 2014)
<http://search.minedu.govt.nz/search?q=internet+safety&spell=1&access=p&getfields=NZGLS%252Edescription&output=xml_no_dtd&ie=UTF-8&client=minedu_frontend&site=minedu&proxystylesheet=minedu_frontend&sourcehostname=www.minedu.govt.nz>.

Ministry of Education “National Education Guidelines” (23 September 2014)
<<http://www.minedu.govt.nz/Boards/LegalObligations/NationalEducationGuidelines.aspx>>.

Ministry of Education “Safe and Secure Internet Use” (23 September 2014)
<<http://www.minedu.govt.nz/NZEducation/MinistryBulletinSchoolLeaders/Issue7/SafeInternetUse.aspx>>.

Ministry of Education “The National Curriculum” (22 September 2014)
<<http://www.minedu.govt.nz/Parents/AllAges/EducationInNZ/TheNationalCurriculum.aspx>>.

Ministry of Education “The National Education Guidelines (NEGs)” (22 September 2014)
<<http://www.minedu.govt.nz/theMinistry/EducationInNewZealand/EducationLegislation/TheNationalEducationGuidelinesNEGs.aspx>>.

Ministry of Education “The New Zealand Curriculum: Purpose and Scope” (22 September 2014) <<http://nzcurriculum.tki.org.nz/The-New-Zealand-Curriculum/Purpose-and-scope>>.

Ministry of Justice “Child Pornography” (2002) Ministry of Justice <<http://www.justice.govt.nz/publications/publications-archived/2002/protecting-our-innocence/child-pornography>>.

Ministry of Justice “Film and Literature Classification, Office of” (28 June 2015) <<http://www.justice.govt.nz/publications/global-publications/d/directory-of-official-information-archive/directory-of-official-information-december-2011/alphabetical-list-of-entries-1/f/film-and-literature-classification-office-of>>.

Ministry of Justice “International Covenant on Civil and Political Rights” (6 July 2014) Ministry of Justice <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/international-covenant-on-civil-and-political-rights>>.

Ministry of Justice “Introduction to the Care of Children Act — Ministry of Justice, New Zealand” (28 June 2015) justice.govt.nz <<http://www.justice.govt.nz/courts/family-court/what-family-court-does/care-of-children/introduction>>.

Ministry of Justice “United Nations Convention on the Rights of the Child” (4 March 2014) <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/united-nations-convention-on-the-rights-of-the-child>>.

Ministry of Justice, New Zealand “Status Quo” (23 April 2015) <<http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-addressing-child-pornography-and-related-offending/status-quo>>.

Ministry of Social Development “Optional Protocols to UNCROC - Ministry of Social Development” (20 May 2015) Ministry of Social Development <<https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/monitoring/uncroc/optional-protocols.html#OptionalProtocolontheSaleofChildrenChildProstitutionandChildPornography2>>.

NetClean Technologies “Microsoft and NetClean provide PhotoDNA Technology to Help Law Enforcement Fight Online Child Sexual Exploitation” (19 March 2012) NetClean Technologies <<https://www.netclean.com/en/press/microsoft-and-netclean-provide-photodna-technology-to-help-law-enforcement-fight-online-child-sexual-exploitation/>>.

NetClean Technologies “NetClean Analyze” (19 October 2014) <<https://www.netclean.com/en/analyze/investigations/overview/>>.

NetClean Technologies “NetClean WhiteBox” (3 July 2014) <<https://www.netclean.com/en/whitebox/for-isp/overview/>>.

Netsafe “Confronting the Reality of Child Pornography” (2012) Netsafe <http://www.netsafe.org.nz/keeping_safe.php?sectionID=Library&titleID=Confronting%20the%20Reality%20of%20Child%20Pornography&pageID=182&menuID=182>.

Netsafe “The Internet Safety Group and the NetSafe Kit for Schools” (24 September 2014) <<http://www.cybersafety.org.nz/kit/welcome/netsafe.html>>.

Netsafe “The Internet Safety Group ISG” (24 September 2014) <http://www.netsafe.org.nz/archive/aboutisg/aboutisg_default.html>.

Netsafe “The Netsafe Kit for Schools - How to use the Kit” (24 September 2014) <<http://www.netsafe.org.nz/the-kit/how-to-use-the-kit>>.

Netsafe “The Netsafe Kit for Schools - Policy and Use Agreements” (24 September 2014) <<http://www.netsafe.org.nz/the-kit/policy-and-use-agreements>>.

Netsafe “The NetSafe Kit for Schools” (24 September 2014) <<http://www.netsafe.org.nz/the-netsafe-kit-for-schools/>>.

Netsafe “The Netsafe Kit for Schools” (25 September 2012) <<http://www.netsafe.org.nz/the-kit/>>.

New Zealand Customs Service “New Zealand Customs Service” (19 July 2014) <<http://www.customs.govt.nz/about/Pages/default.aspx>>.

New Zealand Ministry of Foreign Affairs and Trade “Embassies - New Zealand Representatives Overseas - New Zealand Ministry of Foreign Affairs and Trade” (10 November 2014) <<http://www.mfat.govt.nz/Embassies/1-NZ-representatives-overseas/0-embassies-list.php?country=United+Kingdom>>.

New Zealand Ministry of Foreign Affairs and Trade “What the Embassy Does” (10 November 2014) <<http://www.nzembassy.com/usa-washington/about-the-embassy/what-the-embassy-does>>.

New Zealand Police “New Zealand Police Liaison Officer (Bangkok)” (10 November 2014) New Zealand Police <<http://www.police.govt.nz/contact-us/station/new-zealand-police-liaison-officer-bangkok>>.

New Zealand Police “Online Child Safety” (18 July 2014) <<http://www.police.govt.nz/advice/email-and-internet-safety/online-child-safety>>.

Office of Film and Literature Classification “A Breif History of Censorship in New Zealand” (2012) <<http://www.censorship.govt.nz/about-censorship/a-brief-history-of-censorship-in-new-zealand.html#anchor20>>.

Office of Film and Literature Classification “Censorship Enforcement, Offences And Penalties” (2013) <<http://www.censorship.govt.nz/about-censorship/censorship-enforcement-offences-and-penalties.html#anchor01>>.

Office of Film and Literature Classification “Enforcing New Zealand Censorship Law” (2013) <<http://www.censor.org.nz/classification-law/enforcing-nz-censorship-law.html>>.

Office of the Attorney General “New Jersey State Police - NJ Sex Offender Internet Registry - Megan’s Law Legislation” (5 May 2013) <http://www.nj.gov/njsp/spoff/megans_law.html>.

Office of the Attorney General “New Jersey State Police - NJ Sex Offender Internet Registry - Megan’s Law - Introduction” (6 May 2013) <http://www.state.nj.us/njsp/info/reg_sexoffend.html>.

Office of the High Commissioner for Human Rights “International Human Rights Law” (7 April 2014) <<http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>>.

Office of the Privacy Commissioner “Telecommunications Information Privacy Code” (16 October 2014) Office of the Privacy Commissioner <<https://privacy.org.nz/the-privacy-act-and-codes/codes-of-practice/telecommunications-information-privacy-code/>>.

Office of the Privacy Commissioner “Telecommunications Information Privacy Code - General information” (16 October 2014) Office of the Privacy Commissioner <<https://privacy.org.nz/the-privacy-act-and-codes/codes-of-practice/telecommunications-information-privacy-code/telecommunications-information-privacy-code-general-information/>>.

Office of the Privacy Commissioner “The Privacy Act and Codes” (1 January 2016) Office of the Privacy Commissioner <<https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-act-and-codes-introduction/>>.

OpenNet Initiative “United Kingdom” (19 March 2015) OpenNet Initiative
<<https://opennet.net/research/profiles/united-kingdom>>.

Peace Pledge Union “The Convention on the Rights of the Child” (7 April 2014)
<<http://www.ppu.org.uk/learn/texts/convention1.html>>.

Peel Regional Police “Internet Child Exploitation Unit” (29 September) Peel
Regional Police
<<http://www.peelpolice.on.ca/en/aboutus/internetchildexploitation.asp>>.

Police Chief Magazine “Growing Challenge of Computer Forensics” (26 March
2015) Police Chief Magazine.org
<http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1136&issue_id=32007>.

Spark New Zealand “Business Broadband (update) - Terms and Conditions” (17
March 2015) Spark <<http://www.spark.co.nz/help/other/terms/broadband-from-17-march-2015/>>.

Stop Trust “Who is the STOP Adolescent Programme for?” (3 November 2014)
Stop Trust <http://www.stop.org.nz/main/adolescent_who_for/>.

Tech Liberty NZ “Internet Filtering FAQ” (21 April 2014)
<<http://techliberty.org.nz/issues/internet-filtering/filtering-faq/>>.

Thames Valley Police “Child Sexual Offender Disclosure Scheme” (9 September
2014) <<http://www.thamesvalley.police.uk/aboutus/aboutus-depts/aboutus-depts-intel-2/aboutus-depts-vpu/aboutus-depts-vpu-csods.htm>>.

The Australian Communications and Media Authority “Introduction to the ACMA”
(30 January 2014) <<http://www.acma.gov.au/theACMA/About/The-ACMA-story/Communicating/introduction-to-the-acma>>.

The Australian Communications and Media Authority “Online content complaints, January 2011 - ACMA sphere 61” (4 April 2013) <<http://www.acma.gov.au/theACMA/online-content-complaints-january-2011-acmasphere-61>>.

The Australian Communications and Media Authority “Prohibited Online Content” (22 May 2014) <<http://www.acma.gov.au/Industry/Internet/Internet-content/Internet-content-complaints/prohibited-online-content-internet-safety-i-acma>>.

The Australian Communications and Media Authority “The ACMA story” (2 June 2014) <<http://www.acma.gov.au/Home/theACMA/About/The%20ACMA%20story>>.

The Crown Prosecution Service “Indecent Photographs of Children: Legal Guidance: The Crown Prosecution Service” (17 December 2014) <http://www.cps.gov.uk/legal/h_to_k/indecent_photographs_of_children/>.

The Department of Internal Affairs “Amendment Act 2005” (2012) The Department of Internal Affairs <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Censorship-Compliance-Amendment-Act-2005?OpenDocument>.

The Department of Internal Affairs “Censorship Compliance” (2012) The Department of Internal Affairs <<http://www.dia.govt.nz/Services-Censorship-Compliance-Index>>.

The Department of Internal Affairs “Censorship Policy” (2012) The Department of Internal Affairs <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Our-Policy-Advice-Areas-Censorship-Policy?OpenDocument>.

The Department of Internal Affairs “Code of Practice” (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Code-of-Practice>>.

The Department of Internal Affairs “Common Questions and Answers” (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Common-Questions>>.

The Department of Internal Affairs “Digital Child Exploitation Filtering System Code of Practice March 2013” (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Code-of-Practice-March-2013>>.

The Department of Internal Affairs “Digital Child Exploitation Filtering System Code of Practice May 2012” (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Code-of-Practice-May-2012>>.

The Department of Internal Affairs “Explanatory Statement” (25 June 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Explanatory-Statement>>.

The Department of Internal Affairs “Independent Reference Group” (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Independent-Reference-Group>>.

The Department of Internal Affairs “Internet and Website Filter” (25 June 2014) <<http://www.dia.govt.nz/Censorship-DCEFS>>.

The Department of Internal Affairs “Public Information Pack” (11 April 2014) <<http://www.dia.govt.nz/Censorship-DCEFS-Public-Information-Pack>>.

The Department of Internal Affairs “The Film and Literature Board of Review” (2013) The Department of Internal Affairs <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Film-and-Literature-Board-of-Review-Index?OpenDocument>.

The Department of Internal Affairs “Web Filter Code of Practice Available” (25 August 2009) <<http://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/a765e9d6dd4ecf37cc25761c0083957e!OpenDocument>>.

The Department of Internal Affairs “Web Filter will Focus Solely on Child Abuse Images” (16 July 2009)
<<http://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/26bc0621775bbe47cc2575f50010a894>>.

The New Zealand Herald “Search Results for ‘Child Pornography New Zealand’” (6 December 2013) The New Zealand Herald
<<http://www.nzherald.co.nz/child20pornography20new20zealand/search/results.cfm?kw1=child%20pornography%20new%20zealand&kw2=&st=gsa>>.

The Sensible Sentencing Trust “Offenders Database” (10 September 2014)
<<http://www.sst.org.nz/offenders-database/>>.

The United States Department of Justice “Child Pornography” (2002) The United States Department of Justice
<<http://www.justice.gov/criminal/ceos/childporn.html>>.

The White House “President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006” (4 September 2014) The White House
<<http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>>.

Topolsky, Joshua “Nexus One Review” (24 January 2010) Engadget
<<http://www.engadget.com/2010/01/04/nexus-one-review/>>.

TopTenREVIEWS “Internet Pornography Statistics” (2013) <<http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html>>.

Trademe “Smart Phone for Sale, New Zealand” (13 December 2013)
<http://www.trademe.co.nz/Browse/SearchResults.aspx?&cid=422&searchType=&searchString=smart+phone&x=0&y=0&searchregion=100&type=Search&sort_order=&redirectFromAll=False&rptpath=344-&generalSearch_keypresses=11&generalSearch_suggested=0>.

UNICEF “UNICEF - Convention on the Rights of the Child - Frequently Asked Questions” (23 April 2014).

UNICEF “UNICEF - Convention on the Rights of the Child - Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography” (August 2013) UNICEF <http://www.unicef.org/crc/index_30204.html>.

UNICEF “UNICEF - Convention on the Rights of the Child” (25 April 2012) unicef.org <<http://www.unicef.org/crc/>>.

United Nations “United Nations Treaty Collection -Chapter IV Human Rights” (6 July 2014) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

United Nations “United Nations Treaty Collection -Chapter IV Human Rights” (25 May 2015) <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en>.

United Nations “United Nations Treaty Collection” (19 May 2015) United Nations <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en>.

United States Department of Justice “Dru Sjodin National Sex Offender Public Website” (4 September 2014) <<http://www.nsopw.gov/>>.

University of Waikato “Children in Crisis Conference - A National Hui” (6 October 2014) <<http://www.waikato.ac.nz/globalstudies/conferences/children-in-crisis>>.

US Department of Homeland Security “Child Exploitation/Operation Predator” (29 September 2011) U.S. Department of Homeland Security <<http://www.ice.gov/predator/>>.

USLegal “Digital Distribution Law & Legal Defintion” (26 January 2016) USLegal
<<http://definitions.uslegal.com/d/digital-distribution/>>.

Virtual Global Taskforce “VGT’s Sixth Biennial International Conference in Amsterdam” (6 October 2015)
<<http://www.virtualglobaltaskforce.com/2014/vgt%e2%80%99s-sixth-biennial-international-conference-in-amsterdam/>>.

Virtual Global Taskforce “What We Do – Virtual Global Taskforce” (18 July 2014)
<<http://www.virtualglobaltaskforce.com/what-we-do/>>.

Vodafoneconz “Google Nexis One” (2012) <<http://www.vodafone.co.nz/online-shop/>>.

Vodafoneconz “What is Android?” (2012)
<<http://www.vodafone.co.nz/mobile/android.jsp?gclid=CK3eysGd5a4CFVGApo0lKfxQ>>.

Waikato Times “Couple Facing Child Pornography Charges” (7 June 2012) Stuff.co.nz <<http://www.stuff.co.nz/waikato-times/7234227/Couple-facing-child-exploitation-charges>>.

White, Charlie “6 Awesome Ways Apps Could Use iPhone 4’s Front-Facing Camera” (7 June 2010) DVICE (Syfy) <<http://dvice.com/archives/2010/06/iphone-4-wish-l.php>>.

Wiltshire Police “The Child Sex Offender Disclosure Scheme” (19 September 2009) <<http://www.wiltshire.police.uk/index.php/click-on/sarahs-law>>.

Winterford, Brett “Conroy Requests Faith in Net Filter Scheme” (2009) iTnews <<http://www.itnews.com.au/News/139822,conroy-requests-faith-in-net-filter-scheme.aspx>>.

Wortley, Richard and Smallbone, Stephen “Child Pornography on the Internet Guide No.41” (11 July 2014) Center for Problem-Oriented Policing, State University of New York
<http://www.popcenter.org/problems/child_pornography/print/>.