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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

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by

Tawhana Ball

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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.

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List of Abbreviations

ACMA – Australian Communications and Media Authority.

Administration Committee – Government Administration Committee.


Board of Review – Film and Literature Board of Review.

CCU or Unit – Censorship Compliance Unit.


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

COCA – Care of the Children Act 2004.


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.


Department – Department of Internal Affairs.

Disclosure Scheme – Child Sex Offenders Disclosure Scheme.

EU – European Union.

FBI – Federal Bureau of Investigation.


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


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.


Kit – Internet Safety Kit/Netsafe Safety Unit.


MLAT – Mutual Legal Assistance Treaty.

MOU – Memorandum of Understanding.

MP – Member of Parliament.


NGO – Non-Governmental Organisation.

OCEANZ – Online Child Exploitation Across New Zealand Unit.


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

UK – United Kingdom.

UN – United Nations.

US – United States of America.

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. 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

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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.
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 paedophiles\(^5\) 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

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\(^5\) 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{13} At ch 2.
\textsuperscript{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). The examination reviews some of the concerns about this international instrument which have resulted in calls for greater transnational co-operation and the enactment of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (‘Optional Protocol’). Chapter 2 then explains how the Optional Protocol extends New Zealand’s obligation to protect children from child pornography. 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

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signatories to the Optional Protocol. 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

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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.

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.  

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. 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, Brokers, 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

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23 William Putman Legal Research (Cengage Learning, New York, 2009) at 158.
that the law is part of a broader mode of research. A comparative study is an examination of the law between jurisdictions and is undertaken to aid legislative reforms. 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. 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

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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. 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 Internet and digital technology have been utilised to facilitate a substantial increase in the consumption of child pornography around the world. 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. 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.

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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.


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:\(^ {35}\)

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Visual depictions of children that are sexually provocative or that show children engaged in sexual activity whether with other children or adults.
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\(^{33}\) 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).


However, in New Zealand the legal definition of child pornography is simply any content “involving a child 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. 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. This content encourages the sexual objectification of children and also increases their vulnerability. 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, and a child molester can be defined as an individual who has engaged in sexual contact with a child. The significance of this distinction is that although child pornography offending is often indicative of paedophilia it does not necessarily mean that this category of offender is a child molester. 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.

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.
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 reported\(^49\) 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.\(^52\)

\(^{47}\) Erich Goode Moral panics (Blackwell, Oxford, UK; Cambridge, USA, 1994) at 11.
\(^{48}\) Ost, above n 8, at 155.
\(^{52}\) 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. 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. What is more, the press is able to build on the community’s existing concerns about child sexual abuse. These concerns are aggravated by the characteristics of the Internet and the popularity of social networking among young people. Via social networking sites including Instagram and Facebook, the Internet is simply another avenue which enables paedophiles to interact with children. 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', moral panic can be fuelled. Such moral panic is heightened by the linking of sexual abuse discourses such as ‘stranger danger’ with the Internet.

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

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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.
58 Quayle and Ribisl, above n 27, at 116.
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.\textsuperscript{65} They are deviants or outsiders who are considered to be legitimate targets of self-righteous hostility and anger.\textsuperscript{66} Sometimes the object of a moral panic can be relatively novel.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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,\textsuperscript{71} including the loss of childhood innocence and the forfeiture of both parental and State control of children.\textsuperscript{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.\textsuperscript{73} This proposition is partly based on the assumption that

\textsuperscript{65} Goode, above n 21, at 31.
\textsuperscript{66} At 31.
\textsuperscript{67} Kenneth Thompson, ebrary, Inc Moral Panics (Routledge, London; New York, 1998) at 8.
\textsuperscript{68} At 8.
\textsuperscript{69} For the characteristics of a moral panic see Goode, above n 21, at 33–41.
\textsuperscript{70} Quayle and Ribisl, above n 27, at 116–119.
\textsuperscript{72} Potter and Potter, above n 45.
the Internet is the tool that is most often utilised to commit such offences.\textsuperscript{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.\textsuperscript{75} For that reason, to claim that the Internet is the source of the problem is groundless and simply untrue\textsuperscript{76} as the Internet can also be used to convey information that is both morally acceptable and legal.\textsuperscript{77}

There are also symbolic politics which concern threats to children being played out in this field of activity,\textsuperscript{78} where interest groups move their focus from one issue to another in order to maintain pressure on the first issue of concern.\textsuperscript{79} One of the major spurs for attempts to regulate the Internet is the moral panic concerning cyber-porn.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{83} This concern is compounded by the fact that children are often more technologically savvy than their parents.\textsuperscript{84} The author therefore argues, that the Internet is not the

\textsuperscript{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).


\textsuperscript{76} Philip Jenkins Intimate Enemies (Transaction Publishers, 1992) at 10.

\textsuperscript{77} At 10.

\textsuperscript{78} Lelia Green Communication, Technology and Society (SAGE, 2002) at 150.

\textsuperscript{79} Jenkins, above n 52, at 10.

\textsuperscript{80} At 10.

\textsuperscript{81} Krinsky, above n 47, at 32.

\textsuperscript{82} Philip Jenkins Intimate Enemies (Transaction Publishers, 1992) at 10.

\textsuperscript{83} At 10.

\textsuperscript{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.
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.\textsuperscript{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.\textsuperscript{95} It acts as a deterrent which discourages individuals from downloading\textsuperscript{96} child pornography and from committing sexual abuse against children in order to create it.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{100}

\textsuperscript{94} Ost, above n 20, at 459.
\textsuperscript{95} At 459.
\textsuperscript{96} Downloading is the transmission of a file or data from one computer system to another. For more information see: Anastasia Suen \textit{Downloading and Online Shopping Safety and Privacy} (The Rosen Publishing Group, New York, 2013) at ch 1.
\textsuperscript{97} Ost, above n 20, at 459.
\textsuperscript{98} At 459.
\textsuperscript{99} See the enforcement provisions of the Films, Videos, and Publications Classification Act 1993; Crimes Act 1961 (NZ).
\textsuperscript{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. This thesis investigates how the availability of this material has the potential to create numerous problems in the community. 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. 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.

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. 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. Furthermore, there is an increasing amount of academic information to support this correlation. One study investigated whether being charged with a child pornography offence is a valid...
diagnostic indicator of paedophilia. The results of the study show that child pornography offending is indeed a strong diagnostic indicator of paedophilia. A Federal Prosecutor employed by the US Department of Justice discussed the dangers posed by offenders who possess child pornography and stated:

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. 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. 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 children that had not been reported to law enforcement agencies. Statistics generated by the US Postal Inspection Service correspond with these

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109 At 613.
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.
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.\footnote{Kim, above n 81, at 1.}

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 offences\footnote{At 1.} means that the risk to children is indeed substantial.\footnote{US Department of Justice, above n 84, at 19.} Obviously, not every offender who masturbates to child pornography will inevitably progress to contact sexual offences on children or other vulnerable members of society.\footnote{MacVean and Spindler, above n 91, at 11–20.} 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.\footnote{At 11–20.} Some evidence confirms that there is a correlation between the possession of child pornography and an increased risk of contact offending against children.\footnote{US Department of Justice, above n 84, at 19.} Such investigations indicate that offenders who possess child pornography are often actively engaged in the sexual abuse of children.\footnote{Kim, above n 81, at 1.} 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.\footnote{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.} 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.\footnote{Kim, above n 81, at 2.} Possession is often an indication
that the offender has been involved in the actual sexual abuse of children. Accordingly, the accessing of child pornography on the Internet represents a significant risk to New Zealand’s society, especially its children.

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. This goes against the common misconception among the general population of New Zealand that the viewing of child pornography is indeed a victimless crime. 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. While they may begrudgingly admit that abusing children is wrong, the same individuals will declare that there is no harm in viewing child pornography. 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. Those who support this stance focus their attention on the end product, which is the image itself. They downplay the actual sexual abuse of a child that occurred during the production and consumption of the image. Furthermore, this belief enables the downloader to differentiate between themselves and those who are directly involved in child sexual abuse. It enables them to create distance between their own behaviour, the

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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.
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. Support for this misguided view was disclosed by ‘Mr Blue’ who stated:

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 distribution 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. These disorders include depression, post-traumatic stress disorders and withdrawal that can continue well into adulthood. 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. Moreover, this form of victimisation has the potential to last forever, as the Internet enables the images to resurface indefinitely. Therefore, the act of deliberately searching the

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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.
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 viewed is in no way a victimless crime. 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.

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. Possession and consumption of this material encourages further production and therefore increases the frequency of child sexual abuse. This production of content and the sexual abuse of children is driven by people actively searching for these images on the Internet. As a result, the possessors of child pornography are simply active abusers by proxy. They prefer that others sexually abuse children and do their unpleasant work for them. 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.

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. However, it was the invention of the camera in the early part of the nineteenth century which resulted in the production

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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).
147 At 452.
148 At 452.
149 At 452.
151 At 70.
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.


\(^{157}\) 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.
\(^{170}\) The United States Department of Justice, above n 142.
\(^{171}\) Wortley and Smallbone, above n 127, at 8.
child pornography and risk arrest.\textsuperscript{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.\textsuperscript{173}

Accordingly, the availability and distribution of child pornography through the Internet has become a serious social concern for society.\textsuperscript{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.\textsuperscript{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.\textsuperscript{176} This is an argument that has been used to support the availability of pornographic material.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{181} Hence, this material is claimed

\begin{thebibliography}{99}

\bibitem{172} Ferraro, Casey and McGrath, above n 1, at 11.
\bibitem{173} At 11.
\bibitem{174} Yaman Akdeniz \textit{Internet child pornography and the law} (Ashgate, Burlington, VT, 2008) at 1.
\bibitem{175} Wortley and Smallbone, above n 127, at 8.
\bibitem{177} Angela Carr \textit{Internet Traders of Child Pornography and Other Censorship Offenders in New Zealand} (2004) at 9.
\bibitem{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.
\bibitem{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.
\bibitem{180} David L Riegel “Effects on Boy-attracted Pedosexual Males of Viewing Boy Erotica” (2004) 33 Arch Sex Behav 321 at 323.
\bibitem{181} At 323.
\end{thebibliography}
to reduce the number of sexual assaults,\textsuperscript{182} by providing an acceptable outlet for dangerous sexual urges.\textsuperscript{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.\textsuperscript{184} This decline in sexual assaults indicated that violent pornography provided a beneficial safety value for individuals with violent sexual instincts.\textsuperscript{185} Those who support the proposition also contended that individuals who were aroused by such material could satisfy their sexual needs through fantasy-induced masturbation\textsuperscript{186} and this reduced the number of sexual assaults.\textsuperscript{187}

However, these propositions have since proved to be false. The illusionary 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{190}

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

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{183} Neil Levy “Virtual Child Pornography: The Eroticization of Inequality” (2002) 4 Ethics and Information Technology 319 at 320.
  \item \textsuperscript{184} Jenkins, above n 130, at 31.
  \item \textsuperscript{185} At 31.
  \item \textsuperscript{186} Levy, above n 157, at 320.
  \item \textsuperscript{187} At 320.
  \item \textsuperscript{188} Diana EH Russell Making Violence Sexy (Teachers College Press, Buckingham, 1993) at 2.
  \item \textsuperscript{189} At 2.
  \item \textsuperscript{191} Taylor and Quayle, above n 97, at 1.
  \item \textsuperscript{192} At 1.
\end{itemize}
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 images\(^{196}\) 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

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\(^{193}\) 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.


\(^{203}\) Government of Canada, above n 176.
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. Four years later, there were 41,000 seizures, and all but three of those were sourced from the Internet and computers. In 2004 the same Manchester Police Force arrested one man who was found to be in possession of almost 1,000,000 images. 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.

The United Kingdom has seen a steady increase in the number of successful prosecutions for the possession and distribution of child pornography. 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. Correspondingly, in 2007 German authorities reported 11,357 child pornography offences, up from 7,318 the previous year. Similar increases in statistics have also been observed in New Zealand by Detective Senior Sergeant John Michael of the New Zealand Police.

Statistics of recorded offences reveal that offences relating to the consumption and supply of objectionable publications are

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204 BBC, above n 75.
205 Hansard, above n 5, at 3978.
206 At 3978.
207 Davidson and Gottschalk, above n 140, at 54.
209 At 114.
210 At 114.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{221} Each year, an estimated 30,000 children are sexually exploited by child pornographers in order to produce new pornography in

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

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

\textsuperscript{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.


\textsuperscript{218} AdelaideNow, above n 191.

\textsuperscript{219} Davidson and Gottschalk, above n 140, at 54.

\textsuperscript{220} At 54.

\textsuperscript{221} Ethel Quayle and Maxwell Taylor Viewing child pornography on the Internet (Russell House, Lyme Regis, 2005) at 31.
the Los Angeles region alone.\textsuperscript{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.\textsuperscript{223} Therefore, any increase in demand for this material will require more children to be recruited and sexually abused.\textsuperscript{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.\textsuperscript{225} The study indicated that child pornography offending is a valid diagnostic indicator of paedophilia.\textsuperscript{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.\textsuperscript{227} In a study conducted by the COPINE Project\textsuperscript{228} 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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{223} Quayle and Taylor, above n 195, at 76.
\item \textsuperscript{224} Carr, above n 80, at 7.
\item \textsuperscript{225} Seto, Cantor and Blanchard, above n 82, at 613.
\item \textsuperscript{226} At 613.
\item \textsuperscript{227} Skorzewska-Amberg, above n 141, at 271.
\item \textsuperscript{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.
\item \textsuperscript{229} See Rachel O’Connell Untangling the Complexities of Combating Paedophile Activities in Cyberspace (1999).
\item \textsuperscript{230} John Carr Child Pornography (2008) at 16.
\end{itemize}
it in the real world.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{234} The empirical literature suggests that a range of risk factors\textsuperscript{235} are associated with adolescent sexual offending.\textsuperscript{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.\textsuperscript{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.\textsuperscript{238} Therefore, these outcomes suggest that viewing child pornography may play a significant role in adolescent sexual offending against children.\textsuperscript{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

\textsuperscript{231} At 16.
\textsuperscript{232} At 16.
\textsuperscript{235} These risk factors include sexual abuse history, exposure to violence, social isolation, early exposure to sex or pornography, anxiety and low self-esteem.
\textsuperscript{237} Prichard and others, above n 103, at 998.
\textsuperscript{238} At 998.
\textsuperscript{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. 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. Twenty years ago, child molesters used to go to circuses and playgrounds; today they go to places like Facebook, Twitter and Bebo.

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. 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. 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.
242 Thomas Clabur “Study: Child Porn Isn’t Illegal In Most Countries” InformationWeek (USA, April 2006) <http://www.canadiancrc.com/Newspaper_Articles/InformationWeek_Study_Child_Porn_Isnt_Illlegal_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.
\(^{252}\) At xi.

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this proposition.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{257} The distribution of child pornography is a multi-billion dollar industry which has been further fuelled by the Internet.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{261} As a result, the

\textsuperscript{255} At 29.
\textsuperscript{256} At 29.
\textsuperscript{257} Europol \textit{High Tech Crimes within the EU: Old Crimes New Tools Threat Assessment 2007} (247781 2007) at 41.
\textsuperscript{260} At 214.
\textsuperscript{261} Arnold I Burns \textit{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 industry and one of the fastest-growing criminal segments of the Internet. In Germany alone, sales of child pornography during the early 1990s exceeded $250 million. However, the most lucrative market for child pornography is the United States. It is claimed that in the United States, $6 billion is generated annually from the sale of all forms of child pornography.

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

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266 United Nations, above n 233, at 215.

272 Taylor and Quayle, above n 97, at 8.
enforcement and reductions in profits. 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. 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. As a result, amateurs frequently utilise this inexpensive digital technology to consume and distribute child pornography via the Internet.

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. 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. Furthermore, digital technology has ensured that producing and consuming child pornography has now

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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.


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

276 Booth, above n 248.

277 At 13.


279 Carr, above n 204, at 19.
become inexpensive and no longer requires that material be commercially processed in order to be duplicated.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
\textsuperscript{280} Quayle and Taylor, above n 195, at 31.
\textsuperscript{281} Healy, above n 252, at 3.
\textsuperscript{282} Charlie White “6 Awesome Ways Apps Could Use iPhone 4’s Front-Facing Camera” (7 June 2010) DVICE (Syfy) \textlangle http://dvice.com/archives/2010/06/iphone-4-wish.php\textrangle.
\textsuperscript{283} Trademe “Smart Phone for Sale, New Zealand” (13 December 2013) \textlangle http://www.trademe.co.nz/Browse/SearchResults.aspx?&cid=422&searchType=&searchString=smartphone&x=0&y=0&searchregion=100&type=Search&sort_order=&redirectFromAll=False&rptpath=344&generalSearch_keypresses=11&generalSearch_suggested=0\textrangle.
\textsuperscript{286} Vodafone “Google Nexus One” (2012) \textlangle http://www.vodafone.co.nz/online-shop\textrangle.
\end{footnotesize}
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. 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.

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. Peer-to-peer 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. Such files can contain images, videos and various other forms of software. 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. Steve O’Brien, the National Manager of New Zealand’s Censorship Compliance Unit, confirmed in an interview that file-sharing environments such as Giga Tribe have now become one of the favoured means to disseminate child pornography. 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

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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.
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

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.
306 These search terms were ‘Pthc’, ‘Lolita’ and ‘Teen’.
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 I was released in 2010. 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. However, what is even more alarming is that these images are becoming more extreme. 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. 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.

Police believe that the utilisation of file-sharing technology by paedophiles is feeding demand for real-time victims of abuse. 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. In 1996, members of a paedophile group that named itself the Orchid Club were arrested in the United States. Using a digital camera, one of the group’s members transmitted real-time images of a child being sexually assaulted. This member then acted upon requests from other club members to view certain sexual acts which were performed on the child in real-time. The fact that members of the Orchid

Prichard and others, above n 103, at 993.
At 995.
Audrey Gillian, above n 270.
Audrey Gillian, above n 270.
Prichard and others, above n 103, at 993.
At 995.
Audrey Gillian, above n 270.
Audrey Gillian, above n 270.
Prichard and others, above n 103, at 993.
At 995.
Audrey Gillian, above n 270.
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Prichard and others, above n 103, at 993.
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Prichard and others, above n 103, at 993.
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Prichard and others, above n 103, at 993.
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Audrey Gillian, above n 270.
Audrey Gillian, above n 270.
Prichard and others, above n 103, at 993.
At 995.
Audrey Gillian, above n 270.
Audrey Gillian, above n 270.
Club living in the United States, Europe and Australia had access to the material demonstrates the international dimension of this type of offending.\footnote{At 97.}

In March 2011, it was revealed that six New Zealanders were among the main participants in the world’s largest Internet paedophile ring.\footnote{Blair Ensor “Frustration at Repeated Sexual Predator Warnings” \textit{Stuff.co.nz} (1 December 2011) \textlangle http://www.stuff.co.nz/dominion-post/news/6065187/Frustration-at-repeated-sexual-predator-warnings\textrangle.} This paedophile ring comprised 70,000 paedophiles in some 20 countries.\footnote{Ensor, above n 293.} The victims of the six men included three New Zealand children who were filmed being sexually abused\footnote{Ensor, above n 293.} and were identified after images of them were found on the computer of a man Police had been investigating at the time.\footnote{Vaimoana Tapaleao “Paedophile Ring Bust Nets NZ Offenders” \textit{New Zealand Herald} (18 March 2011) \textlangle http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10713172\textrangle.} 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.\footnote{Tapaleao, above n 296.} 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’\footnote{Keith F Durkin “Misuse of the Internet by Pedophiles: Implications for Law Enforcement and Probation Practice” (1997) 61 Fed Probation 14 at 14.} with its own forms of ‘cyberculture’.\footnote{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.} This cyberculture\footnote{Cyberculture refers to the social conditions brought about by the extensive use of computer networks for entertainment, business and all forms of communication.} 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
children, cyberspace offers a private, safe and anonymous way to explore those fantasies. The author further argues that the formation and online activities of organisations such as the North American Man/Boy Love Association encourages people to experiment sexually with children. 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. 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.

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. This investigation involved a 29-year-old New Zealand man who was part of an international child pornography ring that spanned three continents, including New Zealand. The Lost Boy bulletin board was dedicated to men who have a sexual

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327 Cyberspace is an abstract environment in which communication over computer networks occurs.
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.
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_S88K8sxLMM9MSSzPy8xBz9CP0os3hLAwMDd3- nYCN3M19LA0_nEDPvMJMAQ39jA_2CbEdFAFVdgg4/?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.
interest in young boys and was established to provide a forum for trading in child pornography.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{341} It

\textsuperscript{336} Los Angeles County Sheriff’s Department, above n 307.
\textsuperscript{337} TVNZ, above n 309.
\textsuperscript{338} Los Angeles County Sheriff’s Department, above n 307.
\textsuperscript{339} Los Angeles County Sheriff’s Department, above n 307.
\textsuperscript{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.\footnote{Leary, above n 208, at 9.} 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.\footnote{Ost, above n 8, at 103.} These harms include the harm to the children depicted in the images and also the potential harm to society as a whole,\footnote{Leary, above n 208, at 9.} as child pornography can be utilised to justify paedophilia.\footnote{Leary, above n 208, at 9.} 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.\footnote{Leary, above n 208, at 9.}

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,\footnote{Harris Mirkin \textquotedblleft The Social, Political, and Legal Construction of the Concept of Child Pornography\textquotedblright{} (2009) 56 Journal of Homosexuality 233 at 234.} child pornography legislation does make a valuable contribution to reducing child sexual abuse.\footnote{Bruce Ryder \textquotedblleft The Harms of Child Pornography Law\textquotedblright{} (2003) 36 University of British Columbia Law Review 101 at 103.} 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.\footnote{At 103.} 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.\footnote{Mirkin, above n 321, at 234.} This concern is grounded in ancient and medieval theories about the impact of harmful behaviour\footnote{At 234.} that claim that behaviour which violates the dominant moral structure of the society dissolves the glue that holds the social order together.\footnote{At 234.} In New Zealand the view that society may be harmed by the availability of certain types of material was recognised by

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\begin{footnotes}
\begin{enumerate}
\item Leary, above n 208, at 9.
\item Ost, above n 8, at 103.
\item Leary, above n 208, at 9.
\item Michael J Henzey \textquotedblleft Going on the Offensive: a Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action\textquotedblright{} (2011) 11 Appalachian Journal of Law LegalTrac at 9.
\item Leary, above n 208, at 9.
\item Harris Mirkin \textquotedblleft The Social, Political, and Legal Construction of the Concept of Child Pornography\textquotedblright{} (2009) 56 Journal of Homosexuality 233 at 234.
\item Bruce Ryder \textquotedblleft The Harms of Child Pornography Law\textquotedblright{} (2003) 36 University of British Columbia Law Review 101 at 103.
\item At 103.
\item Mirkin, above n 321, at 234.
\item At 234.
\item At 234.
\end{enumerate}
\end{footnotes}
statute in the Victorian era and remains generally accepted to this day. The desired outcome of this stance is the reduction of potential harm to the community. Nevertheless, classical theorists of liberal democracy developed a more restrictive view of the Government’s role in moral issues. The views of these theorists grounded the Government’s right to limit behaviour in what became known as the ‘harm principle’.

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. 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. 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. The philosophical topics of harm and punishment are very complex notions. 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. John Locke, in his work The Second Treatise of Government, states:

353 The Offensive Publications Act 1892.
355 The Department of Internal Affairs, above n 328.
356 Mirkin, above n 321, at 234.
357 At 234.
358 At 235.
359 At 234.
360 At 235.
361 At 105.
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, Hart\(^{368}\) 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 Mill\(^{371}\) have also championed the harm principle.\(^{372}\) Mill’s formulation is probably the most famous\(^{373}\) and is defined as:\(^{374}\)

\(^{364}\) At 8.
\(^{366}\) 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.
\(^{372}\) 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.\textsuperscript{375} Jorge Menezes Oliveira suggests that Mill’s definition of the harm principle is in fact two separate principles.\textsuperscript{376} The harm principle itself, and a more practical principle of expediency.\textsuperscript{377} According to these two principles, where an individual’s conduct is harmless, then it is outside the authority of the State\textsuperscript{378} but if an individual’s conduct does cause harm, then this conduct is within the State’s domain of regulation and authority.\textsuperscript{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.\textsuperscript{380}

In this sense, the harm principle can be viewed as jurisdictional in character.\textsuperscript{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.\textsuperscript{382} Donald Dripps provides a simplified version of the characteristics of the harm principle and states:\textsuperscript{383}

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

\textsuperscript{375} Mirkin, above n 321, at 235.
\textsuperscript{376} Jorge Menezes Oliveira Harm and Offence in Mill’s Conception of Liberty (2012) at 19.
\textsuperscript{377} At 19.
\textsuperscript{378} Smith, above n 314, at 5.
\textsuperscript{379} At 5.
\textsuperscript{380} At 5.
\textsuperscript{381} At 5.
\textsuperscript{382} Gerald Dworkin “Devlin Was Right: Law and the Enforcement of Morality” (1998) 40 Wm & Mary L Rev 927 at 934.
\textsuperscript{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.\textsuperscript{384} Bernard Harcourt also notes.\textsuperscript{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,\textsuperscript{386} with its commitment to the separation of powers in a system of constitutional democracy such as New Zealand.\textsuperscript{387}

\subsection*{1.3.3 Joel Feinberg’s Theory of Harm and Child Pornography}

\subsubsection*{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{390} As a result, the harm principle is a coercion-legitimising principle,\textsuperscript{391} which is designed to justify State intrusion into individual liberty and behaviour.\textsuperscript{392} Feinberg approaches the issue of which conduct the State should make criminal\textsuperscript{393} by considering the application of several liberty-

\begin{itemize}
\item \textsuperscript{384} Smith, above n 314, at 6.
\item \textsuperscript{386} Smith, above n 314, at 6.
\item \textsuperscript{387} At 7.
\item \textsuperscript{388} See Joel Feinberg \textit{Harm to Others} (Oxford University Press, USA, Oxford, 1984).
\item \textsuperscript{389} Bedau, above n 333, at 106.
\item \textsuperscript{390} Feinberg, above n 362, at 9–10.
\item \textsuperscript{391} Joel Feinberg \textit{Harmless Wrongdoing} (Oxford University Press, Oxford, 1988) at 5.
\item \textsuperscript{392} Bedau, above n 333, at 106.
\item \textsuperscript{393} See Feinberg, above n 362, at 3.
\end{itemize}
limiting principles to conduct that might be prohibited. He defines a liberty-limiting principle as:

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. Feinberg argues that liberty-limiting principles are limited to the harm and offence principles:

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. The use of prohibitions is clearly set out in Feinberg’s writing on the harm principle. Feinberg initially states of the harm principle that:

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. 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. Paternalism as the harm principle suggests it is not moral paternalism,
and it is this stance which underpins New Zealand’s censorship legislation, the Films, Videos, and Publications Classification Act 1993.\textsuperscript{403} The Act’s approach to censorship does not acknowledge issues such as moral decency\textsuperscript{404} but rather whether or not the publication in question is going to be injurious to the public good.\textsuperscript{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.\textsuperscript{406} Moreover, Feinberg indicates that where the State prohibits conduct, the State can also punish for this conduct.\textsuperscript{407} Feinberg’s formulation of this principle is straightforward.\textsuperscript{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.\textsuperscript{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.\textsuperscript{410} Feinberg’s construction of the harm principle places much prominence on the concept of punishment.\textsuperscript{411} He states:\textsuperscript{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.

\textsuperscript{403} Films, Videos, and Publications Classification Act 1993.
\textsuperscript{404} Interview with Dr Andrew R Jack, Chief Censor, Office of Film and Literature Classification, New Zealand (9 June 2014) at 6.
\textsuperscript{405} See Films, Videos, and Publications Classification Act 1993, s 3.
\textsuperscript{406} Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 6.
\textsuperscript{407} Bedau, above n 333, at 107.
\textsuperscript{408} Feinberg, above n 362, at 12.
\textsuperscript{409} Bedau, above n 333, at 107.
\textsuperscript{410} An example of this can be seen in the introduction of the Objectionable Publications and Indecency Legislation Bill 2013 (124-1).
\textsuperscript{411} Bedau, above n 333, at 107.
\textsuperscript{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 values\(^{420}\) 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.\(^{422}\)

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\(^{413}\) 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.\footnote{For a more elaborate example see Feinberg, above n 365, at 57–60.} Feinberg is in favour of criminalising any pornography that involves wanton and painful violence against helpless victims.\footnote{Joel Feinberg \textit{Offense to Others} (Oxford University Press, Oxford, 1985) at 146.} The philosopher also concedes that:\footnote{Feinberg, above n 362, at 154.}

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

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.\footnote{Leary, above n 208, at 9.} It is the abusive and exploitative harm caused during its creation which overwhelmingly rationalises the outlawing of this behaviour.\footnote{Ost, above n 8, at 104.} 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 \textit{R. v. Sharpe}\footnote{\textit{R v Sharpe} (2001) (ca SCC) at [189].} agrees and stated:\footnote{Ryder, above n 322, at [189].}

\begin{quote}
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…
\end{quote}
According to Feinberg, harm prevention is definitely a legitimate use of the criminal law. Therefore, Feinberg’s harm principle can be employed by this thesis to justify New Zealand’s rigorous restrictions on the downloading and viewing of child pornography. The stance of community stake holder Debbi Tohill, Interim General Manager of Ecpat Child Alert New Zealand’s on why child pornography should be outlawed is consistent with Feinberg’s theory of criminalisation. Tohill stated that:

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. The Chief Censor of the Classification Office, Dr Andrew Jack also acknowledges the harm inherent in child pornography and states:

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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.
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 maintains\(^{438}\) 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 1996\(^{441}\) 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.
\(^{441}\) 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.
One of these issues is that of pornography, where Feinberg states in his discussion on freedom of expression and pornography:

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:

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. 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. 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. Any such restriction on pornography violates two of the fundamental principles of liberal ideology, freedom of expression and an individual’s right to liberty. For that reason, it could be

447 See Feinberg, above n 398, at 281–287.
448 At 156–157.
450 At 206.
451 At 206.
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.\textsuperscript{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 1990\textsuperscript{455} (Bill of Rights Act 1990) which states:\textsuperscript{456}

\begin{verbatim}
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.
\end{verbatim}

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.\textsuperscript{457} As the Chief Censor, Dr Jack explains in the following comment on the classification procedure:\textsuperscript{458}

\begin{verbatim}
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.
\end{verbatim}

As a result, liberals must concede that neither the right to freedom of expression nor the right to individual liberty can be absolute.\textsuperscript{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

\textsuperscript{454} See Richards, above n 426.
\textsuperscript{455} New Zealand Bill of Rights Act 1990 (NZ).
\textsuperscript{456} New Zealand Bill of Rights Act 1990, s 14.
\textsuperscript{457} For a demonstration of the importance of Freedom of Expression to New Zealand’s censorship regime see Moonen v Film and Literature Board of Review [2002] NZCA 69 (NZ Court of Appeal Wellington).
\textsuperscript{458} Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.
\textsuperscript{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.\textsuperscript{460} Feinberg states:\textsuperscript{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.\textsuperscript{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.\textsuperscript{463} This thesis will substantiate this claim by providing evidence\textsuperscript{464} throughout its chapters that demonstrates the existence of such harms.\textsuperscript{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.\textsuperscript{466} A careful analysis of Mill’s work \textit{On Liberty} reveals that the theorist would allow the State to suppress freedom of expression when it is used to promote harm to others.\textsuperscript{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.\textsuperscript{468} Mill’s states that there is:\textsuperscript{469}

\begin{footnotesize}
\textsuperscript{461} At 151.
\textsuperscript{462} O’Donnell and Milner, above n 124; Taylor and Quayle, above n 97; Alisdair Gillespie \textit{Child pornography} (Routledge, Abingdon, Oxon; New York, 2011).
\textsuperscript{463} Stewart, above n 368, at 61.
\textsuperscript{465} Stewart, above n 368, at 61.
\textsuperscript{467} Leo Groarke “Pornography, Censorship, and Obscenity Law in Canada” (1990) 2 Windsor Rev Legal &amp; Soc Issues 25 at 28.
\textsuperscript{468} At 28.
\textsuperscript{469} Mill, above n 440, at 170.
\end{footnotesize}
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.\textsuperscript{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.\textsuperscript{471} This is because the criterion which underpins acceptability is whether or not an individual is benefiting from promoting directly harmful acts.\textsuperscript{472} The above example indicates that Mill would probably regard the consumption of child pornography as unacceptable.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{470} Groarke, above n 441, at 28.
\textsuperscript{471} Mill, above n 440, at 170.
\textsuperscript{472} Groarke, above n 441, at 28.
\textsuperscript{473} At 28.
\textsuperscript{474} At 28.
\textsuperscript{475} At 29.
\textsuperscript{476} At 29.
\textsuperscript{477} Smith, above n 314, at 16.
behaviour as deviant and a potential danger to their children.\textsuperscript{478} Members of the community are aware that children are abused during the production and consumption of child pornography\textsuperscript{479} and that these images are a permanent record of that sexual abuse.\textsuperscript{480} The Supreme Court of the United States agrees with this proposition and in \textit{New York v Ferber},\textsuperscript{481} the Court acknowledged the harm caused to children by the permanent record of these images.\textsuperscript{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 molested\textsuperscript{483} and to decrease the inhibitions of potential victims such as children.\textsuperscript{484} Moreover, liberalism does permit State interference when the security and autonomy of an individual is threatened\textsuperscript{485} and according to Feinberg’s theory:\textsuperscript{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.\textsuperscript{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.\textsuperscript{488} Surely, security and autonomy include freedom from mental pain and distress.\textsuperscript{489} Therefore, the

\textsuperscript{478} At 16.
\textsuperscript{479} Roberta Lynn and Daniel Sugar Sinclair \textit{Internet Based Sexual Exploitation of Children and Youth Environmental Scan} (2005) at 7.
\textsuperscript{480} At 7.
\textsuperscript{481} \textit{New York v Ferber}, 458 747 (us 1982).
\textsuperscript{482} At 759–760.
\textsuperscript{483} Healy, above n 252.
\textsuperscript{485} Bakan, above n 344, at 20.
\textsuperscript{486} Feinberg, above n 365, at 131–133.
\textsuperscript{487} Bakan, above n 344, at 19.
\textsuperscript{488} At 19.
\textsuperscript{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
coeptive jurisdiction.\footnote{Smith, above n 314, at 16.}

According to the harm principle, the Government has jurisdiction if and only if an
individual’s action causes harm.\footnote{At 16.} 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.\footnote{At 16.} Feinberg suggests
that a:\footnote{Joel Feinberg “Pornography and the Criminal Law” (1978) 40 U Pitt L Rev 567 at 567.}

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**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.\footnote{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.} It is, however, the harmful
effects on their future development that arguably cause the most harm.\footnote{At 216.} As
previously explained, there is evidence that these children suffer from physical
trauma and emotional symptoms including moodiness, fear, anxiety and
hopelessness.\footnote{At 226.} ‘Mr White’,\footnote{Mr White is a nom de plume.} a Registered Psychologist with eight years’
experience in dealing with child pornography offending, agrees and states:\footnote{Interview with Mr White, Registered Psychologist (23 June 2014) at 1.}

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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

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\footnote{At 16.}
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. The Supreme Court of the United States in Osborne v Ohio agreed. 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. The continued existence of the pornography causes the children harm by haunting them in years to come. Furthermore, it cannot be denied that emotional distress is a kind of suffering or pain. It is readily acknowledged that emotional distress is a form of harm and that the prevention of such distress by the State is justified. Richard Arneson perceives that:

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. Applying this suggestion to New Zealand, it would follow that the availability of child pornography on the Internet is harming New Zealand’s society.

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499 Leary, above n 208, at 10.
500 Osborne v Ohio, 495 103 (us 190AD).
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.
506 At 374.
Harm occurs towards the child who is portrayed in the images and further harm transpires when someone views the images of the child online.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{511} Therefore, it is argued that because child pornography can be utilised to normalise and validate paedophilia, it harms society.\textsuperscript{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.\textsuperscript{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.\textsuperscript{514} This compulsion to acquire more material also stimulates the market to produce and consume more hardcore child pornography which again harms society.\textsuperscript{515} However, the relevance of the harm argument is reduced when it is applied to the outlawing of pseudo images.\textsuperscript{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.\textsuperscript{517} Nevertheless, the argument that the consumption of pseudo images drive the market for actual child pornography and thereby cause substantial indirect

\textsuperscript{508} Ethel Quayle and Roberta Sinclair “An Introduction to the Problem” in Ethel Quayle and Kurt M Ribisl (eds) \textit{Understanding and Preventing Online Sexual Exploitation of Children} (Routledge, Abingdon, Oxon ; New York, 2012) at 4.
\textsuperscript{509} O’Donnell and Milner, above n 124, at 74.
\textsuperscript{511} O’Donnell and Milner, above n 124, at 75.
\textsuperscript{512} Henzey, above n 319, at 9.
\textsuperscript{513} Jenkins, above n 130, at 103.
\textsuperscript{514} Henzey, above n 319, at 10.
\textsuperscript{515} At 10.
\textsuperscript{516} Quayle and Sinclair, above n 482, at 5.
harm to society is a view firmly held by many experts concerned about their use and criminalisation.\textsuperscript{518}

Another issue of concern to society is that many child pornographic images depict children smiling as though they are enjoying themselves.\textsuperscript{519} As already noted, child pornography consumers seize on this apparent denial of victimhood as a means of neutralising their behaviour.\textsuperscript{520} Paedophiles who engage in online networking are known to use language that neutralises the inherent harm of child pornography.\textsuperscript{521} Neutralisation is a technique that enables paedophiles to justify the downloading of child pornography even though they subconsciously recognise it as being wrong.\textsuperscript{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.\textsuperscript{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.\textsuperscript{524} Moreover, this rationalisation harms society as it enables paedophiles to deceive themselves and those they associate with.\textsuperscript{525} It also perpetrates the market for the production and consumption of additional child pornography which also harms society.\textsuperscript{526}

Society is also further harmed by child pornography as this material can incite paedophiles to seek out and sexually abuse children.\textsuperscript{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

\begin{footnotesize}
\textsuperscript{519} Henzey, above n 319, at 10.
\textsuperscript{520} At 10.
\textsuperscript{521} O’Donnell and Milner, above n 124, at 74.
\textsuperscript{522} Jenkins, above n 130, at 116.
\textsuperscript{523} At 116–117.
\textsuperscript{525} Henzey, above n 319, at 10.
\textsuperscript{526} At 10.
\textsuperscript{527} At 10.
\end{footnotesize}

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When a paedophile regularly views child pornography their arousal is intensified and this increases their desire for a sexual relationship with a child. 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. This explanation supports the notion that for some paedophiles, the viewing of child pornography is intertwined with contact offending against children.

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. The online grouping of paedophiles within marginalised communities both normalises and legitimises outlawed activities such as the viewing of child pornography. This normalisation further promotes the dangerous belief that children are legitimate sexual targets. 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. 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.

1.3.5.2 The Communal Harm of Child Pornography

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

528 Quayle and Sinclair, above n 482, at 4.
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.\textsuperscript{539} It can also create an unwholesome environment which can lead to further sexual abuse of children throughout the community.\textsuperscript{540} This type of harm is known as ‘communal harm’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{543} Child pornography expert Dr Ethel Quayle suggests that the viewing of child pornography increases the likelihood that children will continue to be abused\textsuperscript{544} because viewing such material stimulates the market to produce and consume more hardcore pornography.\textsuperscript{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.\textsuperscript{546} The availability of child pornography is causing communal harm by harming individual members of the community.\textsuperscript{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.\textsuperscript{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:\textsuperscript{549}

\begin{quote}
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
\end{quote}

\begin{itemize}
\item \textsuperscript{539} See Child Pornography Prevention Act 1996, s 121(1)1.
\item \textsuperscript{540} See Child Pornography Prevention Act 1996, s 121(1)1.
\item \textsuperscript{541} Smith, above n 314, at 17.
\item \textsuperscript{542} At 17.
\item \textsuperscript{543} At 17.
\item \textsuperscript{544} See Ethel Quayle “The Impact of Viewing an Offending Behavior” in Martin Calder (ed) \textit{Child Sexual Abuse and the Internet: Tackling the New Frontier} (Russell House Publishing, 2004).
\item \textsuperscript{545} Henzey, above n 319, at 10.
\item \textsuperscript{546} Smith, above n 314, at 17.
\item \textsuperscript{547} At 17.
\item \textsuperscript{548} At 17.
\item \textsuperscript{549} Blue, Convicted Child Sexual Offender, above n 105, at 2.
\end{itemize}
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. What they do in private will eventually influence their views and the activities that they engage in and support. Dr Diana Russell agrees and argues that viewing child pornography predisposes some males to sexually desire children. It undermines their internal inhibitions and their social boundaries with minors, and reduces the ability of children to avoid sexual victimisation. The watching of extreme pornography such as child pornography is likely to influence the viewer’s conduct. It will also affect the wider community as they interact with the community.

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. 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. This has in fact already happened in New Zealand. Former National Party Member of Parliament Trevor Rodgers revealed to Parliament that:

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.

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550 Smith, above n 314, at 17.
551 At 17.
553 At 66.
554 Smith, above n 314, at 17.
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. 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. Consequently, the parents of the viewer’s children’s friends would more than likely prefer that their children were not exposed to child pornography. 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. 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. This sort of concern is described by Arneson as ‘self-paternalism’. Arneson claims that self-paternalism is in principle a legitimate reason for instituting criminal prohibitions and states:

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. Liberal theorist Dworkin agrees and concedes this point when arguing for the right to pornography. 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. Arneson explains that such desires

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

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

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577 At 927.
579 At 9.
580 Webley, above n 550, at 927.
581 At 927.
582 At 927.
qualitative researchers examining legal issues.\textsuperscript{583} The interviews conducted provided this thesis with access to the perceptions and experiences\textsuperscript{584} of experts in this area of offending and are therefore able to provide highly informative and relevant information.\textsuperscript{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.\textsuperscript{586} The initial step in this type of study is to implement a substantive framework that encapsulates the different topics of study.\textsuperscript{587} Interviews enabled this thesis to build and remodel its substantive framework in response to the qualitative information disclosed by interview participants.\textsuperscript{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.\textsuperscript{589} The reliability or soundness of this study depends on the likelihood of the research findings being repeated in other studies.\textsuperscript{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.\textsuperscript{591} Therefore, the information disclosed during the interview phase of this thesis has been frequently referred to in other publications on Internet child pornography

\textsuperscript{583} Hilary Sommerlad “Researching and Theorizing the Processes of Professional Identity Formation” (2007) 34 Journal of Law and Society 190; Margaret Thornton \textit{Dissonance and Distrust} (Oxford University Press, Melbourne ; New York, 1996).
\textsuperscript{584} Webley, above n 550, at 936.
\textsuperscript{585} Robert Stuart Weiss \textit{Learning from Strangers} (Free Press, New York, 1994) at 17.
\textsuperscript{586} At 1.
\textsuperscript{587} At 15.
\textsuperscript{588} At 15–17.
\textsuperscript{589} Webley, above n 550, at 937.
\textsuperscript{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 technology\(^{597}\) 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.\(^{599}\)

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\(^{592}\) 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 children and to disseminate child pornography across the world. 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 law and New Zealand’s domestic legislation. These instruments place an obligation on the State to provide children with the same protection afforded to adults. 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. 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

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600 Skorzewska-Amberg, above n 141, at 262.
601 Ministry of Justice, above n 215, at 10.
603 Care of Children Act 2004 (NZ).
combat child pornography. This chapter will examine the United Nations Convention on the Rights of the Child 1989 and its subsequent Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000. 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.


1.7.1 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. This notion is also evident in the acceptance and protection of children’s rights among the international community. Further evidence of this view can be ascertained from the fundamental obligations of the Convention on the Rights of the Child 1989 (‘Convention’). The essential requirement for the implementation of the Convention is that a child is fully recognised as a human being with human rights. This requirement and the fact that no other international human rights instrument has been more widely ratified in the history of human rights suggests that children’s rights are a widely accepted notion. Moreover, the premise that children’s rights are human rights is affirmed by Article 6 of the Universal

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606 O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.
610 At 12.
612 At 199.
613 The two most notable exceptions to the ratification of the Convention are the United States and Somalia.
615 Fortin, above n 583, at 13.
Declaration of Human Rights 1948,\(^\text{617}\) which states that everyone has the right to recognition everywhere as a person before the law.\(^\text{618}\)

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.\(^\text{619}\) The significance of these rights for children is in their potential to account for the imbalance between themselves and adults.\(^\text{620}\) Children’s rights identify and respond to the power differential between children and adults.\(^\text{621}\) The importance of children’s rights is that they enable an individual child to be heard and to have value as a human being.\(^\text{622}\) Nevertheless, the concept of children as rights holders requires a sound theoretical justification.\(^\text{623}\) This assessment of children rights would be incomplete without recourse to the jurisprudential and philosophical arguments\(^\text{624}\) concerning whether or not children can be regarded as rights holders.\(^\text{625}\) The main issue in this debate is the disagreement over the nature of the rights themselves\(^\text{626}\) and whether children can exercise the right of choice.\(^\text{627}\)

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.\(^\text{628}\) In this sense, rights are the exclusive domain of the rational adult.\(^\text{629}\) 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.\(^\text{630}\) Proponents of the choice theory argue that children lack the ability to make

\(\text{617}\) Universal Declaration of Human Rights 1948 (un.org).
\(\text{618}\) Universal Declaration of Human Rights 1948, art 6.
\(\text{619}\) Universal Declaration of Human Rights 1948, art 1.
\(\text{621}\) At 345.
\(\text{622}\) At 345.
\(\text{623}\) At 345.
\(\text{624}\) Fortin, above n 583, at 13.
\(\text{625}\) 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.
\(\text{626}\) Fortin, above n 583, at 13.
\(\text{627}\) At 13.
\(\text{628}\) At 13.
\(\text{620}\) Federle, above n 594, at 346.
\(\text{630}\) Fortin, above n 583, at 13.
informed choices and therefore, they cannot be given rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{634}

In contrast, other theorists\textsuperscript{635} argue that the concept of rights does not have to be confined to those who have the capacity to exercise those rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{631} At 13.
\textsuperscript{633} Fortin, above n 583, at 13.
\textsuperscript{634} At 13.
\textsuperscript{636} Fortin, above n 583, at 13.
\textsuperscript{637} Raz, above n 609, at 165–192; MacCormick, above n 609, at 154.
\textsuperscript{638} Fortin, above n 583, at 14.
\textsuperscript{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 horse 646 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 remedy 651 and contradictions and other classifications should not distract from the

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.
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

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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.
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 holder 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. 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. Child pornographers are targeting younger children because they are perceived to be more amenable to victimisation. 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. When this duty is combined with the obligation to act in the best interests of the child this requirement signifies that parents have a greater responsibility to younger children and this obligation evolves as the child becomes more autonomous with age. 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 reduced.

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

663 Doek, above n 585, at 200.
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.
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. As a result, the State has an increased obligation to act with due diligence to ensure that the law can respond to this issue. 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. 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. Thus, the Convention should inform and guide Government in planning, policy and practice. This approach to the problem of child pornography on the Internet is critically important due to the international nature of the Internet. 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].
673 Quayle and Rihisl, above n 27, at 61.
child pornography offending on the Internet. As previously noted, the Convention provides the Government with a conceptual framework on which all assistance for children should be based.

This conceptual framework also supports the implementation of new and improved legislation. 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. It is contended that this duty also extends to preventing child pornography within their respective jurisdictions. 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. Moreover, countries such as New Zealand who become States Parties to instruments such as the Convention also assume an obligation to submit periodic reports to the United Nations. These reports must contain the measures that have been adopted to reduce violations under the Convention such as the enactment of the Films, Videos, and Publications.

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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.


685 At 25.
Classification Amendment Act 2005. New Zealand’s report must also detail the progress that this Amendment has made in achieving compliance. The effect of these implementation mechanisms on New Zealand is that the State has a duty to recognise the special obligations of due diligence. 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. 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.

This due diligence standard forces the State to undertake positive action to prevent all forms of sexual violence against children. The standard is one of reasonableness 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.

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

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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.
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.\textsuperscript{695}

Article 27 of the Vienna Convention on the Law of Treaties 1969\textsuperscript{696} (‘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.\textsuperscript{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.\textsuperscript{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 1989\textsuperscript{699} which was ratified by the Government in 1993.\textsuperscript{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.\textsuperscript{701} This Article states that States Parties shall undertake all appropriate measures for the employment of the rights recognised in the present Convention.\textsuperscript{702} The significance of Article 4 is that its provisions relate to all the

\textsuperscript{697} Vienna Convention on the Law of Treaties 1969, art 27.
\textsuperscript{698} Espósito, above n 650, at 562.
\textsuperscript{701} Fisher, above n 673, at 2.
\textsuperscript{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 action 705 to facilitate the enjoyment of basic human rights for its children. 706 Moreover, the Committee on the Rights of the Child has affirmed 707 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 1976 709 and Article 2 of the International Covenant on Economic, Social and Cultural Rights 1976 710 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

708 Rishmawi, above n 677, at 15.
709 International Covenant on Civil and Political Rights 1966 (un.org).
711 Weissbrodt, Hansen and Nesbitt, above n 681, at 122.
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. 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. 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. This definition provides a foundation for improved conceptual clarity and co-operation between national jurisdictions and their law enforcement agencies. 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. This type of regulation could be achieved by the implementation of a universally recognised standard for the international community.

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

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717 Esposito, above n 650, at 562.
718 At 562.
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 Zealand by Section 4(1) of the Care of Children Act 2004 which states:

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. This should include any political decisions, government policies and legislation to regulate child pornography on the Internet.

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. This Article states that:

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…

722 Care of Children Act 2004 (NZ).
723 Care of Children Act 2004, s 4(1).
725 At 409.
726 Convention on the Rights of the Child 1989 (UN), 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. 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. However, the Convention does not define what is considered to be exploitative. It is contended that anything exploitative would require some commercial element. 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. 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.

The issue of the sexual exploitation of children for commercial purposes was discussed by the first UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Vitit Muntarbhorn. 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. However, others are more optimistic and note that Article 34 of the Convention has led to changes in national legislation and acted as a platform

728 Gillespie, above n 436, at 290.
729 At 290.
730 At 290.
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.
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.\textsuperscript{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.\textsuperscript{739} A legal minor cannot consent, even if that minor appears to say yes.\textsuperscript{740} It is the absence of informed consent which constitutes the essential element of illegality.\textsuperscript{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.\textsuperscript{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.


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.\textsuperscript{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.

\textsuperscript{738} At 775.

\textsuperscript{739} Carr, above n 204, at 12.

\textsuperscript{740} At 12.

\textsuperscript{741} At 12.


\textsuperscript{743} Gillespie, above n 436, at 290.
been an area of grave concern for the international community \(^{753}\) 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 Convention \(^{755}\) 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

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\(^{753}\) Santos Pais, above n 650, at 551.

\(^{754}\) Gillespie, above n 436, at 290.


\(^{756}\) Gillespie, above n 436, at 290.

\(^{757}\) See Akdeniz, above n 148, at 209–233.

\(^{758}\) See Gillespie, above n 436, at ch 11.


\(^{760}\) At [173].

\(^{761}\) At [174].
brought to the field of child pornography.\textsuperscript{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.\textsuperscript{763}

It is the advance of technology and the globalisation of communications which have created a number of problems concerning pseudo images.\textsuperscript{764} As pseudo-images\textsuperscript{765} are created without the use of children, it was found that many member States had no provisions for the criminalisation of such material.\textsuperscript{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.\textsuperscript{767} The Special Rapporteur stated that:\textsuperscript{768}

\begin{quote}
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.
\end{quote}

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.\textsuperscript{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.\textsuperscript{770}

\footnotesize
\begin{itemize}
  \item \textsuperscript{763} At [59].
  \item \textsuperscript{764} At [61].
  \item \textsuperscript{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.
  \item \textsuperscript{766} Calcetas-Santos, above n 736, at [61].
  \item \textsuperscript{768} At [30].
  \item \textsuperscript{769} Ofilia Calcetas-Santos, \textit{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].
  \item \textsuperscript{770} At [53].
\end{itemize}
The report also emphasised the importance of self-regulation\textsuperscript{771} in this field alongside any legal measures.\textsuperscript{772} It was revealed that a number of problems existed in Western Europe and other regions.\textsuperscript{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.\textsuperscript{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,\textsuperscript{775} challenging the Committee on the Rights of the Child to:\textsuperscript{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.\textsuperscript{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.\textsuperscript{778}


\textsuperscript{772} Calcetas-Santos, above n 743, at [103].

\textsuperscript{773} At [17].

\textsuperscript{774} At [17].

\textsuperscript{775} At [34].

\textsuperscript{776} At [53].

\textsuperscript{777} Akdeniz, above n 148, at 212.

\textsuperscript{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, a State that is a party to both treaties is obliged to fulfil all its obligations under each treaty. Article 41 of the Convention states that nothing within the Convention shall affect the operation of domestic or international legislation that is more beneficial to the realisation of children’s rights. 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. Article 41 also places an obligation upon the Government of New Zealand to guarantee the enforcement of superior national standards. 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. 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.

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. These signatories include New Zealand which subsequently ratified the instrument in 2011. The Optional Protocol embraces the criminalisation of

779 UNICEF Innocenti Research Centre, above n 690, at 4.
780 At 4.
786 At 4.
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

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790 UNICEF Innocenti Research Centre, above n 690, at 2.
791 At 2.
795 Gillespie, above n 436, at 290.
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.
803 International Conference on Combating Child Pornography on the Internet, above n 776.
partnership between State governments and the Internet industry. The conference stated that:

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.

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, 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. Article 1 sets out the scope of the Optional Protocol as it states:

Article 1

States Parties shall prohibit … child pornography as provided for by the present Protocol.

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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.
As a result, States Parties must agree to implement criminal legislation to outlaw child pornography. 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. The importance of Article 2 is that it provides clear and detailed definitions of what constitutes the sale of children, child prostitution and child pornography with its statement that:

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 cartoons and drawings have also featured in comic books and magazines. This is where the provisions contained within Article 2(c) are truly significant as they outlaw all types of

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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.
Therefore, the above reference to ‘by whatever means’ within Article 2(c) clearly covers more than just photographs. 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 Children is well aware of this development. Consequently, they have interpreted Article 2(c) broadly, and have ensured that simulated activities are incorporated within the definition.

This specialist international agency is now an important part of Interpol and currently utilises the following definition:

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. 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. Moreover, these definitions expressly consider and differentiate between the traditional image-based forms of child pornography and also the more modern digital-based material. Consequently, each definition recognises and anticipates that child pornography can be found on or in several different types of media. This is clearly an acknowledgment by Interpol that all pornography, including child

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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 representation  

830 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.  

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:  

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.
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.
pornography.\textsuperscript{836} It supports the contention that States Parties, including New Zealand, are under a \textit{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.\textsuperscript{837} However, this \textit{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.\textsuperscript{838} These Articles require the State to establish procedures to prosecute offences which occur beyond its territory\textsuperscript{839} and to adequately respond to the harm perpetrated upon the victims of the child pornography industry.\textsuperscript{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.\textsuperscript{841} This would counter concerns expressed by law enforcement agencies that the law is not responding to the new transnational nature of content investigations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{844} Those struggling against this issue are confronted with particular technical and legal challenges, given the ability to move images across jurisdictions.\textsuperscript{845} Therefore,

\begin{itemize}
  \item \textsuperscript{836} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 8(1)(a).
  \item \textsuperscript{837} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 8(1)(a).
  \item \textsuperscript{838} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 4, 5.
  \item \textsuperscript{839} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 4, 5.
  \item \textsuperscript{840} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 3(3).
  \item \textsuperscript{841} Esposito, above n 650, at 562.
  \item \textsuperscript{842} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.
  \item \textsuperscript{843} At 10.
  \item \textsuperscript{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.
  \item \textsuperscript{845} At 60.
\end{itemize}
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.\footnote{Esposito, above n 650, at 562.} These instruments encourage the adoption of measures, such as legislation and policy, to both prevent and address these violations of children’s rights.\footnote{Santos Pais, above n 650, at 551.}

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.\footnote{Esposito, above n 650, at 562.} 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.\footnote{Santos Pais, above n 650, at 564.} 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.\footnote{Esposito, above n 650, at 562.} 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.\footnote{Santos Pais, above n 650, at 564.} 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.\footnote{O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.} 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.\footnote{Santos Pais, above n 650, at 563.} This is especially the case with regard to the universal
ratification of the Optional Protocol\textsuperscript{854} as this is critical for the protection of children from violence and all forms of sexual exploitation by child pornography.\textsuperscript{855}

This response will require resolute international co-operation between nations, law enforcement agencies, the Internet industry and Non-Governmental Organisations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{specialised protections} which evolve with the autonomy of the child.\textsuperscript{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.\textsuperscript{860} International law recognises children as rights holders and places clear and

\textsuperscript{854} At 563.
\textsuperscript{855} At 563.
\textsuperscript{856} Hick and Halpin, above n 818, at 60.
\textsuperscript{857} Santos Pais, above n 650, at 565.
\textsuperscript{858} Hick and Halpin, above n 818, at 61.
\textsuperscript{859} Convention on the Rights of the Child 1989 (UN), art 5.
\textsuperscript{860} Convention on the Rights of the Child 1989, art 5.
undeniable obligations on signatory States to afford these rights.\textsuperscript{861} States have an obligation to their children to recognise and respond to their rights.\textsuperscript{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.

\subsection*{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{866} The implementation of this normative foundation will provide guidance to the international community and direct efforts to eradicate child pornography.\textsuperscript{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.

\begin{footnotesize}
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\textsuperscript{861} Universal Declaration of Human Rights 1948 (un.org), art 1, 6; Convention on the Rights of the Child 1989, art 3.
\textsuperscript{862} Convention on the Rights of the Child 1989, arts 43 - 45.
\textsuperscript{863} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.
\textsuperscript{864} Esposito, above n 650, at 562.
\textsuperscript{866} Santos Pais, above n 650, at 551.
\textsuperscript{867} At 564.
\end{footnotes}
\end{footnotesize}
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 law\textsuperscript{868} and that they deserve to be treated with dignity and equality.\textsuperscript{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.\textsuperscript{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.\textsuperscript{871} Article 4 of the Convention places an obligation on the State to provide a safe and secure environment for New Zealand’s children.\textsuperscript{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.\textsuperscript{873}

It has also been established that the State must recognise that the vulnerability of children is determined by their age.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{868} Universal Declaration of Human Rights 1948 (un.org), art 6.
  \item \textsuperscript{869} Universal Declaration of Human Rights 1948, art 1.
  \item \textsuperscript{870} Convention on the Rights of the Child 1989, art 1.
  \item \textsuperscript{871} Care of Children Act 2004 (NZ), s 4.
  \item \textsuperscript{872} Peace Pledge Union, above n 686.
  \item \textsuperscript{873} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 8.
  \item \textsuperscript{874} Convention on the Rights of the Child 1989, art 5.
\end{itemize}
investigations and prosecutions.\textsuperscript{875} The Convention and the Optional Protocol provide the ideal platform for this initiative because they are specifically intended to protect children from child pornography\textsuperscript{876} and respond to this concern at the international level.\textsuperscript{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.\textsuperscript{878} Although the development of effective co-ordinating mechanisms continues to be a challenge,\textsuperscript{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.\textsuperscript{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.

\textsuperscript{875} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.  
\textsuperscript{876} Santos Pais, above n 650, at 551.  
\textsuperscript{877} Esposito, above n 650, at 562.  
\textsuperscript{878} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 10.  
\textsuperscript{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.  
\textsuperscript{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 1993\(^\text{881}\) (‘Classification Act 1993’ or ‘Act’), which was amended by various amendments such as the Films, Videos, and Publications Classification Amendment Act 2005\(^\text{882}\) (‘Amendment Act’).\(^\text{883}\) 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.\(^\text{884}\) This obligation extends to material from the

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\(^{882}\) Films, Videos, and Publications Classification Amendment Act 2005.


Internet and is intended to prohibit all interaction with this content. The Articles of the Optional Protocol which detail these requirements must also be read in conjunction with each other. 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.

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. It is the ‘State’, that is, the Government and its bureaucracy, which has a constitutional obligation to regulate the public sphere. This includes the right to intervene in the private domain of an individual who is accessing objectionable content via the Internet. 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. 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. Therefore, censorship in New Zealand was historically regarded as a moral issue. This approach is often justified by the negative effects of objectionable publications and the resulting corruption of innocent and vulnerable

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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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{897} Politically motivated censorship has historically been a much-utilised tool.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{902}

1.11.2 The History of New Zealand’s Censorship Law

Criminal law is the basis of censorship at common law.\textsuperscript{903} The criminal precedent was established as early as 1663 in the English case \textit{R v Sidley}.\textsuperscript{904} In this case, Mr

\begin{thebibliography}{99}
\bibitem{895} At 12.
\bibitem{896} At 12.
\bibitem{897} Christoffel, above n 867, at 18.
\bibitem{898} Watson and Shuker, above n 863, at 13.
\bibitem{899} At 13.
\bibitem{900} Greig, above n 866, at 2.
\bibitem{901} Christoffel, above n 867, at 40.
\bibitem{902} At 40.
\bibitem{903} Greig, above n 866, at 3.
\bibitem{904} \textit{R v Sidley} (1663) 1 Sid 168; 82 ER 1036 (gb).
\end{thebibliography}
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. Therefore, the public display of the naked person, or any other act of open and disreputable lewdness, became a criminal offence. Since R v Curl in 1712 the English Courts have held that lewd and obscene publications are indeed a common law offence. The Court in Curl stated that:

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. This case established the Hicklin test and laid down the common law precedent for all commonwealth jurisdictions, including New Zealand. 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. 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.

These common law standards were enforceable in New Zealand until the enactment by Parliament of the Indecent Publications Amendment Act 1954. This Act, and

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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); Sampter 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. The 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. This Act is the Films, Videos, and Publications Classification Act 1993 which is administered by the Ministry of Justice. 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. 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.

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’). 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. 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.

917 Christoffel, above n 867, at 39.
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.
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.\textsuperscript{924}

New Zealand's previous tripartite system for the classification of publications has been replaced by a streamlined, comprehensive classification system.\textsuperscript{925} As previously mentioned, this classification system is administered and enforced by the Office of Film and Literature Classification\textsuperscript{926} under the empowering legislative umbrella of the Films, Videos, and Publications Classification Act 1993.\textsuperscript{927} This Act has replaced the Indecent Publications Act 1963, the Films Act 1983, and the Video Recording Act 1987.\textsuperscript{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.\textsuperscript{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.\textsuperscript{930} This can be seen in the following recommendations:\textsuperscript{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

\textsuperscript{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 I. 7A at 3.
\textsuperscript{925} Philip Joseph and Jason McHerron \textit{LexisNexis®: Document - Criminal Offences} (LexisNexis, 2012) at [203].
\textsuperscript{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.
\textsuperscript{927} Joseph and McHerron, above n 899, at [203].
\textsuperscript{928} \textit{Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)} (2000) 3 NZLR 570 (NZ Court of Appeal) at [3].
\textsuperscript{929} Internal Affairs and Local Government Committee, above n 898, at 3.
\textsuperscript{930} At 3.
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.\textsuperscript{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.\textsuperscript{933} Labour Party MP Lianne Dalziel discussed this issue during the introduction of the Bill into Parliament and stated:\textsuperscript{934}

\begin{quote}
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.
\end{quote}

\begin{footnotes}
\item[932]Films, Videos, and Publications Classification Act 1993, Long Title.
\item[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.
\item[934]Hansard, above n 907, at 12766.
\end{footnotes}
These sentiments were shared by the then Minister of Women’s Affairs Jenny Shipley during the debate. The key issue of concern in this debate was the implementation of the new enforcement provisions for possession of child pornography. This debate also raised serious concerns about the lack of possession provisions in the former classification regime. Shipley’s comments during the Second Reading of the Bill, draw attention to this point.

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.

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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.
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. 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.

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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*. The Appellant in this case had been found in possession of electronic pictures which were stored as jpegs on his computer’s hard drive. 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. 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. Consequently Mr Goodwin was found guilty and convicted on 44 charges of possession of an objectionable publication under Section 131(1) of the Act.

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. To support this multiple publication suggestion the Judge referred to the definition of a book within the Act. This did not appear to rule out the possibility that a publication could be a combination of other publications. A book in terms of the definition contained within the Act includes a magazine and a book or magazine could contain a number of pictures or photographs, each of which is itself a publication.

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*. It was held by Justice O’Regan that the

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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.\textsuperscript{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 \textit{Department of Internal Affairs v Merry},\textsuperscript{954} where the Court proceeded on the basis that each computer image was an objectionable file.\textsuperscript{955} Moreover, in \textit{R v Millard},\textsuperscript{956} Judge Hobbs found that the individual computer files known as jpgs were publications because they were similar to still photographs.\textsuperscript{957} This decision also held that mpgs\textsuperscript{958} were publications and described them as akin to movie clips.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{961} Justice O’Regan stated that:

\begin{quote}
..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.
\end{quote}

\begin{itemize}
\item \textsuperscript{953} At [28].
\item \textsuperscript{954} \textit{Department of Internal Affairs v Merry} (2000) 2000 DCR 733 (NZ District Court).
\item \textsuperscript{955} \textit{Goodin v Department of Internal Affairs}, above n 915, at [29].
\item \textsuperscript{956} \textit{R v Millward} (2000) DCR 2000 633 (NZ).
\item \textsuperscript{957} At 635.
\item \textsuperscript{958} An mpg is a compressed audio or video recording.
\item \textsuperscript{959} \textit{R v Millward}, above n 930, at 635.
\item \textsuperscript{960} \textit{Goodin v Department of Internal Affairs}, above n 915, at [29].
\item \textsuperscript{961} At [37].
\item \textsuperscript{962} At [38].
\end{itemize}
Such an interpretation is consistent with the requirements set out in Section 5(1) of the Interpretation Act 1999, 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. 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. 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.

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’. 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. 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.

963 Interpretation Act 1999.
964 Goodin v Department of Internal Affairs, above n 915, at [38].
965 At [39].
967 Greig, above n 866, at [8].
969 At 7.
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. 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. 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. 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. Moreover, the Departmental Report of 24 May 1993 by the former Department of Justice on the Bill provides valuable background knowledge for the reasons behind the current structure of Section 3 of the Act. This Report reveals that:

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,

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970 Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington), above n 902, at [9].
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.
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)

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\(^{979}\) 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 Classification\(^8\) seem to interpret it\(^9\) as meaning people less than 18 years of age.\(^1\) The omission of an express definition within the Act is deliberate\(^2\) as an inquiry conducted under Section 3 of the Act does not require the ascertainment of the precise age of the person photographed.\(^3\) 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.\(^4\) A report by the Government Administration Committee on the Films, Videos, and Publications Classification Amendment Bill in 2004 endorsed this view.\(^5\) 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.\(^6\) Therefore these provisions do not hinge on whether the publication is portraying a child or young person.\(^7\) This Report further asserts that:\(^8\)

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.

\(^{8}\) 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).

\(^{9}\) 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.

\(^{1}\) Ministry of Justice, above n 940.

\(^{2}\) Moonen v Film and Literature Board of Review (2002) 2 NZLR 754 (NZ Court of Appeal) at [37].

\(^{3}\) At [40].

\(^{4}\) At [40].

\(^{5}\) Phil Goff Films, Videos, and Publications Classification Amendment Bill (Occasional Paper 92–2, 2005).

\(^{6}\) At 7.

\(^{7}\) At 7.

\(^{8}\) At 7.
It may seem surprising that what constitutes a child should even need defining, but this concept is very elusive.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1002} Accordingly, there has been no universally agreed single definition of a child, which is a significant indication of the vagueness of the concept.\textsuperscript{1003}

Increasingly any reference to a definition of a child has been directed toward the stages of development such as infancy, childhood and adolescence.\textsuperscript{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.\textsuperscript{1005} Instead minors progressively assume rights, obligations and duties as they progress through childhood.\textsuperscript{1006} This is particularly evident in New Zealand’s criminal legislation. The Crimes Act 1961\textsuperscript{1007} 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.\textsuperscript{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.

\textsuperscript{1000} Peter Spiller \textit{Butterworths New Zealand Law Dictionary} (6th ed ed, LexisNexis NZ, Wellington, [NZ], 2005) at 47.
\textsuperscript{1002} Margaret L King “Concepts of Childhood: What We Know and Where We Might Go” (2007) 60 Renaissance Quarterly 371 at 402.
\textsuperscript{1003} Gillespie, above n 436, at 13.
\textsuperscript{1004} Gillespie, above n 973, at 201.
\textsuperscript{1005} At 202.
\textsuperscript{1006} At 202.
\textsuperscript{1007} Crimes Act 1961 (NZ).
\textsuperscript{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.

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).
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.\footnote{Mark Henaghan \textit{Care of Children} (LexisNexis, Wellington, NZ, 2005) at 3.} The primary focus of COCA is on the legal regulation of the parent–child relationship,\footnote{At 4.} 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.\footnote{Greig, above n 866, at [33].} 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.\footnote{Alisdair Gillespie “Legal Definitions of Child Pornography” (2010) 16 Journal of Sexual Aggression 19 at 20.} 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.\footnote{Greig, above n 866, at [5].} 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.\footnote{Goff, above n 969, at 7.} This issue was emphasised in Department of Justice’s Departmental Report of 24 May 1993. This Report affirms that:\footnote{Internal Affairs and Local Government Select Committee, above n 942, at 4.}

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
Appeal in *Moonen v Film and Literature Board of Review*. The Court stated in paragraphs 4 and 5 that:

[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).

The Court of Appeal in the later decision of *Living Word Distributors Ltd v Human Government Administration Select Committee*, above n 949, at 2.
Rights Action Group Inc\textsuperscript{1027} created considerable debate when the Court’s definition of what constituted an objectionable publication placed limits on the definition of objectionable.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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’s jurisdiction by the words ‘such as’ contained within Section 3(1) of the Act.\textsuperscript{1031}

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.\textsuperscript{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.\textsuperscript{1034} The Court determined that:\textsuperscript{1035}

\begin{enumerate}
\item 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
\end{enumerate}

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\textsuperscript{1027} Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington), above n 902.
\textsuperscript{1028} Wilson, above n 646, at 72.
\textsuperscript{1029} At 72.
\textsuperscript{1030} At 72.
\textsuperscript{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.
\textsuperscript{1032} Wilson, above n 646, at 72.
\textsuperscript{1033} Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington), above n 902, at [25].
\textsuperscript{1034} At [25].
\textsuperscript{1035} At [27 and 28].
\end{flushright}
Publications Act 1963. Given the similarity of the content description in the successive statutes, “such as” was a deliberate departure from the unrestricted “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.
1039 At 2.
1040 At 2.
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.\footnote{1043}{Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington), above n 902, at 570.}

The judgement by the Court of Appeal in \textit{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.\footnote{1044}{Indecent Publications Act 1963.} 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.\footnote{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).} The \textit{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.\footnote{1046}{Wilson, above n 646, at 72.} 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.\footnote{1047}{Report of the Government Administration Committee, above n 267, at 16.} The Administration Committee stated that:\footnote{1048}{At 16.}

Computer image files and photographs of naked people, particularly children and young persons, are another area that the \textit{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’
related to them. 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. 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.

Justice Thomas emphasised this point and notes that: 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. 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. 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. 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

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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.

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young persons who were fully or partially nude could be redefined and come within the scope of the Act.  

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. Any such restriction on the right to freedom of expression must also meet the rigorous criteria set out under international human rights law. The International Covenant on Civil and Political Rights 1976 is a binding international treaty which New Zealand ratified on 28 December 1978. It has also been adopted by 168 other parties and contains criteria relevant to restricting freedom of expression and filtering of the Internet. Article 19 affirms that:

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.

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1056 Office of Film and Literature Classification, above n 1015.
1058 At [28].
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. These protections also have important procedural dimensions that require the implementation of sensitive tools to distinguish between protected and unprotected speech.

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’). This right is contained within Section 14 which states that:

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.

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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.\footnote{1068 Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd, above n 1019, at 727.} 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.\footnote{1069 New Zealand Bill of Rights Act 1990, s 5.} 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.\footnote{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.\footnote{1071 Report of the Government Administration Committee, above n 267, at 13.} This approach recognises that the context or manner in which something is depicted is crucially important to issues involving censorship.\footnote{1072 At 4.} 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:\footnote{1073 Indecent Publications Tribunal, above n 945, at 4.}

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.
The Bill of Rights Act 1990 applies to the legislative, executive and judicial branches of the Government of New Zealand,\textsuperscript{1074} or any other person or body authorised by law to perform a public function.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 objectionable\textsuperscript{1079} as defined under Section 3 of the Act.\textsuperscript{1080} This is clarified in the judgment of the Court which was delivered by Justice Tipping:\textsuperscript{1081}

\begin{quote}
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
\end{quote}

\textsuperscript{1074} New Zealand Bill of Rights Act 1990, s 3(a).
\textsuperscript{1075} New Zealand Bill of Rights Act 1990, s 3(b).
\textsuperscript{1076} New Zealand Bill of Rights Act 1990, s 6.
\textsuperscript{1077} Report of the Government Administration Committee, above n 267, at 25.
\textsuperscript{1078} Office of Film and Literature Classification, above n 1015.
\textsuperscript{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.
\textsuperscript{1080} Report of the Government Administration Committee, above n 267, at 25.
\textsuperscript{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 Review1083 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1091} The Court found that these concepts denote an effect which advocates or encourages the prohibited activity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Moonen} decision is that the Court of Appeal (which was at the time of this decision New Zealand’s highest Appellate Court) confirmed that

\begin{itemize}
\item \textsuperscript{1089} At [27].
\item \textsuperscript{1090} At [27].
\item \textsuperscript{1091} At [29].
\item \textsuperscript{1092} At [29].
\item \textsuperscript{1093} At [29].
\item \textsuperscript{1094} At [29].
\item \textsuperscript{1095} At [40].
\item \textsuperscript{1096} At [40].
\end{itemize}
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

1099 Human Rights Commission, above n 1072.
1100 *Moonen v Film and Literature Board of Review*, above n 998, at [18].
1102 At 25.
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.\textsuperscript{1104} The 2001 Administration Committee noted that:\textsuperscript{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.\textsuperscript{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 \textit{Moonen} case is deemed to be objectionable.\textsuperscript{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 2000\textsuperscript{1108} (‘Prohibition of Child Pornography Amendment Bill’) by National Party Member of Parliament (MP) and then Women’s Affairs spokesperson, Anne Tolley.\textsuperscript{1109} Labour Party MP Tim Barnett asserted that:\textsuperscript{1110}

\begin{footnotes}
\item[1107] At 26.
\end{footnotes}
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.\textsuperscript{1111} This would be achieved by ensuring that child pornography was less freely available.\textsuperscript{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.\textsuperscript{1113} Anne Tolley specified the purpose of the Bill in its second reading before Parliament and acknowledged that:\textsuperscript{1114}

\begin{quote}
... 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.
\end{quote}

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.\textsuperscript{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

\textsuperscript{1112} At 26.  
\textsuperscript{1113} Report of the Government Administration Committee, above n 1079, at 566.  
\textsuperscript{1114} Hansard, above n 1084, at 8225.  
behaviour depicted.\textsuperscript{1116} It also sought to exempt the Section 3 definition of an objectionable publication from any Bill of Rights Act 1990 considerations.\textsuperscript{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.\textsuperscript{1118} The Attorney General stated that:\textsuperscript{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 nappies\textsuperscript{1120} and academic works that discuss the sexual conduct of children and young persons would be deemed to be objectionable under Subsection (1A).\textsuperscript{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.\textsuperscript{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:\textsuperscript{1123}

\begin{flushright}
\textsuperscript{1117} At 26.
\textsuperscript{1118} House of Representatives, above n 1089, at 4.
\textsuperscript{1119} At 4.
\textsuperscript{1120} At 2.
\textsuperscript{1121} At 2.
\textsuperscript{1122} Report of the Government Administration Committee, above n 267, at 27.
\textsuperscript{1123} Hansard, above n 1084, at 8230.
\end{flushright}
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.\textsuperscript{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.\textsuperscript{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:\textsuperscript{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.\textsuperscript{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

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\begin{itemize}
  \item \textsuperscript{1124} Report of the Government Administration Committee, above n 267, at 11.
  \item \textsuperscript{1125} House of Representatives, above n 1089, at 2.
  \item \textsuperscript{1126} Hansard (16 February 2005) 623 New Zealand Parliamentary Debates 18704 at 18705.
  \item \textsuperscript{1127} Government Administration Committee, above n 1012, at 5.
\end{itemize}
\end{footnotes}
whether specific material should be censored.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1130} Only where such an interpretation is impossible will the Act prevail over the protection contained within the Bill of Rights Act.\textsuperscript{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 Classification\textsuperscript{1132} 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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{1135} Several sequences in the DVD implied that young persons are acceptable sexual partners for adult men and legitimate subjects for adult sexual fantasies.\textsuperscript{1136} The underlying

\textsuperscript{1128} At 5.
\textsuperscript{1129} At 5.
\textsuperscript{1130} At 5.
\textsuperscript{1131} At 5.
\textsuperscript{1132} Andrew R Jack, Office of Film and Literature Classification \textit{Annual Report of the Office of Film and Literature Classification 2012} (2012).
\textsuperscript{1133} At 4.
\textsuperscript{1134} At 4.
\textsuperscript{1135} At 13.
\textsuperscript{1136} At 13.
theme of these sequences tends to promote and support the exploitation of young
persons for sexual purposes.\textsuperscript{1137} Thus, the Classification Office classified this
publication as an objectionable publication and specified that:\textsuperscript{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 \textit{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.\textsuperscript{1139} The outcome of this inquiry was a report\textsuperscript{1140} in which
the Administration Committee made a total of 34 recommendations.\textsuperscript{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.\textsuperscript{1142} The
recommendations contained within the Administration Committees 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.\textsuperscript{1143} This amending legislation became the Films, Videos, and
Publications Classification Amendment Act 2005. The reasoning behind and the

\begin{footnotes}
\footnote{1137}{At 13.}
\footnote{1138}{At 13.}
\footnote{1139}{Keith Manch and David Wilson \textit{Objectionable Material on the Internet: Developments in
Enforcement} (2003) at 6.}
\footnote{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.}
\footnote{1141}{Manch and Wilson, above n 1113, at 7.}
\footnote{1142}{Harvey, above n 922, at 316.}
\footnote{1143}{Manch and Wilson, above n 1113, at 7.}
\end{footnotes}
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:\footnote{1144}{Hansard, above n 1100, at 18704.}

The key feature of this legislation is that it implements though 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.\footnote{1145}{The Department of Internal Affairs, above n 857.} These included expanding the meaning of objectionable to ensure nude pictures of children and young persons are included within Section 3 of the Act.\footnote{1146}{Office of Film and Literature Classification, above n 1015.} Furthermore, the Amendment Act 2005 substantially increased the penalties for possession and distribution of objectionable publications.\footnote{1147}{Office of Film and Literature Classification, above n 1015.} 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.
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. The Classification Office replaced the Chief Censor of Films, the Indecent Publications Tribunal and the Video Recordings Authority. These three former offices had sought to bring some sanity to New Zealand’s censorship legislation. However, this was unfeasible as they operated within different criteria. 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:

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.\textsuperscript{1153} Thus, the Classification Office provides advice and resources to the public in order to aid compliance with the law.\textsuperscript{1154} In accordance with Section 76(2) of the Act as inserted by Section 200 of the Crown Entities Act 2004,\textsuperscript{1155} it is established that the Office is also a recognised Crown entity.\textsuperscript{1156} Furthermore, the Classification Office has its own Board in the form of the Chief Censor and the Deputy Chief Censor.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1159} The Committee released a report in February of that same year which was based on extensive consultation and investigation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1162}

\begin{thebibliography}{9}
\bibitem{1154} Office of Film and Literature Classification, above n 1127.
\bibitem{1155} Crown Entities Act 2004 (NZ).
\bibitem{1156} Films, Videos, and Publications Classification Act 1993 s 76(2).
\bibitem{1157} Interview with Lloyd Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand (2 July 2014) at 3.
\bibitem{1158} At 3.
\bibitem{1159} See New Zealand Ministerial Committee of Inquiry into Pornography, above n 905.
\bibitem{1160} Christoffel, above n 867, at 39.
\bibitem{1161} At 39.
\bibitem{1162} Hansard, above n 907, at 12758.
\end{thebibliography}
Minister of Social Welfare, Jenny Shipley referred to the concerns in Parliament and stated:\textsuperscript{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.\textsuperscript{1164} This complexity had allowed some pornographic material to escape classification\textsuperscript{1165} while other issues such as inconsistencies in decisions also gave weight to the argument for the establishment of a single Classification Office.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1168} The former Attorney General stated:\textsuperscript{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

\textsuperscript{1163} At 12758.  
\textsuperscript{1164} At 12758.  
\textsuperscript{1165} At 12758.  
\textsuperscript{1166} Christoffel, above n 867, at 39.  
\textsuperscript{1167} Hansard, above n 907, at 12758.  
\textsuperscript{1168} Hansard, above n 532, at 17052.  
\textsuperscript{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. 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. This Classification Office would be responsible for the legal classification of all material covered in the Bill. She further specified that:

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

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1171 Hansard, above n 907, at 12758.
1172 At 12758.
1173 At 12758.
regulate the classification of any publication submitted to it for determination.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1178} Consequently, the Courts did not have the expertise necessary to adequately deal with the relevant issues.\textsuperscript{1179} Dr Jack is also adamant that the publications classification process requires a high level of competency to understand it.\textsuperscript{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.\textsuperscript{1181}

Another issue of concern was that the different attitudes of the Judges around the country also resulted in diverse decisions from the Courts.\textsuperscript{1182} Consequently, there

\textsuperscript{1174} Jack, Office of Film and Literature Classification, above n 1106, at 5.
\textsuperscript{1175} At 5.
\textsuperscript{1176} See: \textit{R v Sidley}, above n 878; \textit{R v Curl}, above n 881; \textit{R v Hicklin}, above n 884; Clarkson \textit{v} McCarthy, above n 885.
\textsuperscript{1177} Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 3.
\textsuperscript{1178} At 3.
\textsuperscript{1179} At 3.
\textsuperscript{1180} At 3.
\textsuperscript{1181} Interview with Nic McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand (5 June 2014) at 2.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{1184} Moreover, the content of any child pornography publications is by its very nature extremely challenging.\textsuperscript{1185} There is also the view that Judges and Juries do not want to visually interact with this material.\textsuperscript{1186} Dr Jack considers this notion to be understandable and states:\textsuperscript{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 \textit{R v D}\textsuperscript{1188} has suggested that Judges should view child pornography publications that have been enclosed with applications for production orders sought by crown prosecutors.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1192} The Office is mandated

\begin{itemize}
  \item \textsuperscript{1183} At 3.
  \item \textsuperscript{1184} At 3.
  \item \textsuperscript{1185} At 3.
  \item \textsuperscript{1186} At 3.
  \item \textsuperscript{1187} At 3.
  \item \textsuperscript{1188} \textit{R v D} Court of Appeal, Wellington CA287/2010, 20 September 2010.
  \item \textsuperscript{1189} At [84–85].
  \item \textsuperscript{1190} At [68–69].
  \item \textsuperscript{1191} At [84].
  \item \textsuperscript{1192} Greig, above n 866, at 8.
\end{itemize}
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.\textsuperscript{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.\textsuperscript{1194} The classification system enables the Classification Office to restrict a publication that is deemed to require an age restriction.\textsuperscript{1195} Furthermore, and most importantly, the classification system also permits the Office to place an outright ban on objectionable publications such as child pornography.\textsuperscript{1196} McCully further states:\textsuperscript{1197}

\begin{quote}
It is about protecting the public good and limiting the availability of objectionable publications, to keep them away from children.
\end{quote}

1.15.3.2 The Importance of a Robust Process

‘Mr Black’,\textsuperscript{1198} a former member of the Film and Literature Board of Review agrees with McCully\textsuperscript{1199} and confirms that the classification system reflects the changing attitudes of New Zealand’s society.\textsuperscript{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.\textsuperscript{1201} Furthermore, the positive aspect of

\begin{footnotes}
\textsuperscript{1193} Films, Videos, and Publications Classification Act 1993 s 77(2).
\textsuperscript{1194} McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 2.
\textsuperscript{1195} At 2.
\textsuperscript{1196} At 2.
\textsuperscript{1197} At 2.
\textsuperscript{1198} Mr Black is a nom de plume.
\textsuperscript{1199} Interview with Mr Black, Former Member of the Film and Literature Board of Review, New Zealand (30 May 2014) at 4.
\textsuperscript{1200} At 4.
\textsuperscript{1201} At 3.
\end{footnotes}
New Zealand’s classification system is that it completely outlaws child pornography.\textsuperscript{1202} He is adamant that the classification system in New Zealand is exemplary and a very robust system.\textsuperscript{1203} This powerful classification system, is in Mr Black’s view, due to the highly commendable performance that is undertaken by the Classification Office.\textsuperscript{1204}

The classification system must also be mindful of changing public attitudes.\textsuperscript{1205} Mr Black considers that the way children are sexualized by society is a significant factor in the dilemma of child pornography.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1208} Once the examination has been concluded, the Office must classify the publication\textsuperscript{1209} as unrestricted,\textsuperscript{1210} objectionable,\textsuperscript{1211} or restricted.\textsuperscript{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

\begin{enumerate}
\item \textsuperscript{1202} At 3.
\item \textsuperscript{1203} At 4.
\item \textsuperscript{1204} At 4.
\item \textsuperscript{1205} At 4.
\item \textsuperscript{1206} At 4.
\item \textsuperscript{1207} At 4.
\item \textsuperscript{1208} Films, Videos, and Publications Classification Act 1993 s 23(1).
\item \textsuperscript{1209} Films, Videos, and Publications Classification Act 1993, s 23(2).
\item \textsuperscript{1210} Films, Videos, and Publications Classification Act 1993, s 23(2)(a).
\item \textsuperscript{1211} Films, Videos, and Publications Classification Act 1993, s 23(2)(b).
\item \textsuperscript{1212} Films, Videos, and Publications Classification Act 1993, s 23(c).
\end{enumerate}
injurious to the public good. However, these five stated subject matters are not exclusive. Consequently, they are not the only subject matters to have been considered by the Courts in New Zealand to be objectionable.

A restricted publication is any publication which is not deemed objectionable and the availability of which the Classification Office has determined should be restricted. 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. Furthermore, this publication may be restricted to specified persons or classes of persons or restricted to one or more specified purposes. These specified persons or purposes under the Act include educational, professional, scientific, literary, artistic or technical purposes. 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.

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. 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. 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

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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).
1220 Films, Videos, and Publications Classification Act 1993, s 23(3).
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.\textsuperscript{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.\textsuperscript{1225} It has been held by Justice McCarthy, the then President of the Court of Appeal in \textit{Police v News Media Ownership Ltd}\textsuperscript{1226} that there must be discernible injury to the public good.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1229} This includes: the exploitation of children and young persons, or both, for sexual purposes such as the production of child pornography,\textsuperscript{1230} the use of violence or coercion to compel any person to participate in sexual conduct,\textsuperscript{1231} sexual conduct with or upon the corpse of a dead person;\textsuperscript{1232} the use of urine or excrement in association with degrading or dehumanising

\textsuperscript{1224}Films, Videos, and Publications Classification Act 1993, s 3B.
\textsuperscript{1225}Films, Videos, and Publications Classification Act 1993, s 3(1).
\textsuperscript{1226}\textit{Police v News Media Ownership Ltd} (1975) 1 NZLR 610 (NZ NZCA). Also see \textit{Collector of Customs v Lawrence Publishing Co Ltd} (1986) 1 NZLR 404 (NZ Court of Appeal).
\textsuperscript{1227}\textit{Police v News Media Ownership Ltd}, above n 1200, at 615.
\textsuperscript{1229}Films, Videos, and Publications Classification Act 1993, s 3(1).
\textsuperscript{1230}Films, Videos, and Publications Classification Act 1993, s 3(2)(a).
\textsuperscript{1231}Films, Videos, and Publications Classification Act 1993, s 3(2)(b).
\textsuperscript{1232}Films, Videos, and Publications Classification Act 1993, s 3(2)(c).
conduct or sexual conduct;\textsuperscript{1233} bestiality;\textsuperscript{1234} and finally acts of torture or the infliction of extreme violence or cruelty.\textsuperscript{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.\textsuperscript{1236} Additionally, the Court of Appeal in \textit{Society for the Promotion of Community Standards Inc v Film and Literature Board of Review}\textsuperscript{1237} held that the Board of Review must give detailed reasons for its decision to classify a publication as being objectionable.\textsuperscript{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.\textsuperscript{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;\textsuperscript{1240} sexual violence or sexual coercion, or violence or coercion in association with sexual conduct;\textsuperscript{1241} other sexual or physical conduct of a degrading or dehumanising or demeaning nature;\textsuperscript{1242} sexual conduct with or by children, or young persons, or both;\textsuperscript{1243} physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain.\textsuperscript{1244}

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\textsuperscript{1233} Films, Videos, and Publications Classification Act 1993, s 3(2)(d).
\textsuperscript{1234} Films, Videos, and Publications Classification Act 1993, s 3(2)(e).
\textsuperscript{1235} Films, Videos, and Publications Classification Act 1993, s 3(2)(f).
\textsuperscript{1236} Films, Videos, and Publications Classification Act 1993, s 3(3)(a).
\textsuperscript{1237} Society for the Promotion of Community Standards Inc v Film and Literature Board of Review (2005) 3 NZLR 403 (NZ Court of Appeal).
\textsuperscript{1238} At [8].
\textsuperscript{1239} Films, Videos, and Publications Classification Act 1993, s 55(1)(c).
\textsuperscript{1240} Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(i).
\textsuperscript{1241} Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(ii).
\textsuperscript{1242} Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(iii).
\textsuperscript{1243} Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(iv).
\textsuperscript{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;\(^\text{1245}\) degrades or dehumanises or demeanes any person;\(^\text{1246}\) promotes or encourages criminal acts or acts of terrorism;\(^\text{1247}\) 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.\(^\text{1248}\) 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.\(^\text{1249}\)

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.\(^\text{1250}\) These matters of general concern include the dominant effect of the publication as a whole\(^\text{1251}\) and the impact of the medium in which the publication is presented.\(^\text{1252}\) 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.\(^\text{1253}\) 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.\(^\text{1254}\) The purpose for which the publication is intended to be utilised\(^\text{1255}\) 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).
\(^{1250}\) 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.\textsuperscript{1256}

Accordingly, Section 3(4)(f) of the Act means that these provisions within Section 3(4) are by no way comprehensive.\textsuperscript{1257} This interpretation has been confirmed in the Supreme Court case of Robson v Hicks Smith and Sons Limited\textsuperscript{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 1963\textsuperscript{1259} 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:\textsuperscript{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

\textsuperscript{1256} Films, Videos, and Publications Classification Act 1993, s 3(4)(f).
\textsuperscript{1257} Films, Videos, and Publications Classification Act 1993, s 3(4)(f).
\textsuperscript{1258} Robson v Hicks Smith and Sons Limited NZLR 1113 (nz SC).
\textsuperscript{1259} Indecent Publications Act 1963.
\textsuperscript{1260} Police v News Media Ownership Ltd, above n 1200, at 613.
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. 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. This prevailing characteristic must be the characteristic which has a commanding influence on both the content and nature of the publication.

It has been further acknowledged by Justice Woodhouse in the Supreme Court case of Robson v Hicks Smith and Sons Limited that difficulties in enforcing a censorship issue are not a matter for the consideration of the Classification Office or the Courts, but a matter for the legislature to determine. 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. 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. Humorous content that acts as a guide to the intention of a publication can also be considered in any classification decision.

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...
in accordance with Section 23(2) be given a classification other than objectionable is a matter for the expert judgment.\textsuperscript{1271} This expert judgement must be determined by a person or body authorised by the Act to make such a determination.\textsuperscript{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.\textsuperscript{1273} Justice Tipping in the Court of Appeal case of Moonen\textsuperscript{1274} considered this issue and indicated that:\textsuperscript{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.\textsuperscript{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.\textsuperscript{1277} The strict application of the requirements of

\textsuperscript{1271} Films, Videos, and Publications Classification Act 1993 s 4(1).
\textsuperscript{1272} Films, Videos, and Publications Classification Act 1993, s 4(1).
\textsuperscript{1273} Films, Videos, and Publications Classification Act 1993, s 4(2).
\textsuperscript{1274} Moonen v Film and Literature Board of Review; above n 998.
\textsuperscript{1275} At [34].
\textsuperscript{1276} Films, Videos, and Publications Classification Act 1993, s 4(2).
\textsuperscript{1277} Films, Videos, and Publications Classification Act 1993, s 26.
Section 26 has been confirmed by the Court of Appeal in Re Baise-Moi.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1285} the Commissioner of Police\textsuperscript{1286} or the Secretary of Internal

\begin{flushleft}
\textsuperscript{1278} Re Baise-Moi [2005] NZAR 214 (NZ CA).
\textsuperscript{1279} At [44].
\textsuperscript{1280} Films, Videos, and Publications Classification Act 1993, s 34(a).
\textsuperscript{1281} Films, Videos, and Publications Classification Act 1993, s 41(1).
\textsuperscript{1282} See the Films, Videos, and Publications Classification Act 1993, ss 41(1), 42, 47 and 56.
\textsuperscript{1283} See the Films, Videos, and Publications Classification Act 1993, ss 41(1), 42, 47 and 56.
\textsuperscript{1284} Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.
\textsuperscript{1285} Customs Excise Act 1996 (NZ), s 289(1).
\textsuperscript{1286} Films, Videos, and Publications Classification Act 1993, s 13(1)(a).
\end{flushleft}
Affairs\textsuperscript{1287} to submit any publication to the Classification Office for examination and classification.\textsuperscript{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.\textsuperscript{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 objectionable\textsuperscript{1290} or restricted.\textsuperscript{1291} The Classification Office has exclusive jurisdiction to determine the nature of a publication when the Court refers a publication for determination.\textsuperscript{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.\textsuperscript{1293} The Court has the discretion to accept the admission of the defendant and thereby dispense with a reference to the Classification Office.\textsuperscript{1294}

1.15.4.2 The Interaction of the Courts with the Classification Office

The High Court case of \textit{S v Auckland District Court and New Zealand Police}\textsuperscript{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.\textsuperscript{1296}

\begin{footnotesize}
\textsuperscript{1287}Films, Videos, and Publications Classification Act 1993, s 13(1)(b).
\textsuperscript{1288}Films, Videos, and Publications Classification Act 1993, s 13(1)(a)–(b).
\textsuperscript{1289}Films, Videos, and Publications Classification Act 1993, s 29.
\textsuperscript{1290}Films, Videos, and Publications Classification Act 1993, s 29(1)(a).
\textsuperscript{1291}Films, Videos, and Publications Classification Act 1993, s 29(1)(b)(i) and (ii).
\textsuperscript{1292}Films, Videos, and Publications Classification Act 1993, s 29(1).
\textsuperscript{1293}Films, Videos, and Publications Classification Act 1993, s 29(2)(a).
\textsuperscript{1294}Films, Videos, and Publications Classification Act 1993, s 29(2)(b).
\textsuperscript{1295}S \textit{v Auckland District Court and New Zealand Police} High Court, Auckland M310/SW99, 11 March 1999.
\textsuperscript{1296}At 2.
\end{footnotesize}
Mr S had previously been suspected of committing various offences against the Act. These offences included possessing and distributing child pornography. 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. These charges were in very general terms and consequently did not comply with the provisions of Section 17 of the Summary Proceedings Act 1954.

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. 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. This statement by the Court also confirmed that the Classification Office has exclusive jurisdiction to determine the question.

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. 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. However, the proceeding brought before the Court by the Police relied on particular images being deemed to be objectionable. Consequently, the Classification Office had not made any

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1297 At 2.
1298 At 2.
1299 At 2.
1300 At 2.
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.\textsuperscript{1308} Justice Paterson stated:\textsuperscript{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.\textsuperscript{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.\textsuperscript{1311} Accordingly, the proceedings before the Court could not proceed until further determinations were received from the Classification Office.\textsuperscript{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.\textsuperscript{1313} The Court must also dispense with any reference to the Classification Office where conclusive proof\textsuperscript{1314} of the classification of that publication under Section 41 of this Act is provided.\textsuperscript{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

\textsuperscript{1308} At 11. 
\textsuperscript{1309} At 11. 
\textsuperscript{1310} At 12. 
\textsuperscript{1311} At 12. 
\textsuperscript{1312} At 14. 
\textsuperscript{1313} Films, Videos, and Publications Classification Act 1993 s 29(3). 
\textsuperscript{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. 
\textsuperscript{1315} Films, Videos, and Publications Classification Act 1993, s 29(3).
Classification Act 1993.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1318} The designated staff member then thoroughly examines the publication\textsuperscript{1319} and this involves that staff member specifically addressing three broad questions.\textsuperscript{1320}

Firstly, whether the publication involves sex, crime, cruelty or violence,\textsuperscript{1321} and these are what Dr Jack refers to as\textsuperscript{1322} the ‘gateway criteria’.\textsuperscript{1323} Typically, with child abuse images the gateway criteria entails sex.\textsuperscript{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.\textsuperscript{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).\textsuperscript{1326} These categories include sex with children,\textsuperscript{1327} animals,\textsuperscript{1328} dead people,\textsuperscript{1329} urine, excrement\textsuperscript{1330} or violence.\textsuperscript{1331} Where one of these categories is found to be present in the publication, the publication must be

\begin{footnotesize}
\begin{enumerate}
\item Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.
\item At 4.
\item At 4.
\item At 4.
\item At 4.
\item Films, Videos, and Publications Classification Act 1993 s 3(1).
\item Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.
\item At 4.
\item At 4.
\item Films, Videos, and Publications Classification Act 1993, s 3(2)(a).
\item Films, Videos, and Publications Classification Act 1993, s 3(2)(e).
\item Films, Videos, and Publications Classification Act 1993, s 3(2)(c).
\item Films, Videos, and Publications Classification Act 1993, s 3(2)(d).
\item Films, Videos, and Publications Classification Act 1993, ss 3(2)(b), 3(2)(f).
\end{enumerate}
\end{footnotesize}
presumed to be objectionable as required by Section 3(2) of the Classification Act 1993.\footnote{Films, Videos, and Publications Classification Act 1993, s 3(2).}

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.\footnote{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.} 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.\footnote{Films, Videos, and Publications Classification Act 1993, s 3(3).} 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.\footnote{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.} This context and a range of other factors that the Classification Office must consider are contained within Section 3(4) of the Act.\footnote{Films, Videos, and Publications Classification Act 1993, s 3(4).}

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.\footnote{Films, Videos, and Publications Classification Act 1993, s 3(4).} 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.\footnote{At 4.} 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.\footnote{At 5.} This second visitation to the Freedom of

\begin{thebibliography}{1332}
\footnote{Films, Videos, and Publications Classification Act 1993, s 3(2).}{Films, Videos, and Publications Classification Act 1993, s 3(2).}
\footnote{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.}{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.}
\footnote{Films, Videos, and Publications Classification Act 1993, s 3(3).}{Films, Videos, and Publications Classification Act 1993, s 3(3).}
\footnote{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.}{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.}
\footnote{Films, Videos, and Publications Classification Act 1993, s 3(4).}{Films, Videos, and Publications Classification Act 1993, s 3(4).}
\footnote{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.}{Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 4.}
\footnote{At 4.}{At 4.}
\footnote{At 5.}{At 5.}
\end{thebibliography}
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 restriction\textsuperscript{1340} as opposed to completely banning the publication.\textsuperscript{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.\textsuperscript{1342} The Classification Office then issues a notice on the decision pursuant to Section 38(1) of the Classification Act 1993.\textsuperscript{1343} This classification decision is then entered into the Classification Office’s Register in accordance with Section 39(2) of the Act.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1346} Furthermore, in any criminal proceedings, the Court can simply assume that the publication is objectionable.\textsuperscript{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.\textsuperscript{1348}

\textsuperscript{1340}Films, Videos, and Publications Classification Act 1993, ss 3A, 3B.
\textsuperscript{1341}Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 5.
\textsuperscript{1342}At 5.
\textsuperscript{1343}At 5.
\textsuperscript{1344}At 5.
\textsuperscript{1345}At 5.
\textsuperscript{1346}At 5.
\textsuperscript{1347}At 5.
\textsuperscript{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
The Classification Office assigns a publication to one of their personnel. The criteria that is set down in Section 3 is applied to the publication. The publication is compared with the Freedom of Expression provision contained within Section 14 - New Zealand Bill of Rights Act 1990. Any decision is interpreted as consistently as possible with the right to Freedom of Expression. Does the publication come within the gateway criteria? Does the publication come within one of the categories contained within Section 3(2)? Where one of these categories is present the publication must be presumed to be objectionable as required by Section 3(1). As a result, in any criminal proceedings, the Court can assume that the publication is objectionable.
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

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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. Membership of the Board must include persons with knowledge of, or experience in, the different aspects of matters likely to come before the Board. The then Minister of Justice referred to these Amendments and stated in Parliament:

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. 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. Mr Black also agrees that a combination of community representation is important. This combination provides a more balanced view that adequately represents the attitudes of the community, particularly where a decision may be controversial. However, there has been some criticism of the membership of the Board of Review. Mr Black believes that some of the appointments can be too legally focused. 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.’ Mr Black further reveals that there is certainly concern from the public and states:

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. 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.

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. 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. Therefore, the Board of Review must review the classification of any publication referred to it by the right of review or the Courts. The Board of Review must also review any publication submitted to it following the classification of the publication by the Classification Office. Therefore, the function of the Board of Review is to undertake reviews of decisions made by the Classification Office.

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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.
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.\textsuperscript{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.\textsuperscript{1375} The Board of Review must ascertain whether these Classification Office decisions are appropriate for the kind of material that is presented for classification.\textsuperscript{1376} Mr Black also reveals that during its tenure the Board of Review has been required to reassess a vast range of published material.\textsuperscript{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.\textsuperscript{1378} The Board of Review during this tenure also observed videos where a man felt that he was documenting family life.\textsuperscript{1379} Mr Black is adamant that the videos were pornographic:\textsuperscript{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.\textsuperscript{1381} Mr Black is certain that emotional and physical harm to children is the principal issue that confronts the Board of Review and states:\textsuperscript{1382}

\textsuperscript{1374} Internal Affairs and Local Government Committee, above n 898, at 5.
\textsuperscript{1375} Mr Black, Former Member of the Film and Literature Board of Review, New Zealand, above n 1173, at 2.
\textsuperscript{1376} At 2.
\textsuperscript{1377} At 2.
\textsuperscript{1378} At 3.
\textsuperscript{1379} At 3.
\textsuperscript{1380} At 3.
\textsuperscript{1381} At 3.
\textsuperscript{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. 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. The Act also requires that every review must be conducted as soon as possible and without regard to the decision of the Classification Office. 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. Dr Jack confirms that the reviews start from the beginning of the classification procedure and follow the basic process utilised by the Classification Office. 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.

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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 decision\(^{1391}\) that it believes is the correct.\(^{1392}\) Dr Jack verifies that the decision of the Board of Review supplants the Classification Office’s decision\(^{1393}\) 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.


\(^{1397}\) 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 specifics 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

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\(^{1400}\) 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. 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. This order is also subject to such conditions as the High Court considers to be appropriate.

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. 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.

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. 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. Moreover, every such appeal must be heard and determined in accordance with the rules of the Court.

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

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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).
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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{1417} Mr Black, Former Member of the Film and Literature Board of Review, New Zealand, above n 1173, at 2.
\textsuperscript{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. 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. 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 children and to prohibit material advertising child pornography.

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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.
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.\textsuperscript{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.\textsuperscript{1424} Filtering is simply a way of preventing the viewing and distribution of child pornography.\textsuperscript{1425} This prevention strategy involves Internet Service Providers (‘ISPs’) using blocking software to prevent access to known websites that accommodate child pornography.\textsuperscript{1426} This software has been developed in response to the jurisdictional and policing issues discussed in this thesis.\textsuperscript{1427} These concerns have given added motivation to the search for better technological solutions to reduce the dissemination of child pornography across the Internet.\textsuperscript{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.\textsuperscript{1429}

In New Zealand, the Department of Internal Affairs maintains a large database of sites known to harbour child pornography.\textsuperscript{1430} If a request is made to access a known website currently on the list, that request is blocked by filtering software.\textsuperscript{1431}

\textsuperscript{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.
\textsuperscript{1426} At 67.
\textsuperscript{1427} At 67.
\textsuperscript{1428} At 67.
\textsuperscript{1429} Rashid and others, above n 1398, at 230.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1437} Nevertheless, filtering does play a part in assisting to prevent the casual Internet consumer from stumbling across child pornography when browsing the Internet.\textsuperscript{1438} It also prevents those with a sense of both general and specific curiosity related to pornography from gaining access to this illegal content.\textsuperscript{1439} Furthermore, filtering reduces the volume of harmful content that is available to the public,\textsuperscript{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.\textsuperscript{1441} There is also no way

\begin{footnotes}
\item[1432] Carr and Hilton, above n 1399, at 67.
\item[1433] O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 20.
\item[1434] Carr and Hilton, above n 1399, at 67.
\item[1435] At 68.
\item[1436] Rashid and others, above n 1398, at 235.
\item[1437] Carr and Hilton, above n 1399, at 68.
\item[1438] At 68.
\item[1439] At 68.
\item[1440] At 68.
\item[1441] At 68.
\end{footnotes}
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.\footnote{O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 20.}

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.\footnote{Dawn Nunziato “The Beginning of the End of Internet Freedom” (2014) 45 Georgetown Journal of International Law 383 at 396.} These procedural requirements were articulated by Special Rapporteur Frank La Rue in 2001.\footnote{La Rue, above n 1031.} 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.\footnote{At [25].} The Special Rapporteur’s report explained that any limitation to the right to freedom of expression must pass the following three-part, cumulative test:\footnote{At [24].}

(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
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].
\(^{1454}\) 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 filtering by a number of agencies including Epact, Netsafe and the Department of Internal Affairs. This response also led to several years of trials with the co-operation of several ISPs. Several systems of filtering were trialled and the Department of Internal Affairs finally settled on a Swedish system known as NetClean WhiteBox. 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. Many ISPs were already considering introducing a similar initiative on their own networks, so the majority were willing to sign up. The Department of Internal Affairs’ Filtering System is now known as the Digital Child Exploitation Filtering System (‘Filtering System’). This Filtering System is funded and operated by the Department of Internal Affairs in partnership with New Zealand’s ISPs.

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. Lloyd Bezett, Senior Policy Analyst, for the Department of Internal Affairs explains the reasoning behind and decision to employ the Filtering System:

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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.
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/d77da9b523f12931cc256ac5000d19b6/26bc0621775b9e47cc2575f50010a894>.
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.\footnote{At 16.}

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.\footnote{The Department of Internal Affairs, above n 1436.} It does not cover email, file-sharing
or borderline material\footnote{The Department of Internal Affairs, above n 1437.} because the Department of Internal Affairs does not have
the ability to filter at the Peer-to-Peer level.\footnote{O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal
Affairs of New Zealand, above n 269, at 14.} Steve O’Brien reveals why the
Department of Internal Affairs decided to only filter child pornography:\footnote{At 15.}

\begin{quote}
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.
\end{quote}

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.\footnote{Email from Alan Bell (National Director Ecpat Child Alert New Zealand) “Child Pornography Research Questions” (27 October 2011).} Furthermore, the decision to only filter child pornography ensures that the public is
protected from this particular kind of potentially harmful content.\footnote{For a discussion on the potential types of harm that child pornography causes, see Quayle and Sinclair, above n 482, at 4.} It restricts the
trade of this material and means that fewer children are abused to support the
Thus, the Department of Internal Affairs believes its Filtering System makes a valuable contribution to preventing the sexual abuse of children. In doing so, it restricts freedom of expression as little as possible to achieve its purported aim. The Minister of Internal Affairs, Peter Dunne agrees with this claim and states:

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. 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. New Zealand’s Filtering System is simply a feasible solution to the

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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.\footnote{1487 See Chapter One’s discussion on the harm principle and the psychological effects of child pornography.} The number of blocks to date clearly indicates that such a response is both justified and necessary.\footnote{1488 ECPAT Child Alert “Digital Filtering of Child Exploitation” (27 June 2014) <http://www.ecpat.org.nz/Projects/Internet-Digital-Filtering.aspx>.} New Zealand’s Filtering System is also working proportionally as it only blocks child pornography and no other content whatsoever.\footnote{1489 The Department of Internal Affairs, above n 1436.} 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.\footnote{1490 O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 19.} Using a secure link, the Department of Internal Affairs routes the routing information through to the ISPs.\footnote{1491 ECPAT Child Alert, above n 1462.} 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.\footnote{1492 The Department of Internal Affairs “Public Information Pack” (11 April 2014) <http://www.dia.govt.nz/Censorship-DCEFS-Public-Information-Pack>.} 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.\footnote{1493 ECPAT Child Alert, above n 1462.} If the request does not match an item on the list, the user is presented with the requested page.\footnote{1494 ECPAT Child Alert, above n 1462.} The CCU maintains the Filtering System\footnote{1495 ECPAT Child Alert, above n 1466.} and seeks advice from New Zealand’s specialist censorship organisation, the Classification Office, on its operation.\footnote{1496 Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 3.} Much of the guidance from the Classification Office relates directly to activity concerning the Filtering System such as whether an image
is objectionable or not.\textsuperscript{1497} Website filtering is not a ‘universal’ answer to the dissemination of child pornography on the Internet,\textsuperscript{1498} but it is nevertheless another important tool in the fight against the sexual exploitation of children.\textsuperscript{1499} As Nic McCully, Deputy Chief Censor, of the Classification Office reveals, the purpose of the Filtering System is to:\textsuperscript{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.

\textbf{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 entity\textsuperscript{1501} independent of any other Government agency.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1504} Lloyd Bezett explains the relationship between the Department of Internal Affairs and the Classification Office:\textsuperscript{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

\begin{flushright}
\textsuperscript{1497} At 3.
\textsuperscript{1498} The Department of Internal Affairs, above n 1437.
\textsuperscript{1499} The Department of Internal Affairs, above n 1437.
\textsuperscript{1500} McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 4.
\textsuperscript{1501} Films, Videos, and Publications Classification Act 1993 s 76(2).
\textsuperscript{1502} Hansard, above n 532, at 17052.
\textsuperscript{1503} Films, Videos, and Publications Classification Act 1993, s 4(1).
\textsuperscript{1504} Films, Videos, and Publications Classification Act 1993, s 77(1)(a).
\textsuperscript{1505} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 3.
\end{flushright}
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. Each site is also independently assessed by an Inspector of Publications at the CCU before it is added to the list of banned websites.

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. As aforementioned, the Classification Office is, in accordance with Section 76(2) of the Classification Act 1993, a recognised Crown entity which is fully independent of other Government agencies. Therefore, the Classification Office is independent of unwarranted influences as required by the Special Rapporteur, Frank La Rue. 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.

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. 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

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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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1516} the Filtering System is clearly intended to prevent people from committing the crime of downloading child pornography from the Internet.\textsuperscript{1517} Section 3(3) of the Act also states that particular weight should be given to the outlawing of sexual conduct involving children\textsuperscript{1518} and also the sexual exploitation of children.\textsuperscript{1519} Steve O’Brien agrees and states that:\textsuperscript{1520}

\begin{quote}
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.
\end{quote}

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.\textsuperscript{1521} As stated above, the first feature of the Special Rapporteur’s report states:\textsuperscript{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

\begin{itemize}
\item \textsuperscript{1514} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.
\item \textsuperscript{1515} At 7.
\item \textsuperscript{1516} Films, Videos, and Publications Classification Act 1993 s 3(2)(a).
\item \textsuperscript{1517} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.
\item \textsuperscript{1518} Films, Videos, and Publications Classification Act 1993, s 3(3)(a)(iv).
\item \textsuperscript{1519} Films, Videos, and Publications Classification Act 1993, s 3(3)(b).
\item \textsuperscript{1520} Email from Steve O’Brien (National Manager Censorship Compliance Unit) “Digital Child Exploitation Filtering System” (16 March 2010) at 16.
\item \textsuperscript{1521} La Rue, above n 1031.
\item \textsuperscript{1522} At [24].
\end{itemize}
intentions clear.\textsuperscript{1523} This part of the Classification Act 1993 is transparent and accessible to everyone, as required by the Special Rapporteur.\textsuperscript{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 objectionable\textsuperscript{1525} and this must be done within the defined limits of the Act.\textsuperscript{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.

\begin{flushleft}
\textsuperscript{1523} Indecent Publications Tribunal, above n 945, at 14. \\
\textsuperscript{1524} La Rue, above n 1031. \\
\textsuperscript{1525} Films, Videos, and Publications Classification Act 1993 s 77(1)(a). \\
\textsuperscript{1526} Films, Videos, and Publications Classification Act 1993, s 3.
\end{flushleft}
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.\textsuperscript{1527} The Department of Internal Affairs enters into legal agreements with the ISPs on the running of the Filtering System.\textsuperscript{1528} Therefore, if any ISP is subsequently unhappy it can withdraw.\textsuperscript{1529} Keith Manch explains that “this is another way of ensuring that the Department gets the filter right.”\textsuperscript{1530} Steve O’Brien agrees and states:\textsuperscript{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.\textsuperscript{1532} Furthermore, Bell also confirmed that Ecpat assisted with the introduction of this software into New Zealand\textsuperscript{1533} 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.\textsuperscript{1534} Each ISP already has some form of filtering, because it needs to filter out viruses, malware and spam coming across its own systems.\textsuperscript{1535} All the Department of Internal Affairs is seeking from the Internet industry is their

\textsuperscript{1527} The Department of Internal Affairs, above n 1437.
\textsuperscript{1528} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 14.
\textsuperscript{1529} The Department of Internal Affairs, above n 1437.
\textsuperscript{1530} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 12.
\textsuperscript{1531} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 12.
\textsuperscript{1532} Bell, National Director Ecpat Child Alert New Zealand, above n 1453.
\textsuperscript{1533} Bell, National Director Ecpat Child Alert New Zealand, above n 1453.
\textsuperscript{1534} Bell, National Director Ecpat Child Alert New Zealand, above n 1453.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{1537} Spark, one of New Zealand’s largest ISPs states in its contracts with consumers:\textsuperscript{1538}

\begin{quote}
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.
\end{quote}

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.\textsuperscript{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.\textsuperscript{1540} This

\begin{flushright}
\textsuperscript{1536} At 15.
\textsuperscript{1538} Spark New Zealand, above n 1511; Spark New Zealand, above n 1511; Spark New Zealand, above n 1511.
\textsuperscript{1539} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.
\textsuperscript{1540} At 10.
\end{flushright}
undertaking is the basis of the ISP’s voluntary involvement with the Filtering System\textsuperscript{1541} and Lloyd Bezett, a Senior Policy Analyst for the Department of Internal Affairs, states:\textsuperscript{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 supplier\textsuperscript{1543} of the Filtering System’s software, NetClean WhiteBox.\textsuperscript{1544} NetClean Technologies are very aware of the potential for technologies to be used to breach human rights.\textsuperscript{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.\textsuperscript{1546} A summary of the relevant conditions of the Consumer Licence Agreement states:\textsuperscript{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.

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\textsuperscript{1541} At 10.
\textsuperscript{1542} At 8.
\textsuperscript{1544} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.
\textsuperscript{1545} At 10.
\textsuperscript{1546} At 10.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{1549} This contract ensures that the issue of scope creep is not a relevant concern in New Zealand.\textsuperscript{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.\textsuperscript{1551} The recognition of the importance of Articles 18 and 19 of the Universal Declaration of Human Rights 1948\textsuperscript{1552} within this Agreement is consistent with the Special Rapporteur’s requirements that any restriction of Internet content should be prescribed by international law.\textsuperscript{1553}

1.21 The Limitations of New Zealand’s Filtering System

Filtering is only partially effective in combating the international trade in child pornography.\textsuperscript{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.\textsuperscript{1555} It cannot remove illegal content from the Internet or prosecute the intentional creators and consumers of this material.\textsuperscript{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.\textsuperscript{1557} In just over a year of operation, the Filtering System

\textsuperscript{1548} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.
\textsuperscript{1549} At 10.
\textsuperscript{1550} At 10.
\textsuperscript{1551} La Rue, above n 1031, at [71].
\textsuperscript{1552} Universal Declaration of Human Rights 1948 (un.org).
\textsuperscript{1553} La Rue, above n 1031, at [68].
\textsuperscript{1554} The Department of Internal Affairs, above n 1427.
\textsuperscript{1555} The Department of Internal Affairs, above n 1427.
\textsuperscript{1556} The Department of Internal Affairs, above n 1427.

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blocked more than 13 million requests to access hard-core child pornography.\(^{1558}\) In 2013 it was revealed that some 27 million requests\(^{1559}\) 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 pornography\(^ {1562}\) 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.
\(^{1560}\) McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 4.
\(^{1561}\) O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.
\(^{1562}\) At 4.
\(^{1563}\) At 9.
\(^{1564}\) At 9.
\(^{1565}\) The Department of Internal Affairs, above n 1437.
\(^{1566}\) 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. Steve O’Brien explains the nature of some of the complaints:

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.

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’). ACMA is the independent statutory authority tasked with ensuring that Australia’s media and communications legislation operates effectively, and in the public interest. This supervisory organisation only has the authority to impose content restrictions on Internet content hosted within Australia. Although the regulation tools made available to ACMA have had an impact on Australian content, most complaints to ACMA concern content hosted overseas and therefore, outside the jurisdiction of the organisation. Moreover, the regulation of online content

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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.
within Australia operates under Schedules 5 and 7 of the Broadcasting Services Act 1992 which focus primarily on illegal activities and the protection of children from unsuitable Internet content. 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. Furthermore, under Schedule 7, child pornography and material containing excessive sexual violence are prohibited and classified RC or X18+.

The Australian Government became a signatory to the Optional Protocol in 2001 and ratified this instrument in 2007. 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. This filtering initiative was to be the first time a Western democracy would implement legislation requiring ISPs to block users from accessing materials online. However, this decision by the Government was heavily criticised in the press and likened to the firewalls operating in China and Iran. 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’. Moreover, Internet companies such as Google and Yahoo were also very critical of the Government’s decision. Google wrote to the Australian Government with their concerns,

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1578 Davidson, above n 1549, at 314.
1580 Broadcasting Services Act 1992 (Cth), sch 7.
1582 Australian Communications and Media Authority Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety (2008) at 7.
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.\textsuperscript{1587}

The Australian Government subsequently attempted to introduce mandatory filtering for ISPs in 2012.\textsuperscript{1588} This mandatory filtering initiative soon became a controversial topic involving political considerations that caused the planned implementation of filtering to be withdrawn.\textsuperscript{1589} One of these objections that the introduction of filtering legislation could be the beginning of a Government attempt to suppress political dissent.\textsuperscript{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.\textsuperscript{1591} However, this stance was contradicted by several earlier ministerial releases\textsuperscript{1592} to the press including an admission that a filter against child pornography would also have the ability to filter additional material.\textsuperscript{1593} Opposition parties attacked the introduction of filtering legislation and stated it would create an infrastructure for Government censorship on a broader scale.\textsuperscript{1594} Shadow Treasurer Joe Hockey also stated:\textsuperscript{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!

\textsuperscript{1587} Kamenev, above n 1558.
\textsuperscript{1588} Nunziato, above n 1417, at 385.
\textsuperscript{1589} At 385.
\textsuperscript{1591} Winterford, above n 1564.
\textsuperscript{1592} Stephen Conroy Minister Welcomes Advances in Internet Filtering Technology (2008); Stephen Conroy Labor’s Plan For Cyber Safety (2007).
\textsuperscript{1593} Stephen Conroy, above n 1566, at 1.
\textsuperscript{1595} APC, above n 1568.
As a result, the Australian Government announced in November 2012 that it had cancelled the introduction of filtering legislation.\footnote{Stephen Conroy \textit{Child Abuse Material Blocked Online, Removing Need for Legislation} (2012) at 1.} The Government decided that existing legislation was sufficient to force ISPs to filter websites known to contain child pornography.\footnote{At 1.} This legislative requirement is contained in Subsection 313(1) of the Telecommunications Act 1997.\footnote{Telecommunications Act 1997 (au).} 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.\footnote{Telecommunications Act 1997, s 313(3).} 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).\footnote{Stephen Conroy, above n 1570, at 2.} These actions by the Government have resulted in 90 percent of Australian Internet content being filtered to block known child pornography websites.\footnote{At 1.}

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 1978\footnote{Protection of Children Act 1978 (gb).} which states that it is an offence to take,\footnote{Protection of Children Act 1978, s 1(1)(a).} distribute\footnote{Protection of Children Act 1978, s 1(1)(b).} or have in your possession\footnote{Protection of Children Act 1978, s 1(1)(c).} an indecent photograph of a child\footnote{Protection of Children Act 1978, s 1(1).}. The Obscene Publications Acts 1959\footnote{Obscene Publications Act 1959 (gb).} and 1964\footnote{Obscene Publications Act 1964 (gb).} also state that it is an offence to publish an obscene article\footnote{Obscene Publications Act 1959, s 2(1).} and to possess this content with the intention to publish it for
gain.\textsuperscript{1610} The UK also signed the Optional Protocol in 2000 and ratified this instrument in 2009.\textsuperscript{1611} Furthermore, concerns with the proliferation of child pornography and terrorist activity online have seen a shift towards increased surveillance of Internet content.\textsuperscript{1612} The implementation of new legislation such as the Terrorism Act 2000\textsuperscript{1613} has resulted in the State and ISPs introducing extensive surveillance and filtering measures.\textsuperscript{1614}

In 2004, the UK’s largest ISP British Telecom and the Internet Watch Foundation\textsuperscript{1615} entered into consultation with the Government\textsuperscript{1616} with regard to blocking known child pornography sites.\textsuperscript{1617} British Telecom subsequently agreed to filter a list of websites compiled by the Internet Watch Foundation\textsuperscript{1618} using default search filters.\textsuperscript{1619} Some smaller ISPs such as ICUK\textsuperscript{1620} were reluctant to take part in filtering due to issues such as cost.\textsuperscript{1621} However, pressure from the Government and statements from the Prime Minister David Cameron that “all ISPs must filter content by default”\textsuperscript{1622} have ensured that most ISPs are now filtering the Internet.\textsuperscript{1623}

\textsuperscript{1610} Obscene Publications Act 1964, s 1(2).  
\textsuperscript{1611} United Nations, above n 1555.  
\textsuperscript{1612} OpenNet Initiative “United Kingdom” (19 March 2015) OpenNet Initiative <https://opennet.net/research/profiles/united-kingdom>.  
\textsuperscript{1613} Terrorism Act 2000 (gb).  
\textsuperscript{1614} OpenNet Initiative, above n 1586.  
\textsuperscript{1615} The Internet Watch Foundation is a registered charity which is dedicated to the removal of all child pornography from the Internet.  
\textsuperscript{1618} At 62.  
\textsuperscript{1620} ICUK “ICUK.net” (19 March 2015) ICUK.net <https://www.icuk.net/>.  
\textsuperscript{1621} Nicole Kobie “Smaller ISPs Refuse Cameron’s Calls for Porn Filters” (22 July 2013) PC Pro <http://www.pcpromo.co.uk/news/broadband/383176/smaller-isps-refuse-camerons-calls-for-porn-filters>.  
\textsuperscript{1622} Kobie, above n 1595.  

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The voluntary nature of this filtering initiative removed the requirement for the Government to introduce\textsuperscript{1624} the Communications Data Bill 2008\textsuperscript{1625} and the Online Safety Bill 2014.\textsuperscript{1626} The passing of these Bills into legislation would have compelled all ISPs to implement filtering on their networks.\textsuperscript{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.\textsuperscript{1628} Customers would be blocked from adult content but would have the option to opt-in to access such content,\textsuperscript{1629} provided they could verify that they were over 18 years of age.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1632}

Filtering of the Internet in the UK has attracted much criticism in the press.\textsuperscript{1633} The gay community stated in 2013 that default search filters have the potential to block important sites related to gay issues.\textsuperscript{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,\textsuperscript{1635} which resulted in the ISP being

\begin{footnotes}
\item[1624] Villeneuve, above n 1591, at 62.
\item[1625] Communications Data Bill 2008 (gb).
\item[1626] Online Safety Bill 2014 (gb).
\item[1627] Communications Data Bill 2008, cla 14.
\item[1628] Online Safety Bill 2014, cla 1.
\item[1629] Online Safety Bill 2014, cla 1(1).
\item[1630] Online Safety Bill 2014, cla 1(3).
\item[1631] Communications Data Bill 2008, cla 3.
\item[1632] Communications Data Bill 2008, cla 14.
\item[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>.
\end{footnotes}
accused of supporting homophobia.\textsuperscript{1636} Other sites which contained information on sex education and drug use were also blocked.\textsuperscript{1637} Nearly one in five of the most popular websites on the Internet was also found to be blocked.\textsuperscript{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.\textsuperscript{1639} Another issue of concern is that there is no public scrutiny of the filtering lists.\textsuperscript{1640} Digital rights activists fear that the lists will be expanded to gradually stifle dissent.\textsuperscript{1641} These activists point to filtering systems in other countries such as China and Saudi Arabia\textsuperscript{1642} which have been subverted for political ends.\textsuperscript{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.\textsuperscript{1644} The Department of Internal Affairs invited public input on its draft Code of Practice for blocking objectionable websites that host child pornography.\textsuperscript{1645} Keith Manch stated in 2009 that.\textsuperscript{1646}

\textsuperscript{1636} Robbins, above n 1609.
\textsuperscript{1639} Ward, above n 1611.
\textsuperscript{1640} BBC “Q&A: UK Filters on Legal Pornography” BBC (22 July 2013) <http://www.bbc.co.uk/news/technology-23403068>.
\textsuperscript{1641} BBC, above n 1614.
\textsuperscript{1642} Reporters without Borders Internet Enemies (2009).
\textsuperscript{1643} BBC, above n 1614.
\textsuperscript{1644} The Department of Internal Affairs “Common Questions and Answers” (11 April 2014) <http://www.dia.govt.nz/Censorship-DCEFS-Common-Questions>.
\textsuperscript{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. Clause 1 of the Code of Practice contains the purpose of this agreement and states:

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 available for public comment and information about it is available on the Department of Internal Affairs’ website. 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. Not only does the Code of Practice provide the public with an assurance that only websites containing

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1647 O’Brien, National Manager Censorship Compliance Unit, above n 1494, at 13.
1648 The Department of Internal Affairs, above n 1404.
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.\footnote{The Department of Internal Affairs “Code of Practice” (11 April 2014) <http://www.dia.govt.nz/Censorship-DCEFS-Code-of-Practice>.

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.\footnote{The Department of Internal Affairs, above n 1619.} 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.\footnote{The Department of Internal Affairs, above n 1619.} 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.\footnote{O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 15.} When this type of list has been made accessible to the public in other countries, it has caused major problems for law enforcement agencies.\footnote{O’Brien, National Manager Censorship Compliance Unit, above n 1494, at 15.} However, the Department of Internal Affairs has received requests under Section 12 of the Official Information Act 1982\footnote{Official Information Act 1982 (NZ).} for the list to be released.\footnote{Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 12.} Section 12 of the Official Information Act 1982 states:\footnote{Official Information Act 1982, s 12.}

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


\footnotetext[1653]{The Department of Internal Affairs, above n 1619.}

\footnotetext[1654]{The Department of Internal Affairs, above n 1619.}

\footnotetext[1655]{O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 15.}

\footnotetext[1656]{O’Brien, National Manager Censorship Compliance Unit, above n 1494, at 15.}

\footnotetext[1657]{Official Information Act 1982 (NZ).}

\footnotetext[1658]{Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 12.}

\footnotetext[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.\(^\text{1660}\) 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.\(^\text{1661}\)

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.\(^\text{1662}\) This matter then proceeded to the Ombudsman in accordance with Section 18(3) of the Official Information Act 1982.\(^\text{1663}\) 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.

were being blocked by the Filtering System. 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.

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. Consequently, the Department of Internal Affairs also agreed that it would implement an Independent Reference Group under Clause 4 of the Code of Practice. 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. 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.

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. 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 posted on the Department’s website.

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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.
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. The membership of the Independent Reference Group is representative of Government agencies, ISPs, and community organisations with an interest in the welfare of children. McCully, a former member of the Independent Reference Group, reveals its makeup and purpose in the following statement:

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. 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. 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.

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. 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.\textsuperscript{1680} These community stakeholders ensure that the Filtering System has an extra layer of protection to prevent any arbitrary or discriminatory action.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1684} The user can use the dropdown box on the landing page to forward an appeal to the CCU.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1687} Each appeal and the resulting action undertaken by the Inspector of Publications must be entered in an appropriate report,\textsuperscript{1688} which is forwarded to the Independence Reference Group.\textsuperscript{1689} The Department of Internal Affairs is then required to act on any recommendations made by the Independence Reference Group concerning the report.\textsuperscript{1690} To date there have been no successful appeals because the Filtering

\textsuperscript{1680} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 9.
\textsuperscript{1681} La Rue, above n 1031, at [31].
\textsuperscript{1682} At [31].
\textsuperscript{1683} The Department of Internal Affairs, above n 1404, at 6.
\textsuperscript{1684} At 62.
\textsuperscript{1685} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 15.
\textsuperscript{1686} The Department of Internal Affairs, above n 1404, at 64.
\textsuperscript{1687} At 65.
\textsuperscript{1688} At 67.
\textsuperscript{1689} At 68.
\textsuperscript{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.\textsuperscript{1691} Lloyd Bezett details the nature of the appeals and confirms what Steve O’Brien has stated:\textsuperscript{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.\textsuperscript{1693} The Special Rapporteur required that there be an appeal process and remedy against abusive application of the Filtering System.\textsuperscript{1694} It is clearly evident that the appeal process contained within the Code of Practice meets this requirement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1698} As stated above, the purpose of Internet filtering is to control access to

\textsuperscript{1691} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 10.
\textsuperscript{1692} At 10.
\textsuperscript{1693} La Rue, above n 1031.
\textsuperscript{1694} At [31].
\textsuperscript{1695} At [31].
\textsuperscript{1696} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 13.
\textsuperscript{1697} La Rue, above n 1031, at [31].
information that is regarded to be inappropriate or illegal in certain jurisdictions.\textsuperscript{1699} This type of control software is known to reduce the risk of unwanted exposure of young people to all forms of pornography.\textsuperscript{1700} Therefore, although Internet filtering is a contentious issue, it is possible to gain a certain degree of acceptance by society.\textsuperscript{1701} Acceptance by the public is necessary to allow States to carry out some measure of regulation of harmful content.\textsuperscript{1702} This type of harmful content includes child pornography, which is considered to be the most harmful of all content.\textsuperscript{1703} Moreover, a number of arguments appear in the debate around Internet filtering.\textsuperscript{1704} The main argument utilised to support filtering of the Internet is that the public needs to be protected from harmful content.\textsuperscript{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.\textsuperscript{1706}

Filtering systems, however, only function at a national level and as a result vary from country to country.\textsuperscript{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.\textsuperscript{1708} Law

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{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.
\item\textsuperscript{1702} Eneman, above n 1673, at 227.
\item\textsuperscript{1703} Andrew Murray The Regulation of Cyberspace (Routledge-Cavendish, New York, 2006) at 213.
\item\textsuperscript{1705} Hamilton, above n 1678, at ch 5; Wall, above n 1678, at ch 6.
\item\textsuperscript{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).
\item\textsuperscript{1707} Carr and Hilton, above n 1399, at 68.
\item\textsuperscript{1708} Eneman, above n 1673, at 223.
\end{enumerate}
\end{footnotesize}
enforcement agencies are encouraged to establish links with ISPs as ISPs are crucial partners for the Police. Co-operation can reduce the difficulty of issues such as the absence of specific legislation setting out the obligations of ISPs. 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.

In Sweden, filtering of the Internet is based upon co-operation between the Police and the country’s ISPs. 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. Filtering software is used by the Swedish Police and ISPs to block access to blacklisted websites. 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. 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. 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.

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. 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. New Zealand’s Filtering System is simply designed to prevent the public from accessing harmful content which often results in direct harm being perpetrated on children. 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. 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.

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. 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.
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1729} New Zealand’s approach to filtering Internet content is functioning as intended.\textsuperscript{1730} The Department of Internal Affairs’ Filtering System is not intended to prevent access to all child pornography as this is simply technologically unfeasible.\textsuperscript{1731} It does, however, stop the public from accidentally accessing websites known to harbour child pornography.\textsuperscript{1732} The Filtering System also prevents those people curious about child pornography from allowing their curiosity to draw them into committing a criminal offence by downloading and viewing child pornography.\textsuperscript{1733} Most importantly of all, by limiting consumers to the knowledgeable and determined, the Filtering System

\begin{thebibliography}{99}
\item Akdeniz, above n 148, at ch 9.
\item Interview with Lee Chisholm, Operations Manager, NetSafe, New Zealand (1 April) at 6.
\item O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 18.
\item At 5.
\item 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.
\item Rashid and others, above n 1398, at 230–232.
\item McCully, Deputy Chief Censor, Office of Film and Literature Classification, New Zealand, above n 1155, at 4.
\item Carr and Hilton, above n 1399, at 68.
\item O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 16.
\end{thebibliography}
reduces the commercial market for child pornography,\textsuperscript{1735} which results in fewer children in New Zealand and overseas being sexually abused.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1739}

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\textsuperscript{1735} Carr and Hilton, above n 1399, at 68.
\textsuperscript{1736} At 69.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{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.
\end{flushright}
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

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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.\textsuperscript{1743} The Optional Protocol obliges States to criminalise all interaction with child pornography\textsuperscript{1744} and also to punish those who are found to be in possession of this content.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{1743} At 559.
\textsuperscript{1744} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN), art 3(1).
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’). 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. 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. The Classification Act 1993 concerns the depiction of child pornographic material which is separate from physical offending. 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.

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.
Subsections (1)\textsuperscript{1755} and (3) of Section 123 of the Classification Act 1993 define offences of strict liability,\textsuperscript{1756} which are directed towards commercial dealing in objectionable material.\textsuperscript{1757} This strict liability covers offences relating to the making,\textsuperscript{1758} supplying\textsuperscript{1759} or distributing\textsuperscript{1760} of an objectionable publication under Section 123(1).\textsuperscript{1761} This is \textit{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).\textsuperscript{1762} This Section states:\textsuperscript{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]

\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{1757} Harvey, above n 922, at 305.
\textsuperscript{1758} For an example of what constitutes the making or copying of an objectionable publication, refer to \textit{Kellet v Police} (2005) 21 CRNZ 743 (NZ HC) at [18, 19].
\textsuperscript{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.
\textsuperscript{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 \textit{Espinosa v Department of Internal Affairs} High Court Auckland CRI 2008–404–233, 7 October 2008.
\textsuperscript{1761} \textit{R v Spark}, above n 961, at [15].
\textsuperscript{1762} At [15].
\textsuperscript{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. 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*. 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. The Court of Appeal in *R v Spark* subsequently agreed with the High Court. 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. This creative element could include the renaming and altering of the images to suit the offender’s personal preferences. 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.

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. O’Brien reveals that the *actus reus* of supplying is met when an offender makes available to another person an objectionable publication for gain. Furthermore, the element of distributing requires the offender to make the objectionable publication available to other individuals on the Internet. The High Court case of *Shaw v Department of Internal Affairs* 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.

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165 *Kellet v Police*, above n 1732.
166 At [18–19].
167 *R v Spark*, above n 961, at [36].
168 O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 24.
169 At 24.
170 At 24.
171 Films, Videos, and Publications Classification Act 1993 s 123(1)(b).
172 O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 25.
173 At 25.
174 *Shaw v DIA*, above n 268.
175 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.\textsuperscript{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’.\textsuperscript{1777} The District Court case of \textit{New Zealand Customs Service v Yang}\textsuperscript{1778} demonstrates that entering New Zealand with an objectionable publication from China amounts to importing an objectionable publication.\textsuperscript{1779} As a result, the \textit{actus reus} of this offence is the transporting of an objectionable publication into New Zealand.\textsuperscript{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.\textsuperscript{1781} This provision of the Act was considered in the District Court of \textit{Department of Internal Affairs v Young}\textsuperscript{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.\textsuperscript{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.\textsuperscript{1784} Therefore, the \textit{actus reus} of this provision would be achieved by viewing objectionable content that has been intentionally Google searched.\textsuperscript{1785}

\textsuperscript{1776} Films, Videos, and Publications Classification Act 1993, s 123(1)(c).
\textsuperscript{1777} Customs Excise Act 1996 (NZ), s 2.
\textsuperscript{1778} \textit{New Zealand Customs Service v Yang} District Court, Auckland CRI-2006–092–7202, 28 August 2007.
\textsuperscript{1779} At [5].
\textsuperscript{1780} At [5].
\textsuperscript{1781} Films, Videos, and Publications Classification Act 1993, s 123(1)(e).
\textsuperscript{1782} \textit{Department of Internal Affairs v Young}, above n 118.
\textsuperscript{1783} At [13].
\textsuperscript{1784} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 24.
\textsuperscript{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

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\(^{1786}\) 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.
\(^{1790}\) At [31].
\(^{1791}\) At [33].
\(^{1792}\) Hansard, above n 907, at 17498.
\(^{1793}\) At 17498.
\(^{1794}\) At 17497.
\(^{1795}\) At 17497.
good intentions and the prosecution does not have to prove actual harm or increased risk of harm.\textsuperscript{1797} This analysis of the strict liability provisions within the Act is confirmed in \textit{Department of Internal Affairs v Young} where it was held by the District Court that:\textsuperscript{1798}

\begin{quote}
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.
\end{quote}

This particular provision within the Act has been implemented by Parliament to deal with all commercial avenues of supplying child pornography.\textsuperscript{1799} Commercial child pornographers do not necessarily intend their viewers to be or become child abusers.\textsuperscript{1800} Hardened pornographers only want the audience to be stimulated enough to purchase or provide access to additional child pornography.\textsuperscript{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.\textsuperscript{1802}

Nevertheless, the issue of strict liability has been the subject of some debate.\textsuperscript{1803} The main issue in this debate is whether or not a lack of knowledge of a browser’s cache\textsuperscript{1804} should amount to an excuse that would justify a prosecution.\textsuperscript{1805} Although there is no doubt that under the present legislation this is an offence and would

\begin{flushleft}
\textsuperscript{1797} At 112.  \\
\textsuperscript{1798} \textit{Department of Internal Affairs v Young}, above n 118, at [8].  \\
\textsuperscript{1799} Hansard, above n 5, at 18429.  \\
\textsuperscript{1800} Cohen, above n 1770, at 112.  \\
\textsuperscript{1801} At 112.  \\
\textsuperscript{1802} At 112.  \\
\textsuperscript{1803} Harvey, above n 922, at 304–311.  \\
\textsuperscript{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.  \\
\textsuperscript{1805} Harvey, above n 922, at 305.
\end{flushleft}
result in a prosecution under Section 123 of the Act,\textsuperscript{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.\textsuperscript{1807} The Minister indicated that.\textsuperscript{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 Courts\textsuperscript{1809} or the National Manager of the CCU, Steve O’Brien.\textsuperscript{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.\textsuperscript{1811} O’Brien states:\textsuperscript{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.

\begin{itemize}
\item \textsuperscript{1806} Films, Videos, and Publications Classification Act 1993 s 123.
\item \textsuperscript{1807} Hansard, above n 5, at 18439.
\item \textsuperscript{1808} At 18439.
\item \textsuperscript{1809} See Department of Internal Affairs v Young, above n 118.
\item \textsuperscript{1810} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.
\item \textsuperscript{1811} At 5.
\item \textsuperscript{1812} At 5.
\end{itemize}
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 defence\(^{1814}\) 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\(^{1822}\) 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 123\(^{1823}\) 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.\(^\text{1825}\) However, the burden of establishing absence of fault rests with the defendant\(^\text{1826}\) 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.\(^\text{1827}\)

> 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.\(^\text{1828}\) 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.\(^\text{1829}\) 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.
accordance with policy directives from the Ministry of Justice.\textsuperscript{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.\textsuperscript{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:\textsuperscript{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.\textsuperscript{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.\textsuperscript{1834} As a result, providing access to objectionable material constitutes gain within the meaning of Section 123 of the Act.\textsuperscript{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.\textsuperscript{1836} Every person who commits an offence against Section 123(1) is liable, in the case of an

\textsuperscript{1830} Ross Carter \textit{Films, Videos, and Publications Classification Amendment Bill} (PCO 5406/13 2003) at 1.
\textsuperscript{1831} At 4.
\textsuperscript{1832} Hansard, above n 5, at 18429.
\textsuperscript{1833} McSoriley, above n 1803, at 2.
\textsuperscript{1834} \textit{Shaw v DIA}, above n 268, at [7].
\textsuperscript{1835} At [7].
\textsuperscript{1836} \textit{Films, Videos, and Publications Classification Act} 1993 s 123(3).
individual, to a fine not exceeding $10,000\textsuperscript{1837} and, in the case of a body corporate, to a fine not exceeding $30,000.\textsuperscript{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.\textsuperscript{1839} Justice Mackenzie clarifies this point and gives judicial recognition to the intent of Parliament in *Shaw v Department of Internal Affairs*.\textsuperscript{1840} Justice Mackenzie held that:\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{1837}Films, Videos, and Publications Classification Act 1993, s 123(2)(a).
\textsuperscript{1838}Films, Videos, and Publications Classification Act 1993, s 123(2)(b).
\textsuperscript{1839}McSoriley, above n 1803, at 2.
\textsuperscript{1840}Shaw v DIA, above n 268.
\textsuperscript{1841}At [11].
\textsuperscript{1842}McSoriley, above n 1803, at 2.
\textsuperscript{1843}Shaw v DIA, above n 268, at [5,6,7].
\textsuperscript{1844}Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 4.
pornography over the Internet by offenders varies considerably.\textsuperscript{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:\textsuperscript{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.\textsuperscript{1847} As previously explained, it is the intentional searching for and collecting of child pornography that

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\textsuperscript{1845} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 1.
\textsuperscript{1846} At 1.
\textsuperscript{1847} At 8.
drives the market for new material and this results in more children being harmed to meet this same demand.\textsuperscript{1848}

New Zealand’s Inspectors of Publications also have the capability to exercise discretion when considering whether or not to prosecute a potential offender.\textsuperscript{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 offence\textsuperscript{1850} because, as noted previously, there is no full \textit{mens rea} or knowledge aspect attached to Section 123.\textsuperscript{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.\textsuperscript{1852} Parliament has determined that the knowledge-based offences contained within Section 124 are to be viewed as significant crimes.\textsuperscript{1853} Consequently, the offences created by Section 124 are also considered to be second, or higher-tier offences.\textsuperscript{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.\textsuperscript{1855} Accordingly, Section 124 states:\textsuperscript{1856}

\textsuperscript{1848} At 9.
\textsuperscript{1849} At 8.
\textsuperscript{1850} At 8.
\textsuperscript{1851} Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 5.
\textsuperscript{1852} Films, Videos, and Publications Classification Act 1993 s 124.
\textsuperscript{1853} \textit{R v Spark}, above n 961, at [19].
\textsuperscript{1854} At [16].
\textsuperscript{1855} Hansard, above n 907, at 12767.
\textsuperscript{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 believe that the publication is objectionable. 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. In order to convict for an offence under Section 124(1) a number of elements are vital for a successful prosecution. 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. Justice Harrison in *Espinosa v Department of Internal Affairs* arranges these elements concisely and held that a prosecution under Section 124(1) requires proof of the following four elements:

1. possession of the publication (in order to be able to distribute);

2. an objectionable publication;

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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. 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. In technical terms this requires the \textit{actus reus} component of Section 123(1) and the \textit{mens rea} component of 124(1) which is, more simply, a particular state of knowledge. Therefore, this offence will be committed where a person knows, or has reasonable grounds to believe, that the publication is objectionable.

In addition to Section 124, it is an offence under Section 127(4) 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. 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. Furthermore, Sections 124(2)(b) and 127(5)(b) as amended by Sections 27 and 29 of the Amendment Act

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1864 Shaw v DIA, above n 268, at [13].
1865 At [13].
1866 In this context the \textit{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).
2005 declare that where any person, being a body corporate commits such an offence, they are liable to a fine not exceeding $200,000.\textsuperscript{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.\textsuperscript{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:\textsuperscript{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.\textsuperscript{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 educational\textsuperscript{1876} or professional purposes.\textsuperscript{1877}

\textsuperscript{1872}Films, Videos, and Publications Classification Act 1993, ss 124(2)(b), 127(5)(b).
\textsuperscript{1873}Hansard, above n 5, at 18429.
\textsuperscript{1874}At 18428.
\textsuperscript{1875}Carter, above n 1804, at 4.
\textsuperscript{1876}Films, Videos, and Publications Classification Act 1993, s 128(a).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{1879} Section 124 recognises that in the modern online world, the traders of child pornography are not always driven by financial gain.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1882} The desire of these individuals is to obtain additional images that often portray more extreme violence against children.\textsuperscript{1883} Once completed, the cycle begins again.\textsuperscript{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 possession an objectionable publication’.\textsuperscript{1886} This is an offence of strict liability, as Section 131(3)

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\textsuperscript{1879} Wortley and Smallbone, above n 127, at 9.
\textsuperscript{1880} At 8.
\textsuperscript{1881} R v Spark, above n 961, at [19].
\textsuperscript{1882} Quayle and Taylor, above n 126, at 345–348.
\textsuperscript{1883} Office of the Federal Ombudsman for Victims of Crime, above n 1852, at 5.
\textsuperscript{1884} At 5.
\textsuperscript{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.
\textsuperscript{1886} Films, Videos, and Publications Classification Act 1993 s 131(1).
\end{flushright}
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.\textsuperscript{1887} Consequently, Section 131 affirms that:\textsuperscript{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:

\textsuperscript{1887}Films, Videos, and Publications Classification Act 1993, s 131(3).

\textsuperscript{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 Matauranga 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 Matauranga 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.\textsuperscript{1889} This component of Section 131 was discussed in District Court case of \textit{Department of Internal Affairs v Young}.\textsuperscript{1890}

It was held in this case by Judge Ryan:\textsuperscript{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 \textit{Goodin v Department of Internal Affairs}\textsuperscript{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.\textsuperscript{1893} Justice O’Regan is of

\begin{itemize}
\item \textsuperscript{1889} See \textit{Department of Internal Affairs v Young}, above n 118.
\item \textsuperscript{1890} \textit{Department of Internal Affairs v Young}, above n 118.
\item \textsuperscript{1891} At [13].
\item \textsuperscript{1892} \textit{Goodin v Department of Internal Affairs}, above n 915.
\item \textsuperscript{1893} At [19]; \textit{Department of Internal Affairs v Merry}, above n 928; \textit{Atkins v Director of Public Prosecutions} (2000) 2 All ER 425 (gb).
\end{itemize}
the view that proof of possession requires proof of some element of knowledge.\textsuperscript{1894} In \textit{Meyrick v Police}\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{1900} Moreover, under Section 131(3) an offender does not need to know that the image is objectionable.\textsuperscript{1901} When the offender is fully aware of what they are

\textsuperscript{1894} \textit{Goodin v Department of Internal Affairs}, above n 915, at [19].
\textsuperscript{1896} At [157].
\textsuperscript{1897} Films, Videos, and Publications Classification Act 1993 s 131(4).
\textsuperscript{1898} Films, Videos, and Publications Classification Act 1993, s 135(5).
\textsuperscript{1899} See \textit{Department of Internal Affairs v Young}, above n 118.
\textsuperscript{1900} At [13].
\textsuperscript{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. 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, which drives the market to produce additional child pornography. 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.

1.27.6 Section 131A

It is also an offence 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. 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. What distinguishes the two provisions is the question of whether the offender ‘knew’ or had ‘reasonable cause to believe’ that the publication was objectionable. 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

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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.\footnote{O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.} Where this is clearly evident, the offender has offended against Section 131A (1) of the Act.\footnote{Clark v Police, above n 1882, at [14].} Section 131A states that:\footnote{Films, Videos, and Publications Classification Act 1993, s 131A.}

[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.\footnote{Films, Videos, and Publications Classification Act 1993, s 131A(1).} In the case of an individual this fine must not exceed $50,000,\footnote{Films, Videos, and Publications Classification Act 1993, s 131A(2)(a).} and in the case of a body corporate, may not exceed $100,000.\footnote{Films, Videos, and Publications Classification Act 1993, s 131A(2)(b).} The term of imprisonment that can be imposed on an offender may not exceed five years.\footnote{Films, Videos, and Publications Classification Act 1993, s 131A(2).} 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.\footnote{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.\(^\text{1918}\) 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.\(^\text{1919}\) Section 131A is intended to demonstrate the seriousness with which the Government views this type of offending.\(^\text{1920}\) 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.\(^\text{1921}\) 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.\(^\text{1922}\) Accordingly, Section 145A states:\(^\text{1923}\)

> [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).


\(^{1923}\) Films, Videos, and Publications Classification Act 1993, s 145A.

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. 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 publication and Section 209(6) contains the relevant offence as defined in Section 145A(1) of the Classification Act 1993.

Section 145A(3) reserves New Zealand’s ordinary provisions for extraterritorial jurisdiction in Sections 7, 7A and 8 of the Crimes Act 1961. 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. 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. 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. 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.

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. 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.
1930 Crimes Act 1961, s 8.
legal basis for guaranteeing the universal protection of society and its children from concerns such as child pornography. Therefore, New Zealand does have an obligation to protect children in foreign jurisdictions as human rights obligations are no longer limited to its territory. These fundamental rights are considered to be restricted by the jurisdiction of the State which is founded upon the notion of the State’s ability to exercise lawful authority over an organisation or individual. 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. 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 provides an illustration of these extraterritorial obligations in action. The appellant had set up a commercial website hosted on an ISP server based in the United States. Pornographic content would be posted on this server by the appellant which was then uploaded to the Internet. The Department of Internal Affairs gained access to the website through the use of a computer in Wellington. 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

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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.
1938 Batty v Choven, above n 1763.
1939 At [6].
1940 At [7].
1941 At [27].
1942 At [9].
1993. 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. 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. 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. The appeal was subsequently dismissed by the High Court.

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. 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 Zealand and this offender cannot be extradited because they are a citizen, the New Zealand Courts will have jurisdiction. 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. 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. Section 145A(3) in accordance with Sections 7, 7A and 8 of the Crimes Act reflects the obligations in Article 4(1) of the Optional Protocol.

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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.
1951 Extradition Act 1999 ss 30(2), 30(3).
1953 Crimes Act 1961 (NZ), ss 7, 7A, 8.
to establish jurisdiction over territory and ships. 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.

Section 145A enables law enforcement agencies to use these extraterritorial powers to prosecute individuals who travel overseas and are involved in child pornography offending. 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. Since July 1996, this Unit has been proactively investigating and prosecuting individuals who trade in objectionable material via the Internet. 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. In addition, all of New Zealand’s Inspectors of Publications are

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1957 Carr, above n 151, at 12.
1958 At 12.
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.\textsuperscript{160} These Inspectors of Publications perform a number of duties,\textsuperscript{161} which include:\textsuperscript{162}

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.\textsuperscript{163} The Minister also stated:\textsuperscript{164}

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:\textsuperscript{165}

\textsuperscript{160} Films, Videos, and Publications Classification Act 1993 s 103 and Part VII.
\textsuperscript{161} Report of the Government Administration Committee, above n 267, at 57.
\textsuperscript{162} The Department of Internal Affairs “Censorship Compliance” (2012) The Department of Internal Affairs \texttt{<http://www.dia.govt.nz/Services-Censorship-Compliance-Index>},\textsuperscript{163} Dunne, Minister of The Department of Internal Affairs of New Zealand, above n 1458, at 2.
\textsuperscript{164} At 2.
\textsuperscript{165} 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 Unit 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. The Unit accomplishes this by monitoring Internet Relay Chat (IRC) channels and investigating websites and Newsgroups. When a Government Administration Committee viewed first-hand how the CCU undertakes this surveillance work it was both surprised and impressed with the surveillance work undertaken by the Unit. The Minister of the Department of Internal Affairs, Peter Dunne has also been pleased by the initiatives developed by the CCU. The Minister stated:

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. The CCU also reviews Internet activity, and provides convenient links to other websites that contain information on child safety and other Internet-related issues.

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1966 The CCU currently has 12 operational members.
1968 Carr, above n 151, at 12.
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. 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. Accordingly, the New Zealand Police has established a specialist unit known as the Online Child Exploitation Across New Zealand (OCEANZ) Unit whose operational mandate includes:

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. Michael further states that:

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.

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1975 Films, Videos, and Publications Classification Act 1993 s 103(3).
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.
OCEANZ 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. 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. 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. 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.

OCEANZ is also proactively constructing robust partnerships with law enforcement agencies in other jurisdictions which are operating in this same arena, including the Federal Bureau of Investigation (FBI) and Australian State and Federal Police. These partnerships make it considerably easier to investigate child pornography offending and to elicit an appropriate response from the relevant overseas agencies. OCEANZ is also part of an international taskforce, known as the Virtual Global Taskforce, which has been set up to assist with protecting children from all forms of online sexual abuse. This taskforce comprises a collection of law enforcement agencies and private sector representatives that represent their own country. 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.
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.
Children based in the United States. New Zealand is represented on the taskforce by the New Zealand Police. 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. 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. However, this organisation only operates at a strategic level, not an operational level. Its purpose is to recommend strategies or policies that countries can implement, so they become more effective at investigating these types of crimes. The Virtual Global Taskforce also assists countries that have deficient legislative systems and struggle to investigate this category of criminal offending.

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 borders and is, therefore, responsible for investigating the cross-border movement of child pornography. The Customs Service is highly proactive in investigating child pornography offending. 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

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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.
Customs officials are not considered to be Inspectors of Publications in accordance with Section 105(1) of the Classification Act 1993. 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. 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.

Section 54(1)(aa) of the Customs Act 1996 prohibits the importation of child pornography 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. 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. The Customs Service operates in both of these areas and is part of a taskforce that works with Internal Affairs and the Police. The Child Exploitation Operations Team was also established by the Customs Service in 2008. 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.

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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.
2013 The Child Exploitation Operations Team currently has two full-time investigators.
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.\textsuperscript{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 other\textsuperscript{2017} and with other law enforcement agencies upon request.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2020} The introduction of this taskforce has helped reduce the amount of resources required to gather intelligence on content offending.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{2016} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 4.
\textsuperscript{2017} New Zealand Government, above n 951, at 5.
\textsuperscript{2018} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.
\textsuperscript{2019} At 14.
\textsuperscript{2020} New Zealand Government, above n 951, at 5.
\textsuperscript{2021} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 14.
\textsuperscript{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 Officer,\(^{2026}\) 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

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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).
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).
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 is and collect all the relevant data required to have a search warrant granted.

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 Police in the prescribed form. 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 warrant according to the provisions contained within Section 109 of the Classification Act 1993. This Section of the Classification Act 1993 has also been amended and substituted by Section 23 of the Amendment Act 2005.

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. 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. 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 110.

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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.
2035 Films, Videos, and Publications Classification Act 1993, s 110(1).
2037 Sections 109 and 109C have been amended by the Films, Videos, and Publications Classification Amendment Act 2005 s 23.
2038 Films, Videos, and Publications Classification Amendment Act 2005, s 23.
2040 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. This search warrant is then executed on the ISP that the person in question is utilising. All the CCU or Police requests from the ISP at this stage is the subscriber data. 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.

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 person to ascertain what their Internet activity has been. 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. A Search Warrant may also be issued where there are reasonable grounds to believe that there will be evidence of the commission of an offence or that a publication or tool is intended to be used for the purpose of committing a similar offence. However, search warrants for offences against Sections 126 and 131A must be issued under Section 109A or 109B of the Act. 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

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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.\textsuperscript{2052} Moreover, in all circumstances, it must be reasonable to do so.\textsuperscript{2053} This recourse is limited as only a District Court Judge can issue this warrant.\textsuperscript{2054} In deciding whether to issue such a warrant,\textsuperscript{2055} the Judge is required by Section 109A(2) to have regard to:\textsuperscript{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.\textsuperscript{2057} However, this provision is only applicable where all reasonable efforts have been made to obtain a warrant under Section 109A\textsuperscript{2058} and no District Court Judge is available to deal with such an application under Section 109A.\textsuperscript{2059}

Once the second search warrant is granted the CCU or Police will then exercise a search on that particular address\textsuperscript{2060} in accordance with Section 111(1) of the Classification Act 1993.\textsuperscript{2061} This search warrant allows law enforcement to seize the suspect’s computer and any other publications that may be present.\textsuperscript{2062} The CCU or Police will also seize computer storage devices and interview any suspects at the address.\textsuperscript{2063}

\textsuperscript{2052} \textit{R v Kempen} District Court, Christchurch CRI-2011–009–2703, 13 July 2012 at [3].
\textsuperscript{2053} At [3].
\textsuperscript{2054} At [3].
\textsuperscript{2055} At [3].
\textsuperscript{2056} Films, Videos, and Publications Classification Act 1993, s 109A(2).
\textsuperscript{2057} Films, Videos, and Publications Classification Act 1993, s 109B.
\textsuperscript{2058} Films, Videos, and Publications Classification Act 1993, s 109B(a)(i).
\textsuperscript{2059} Films, Videos, and Publications Classification Act 1993, s 109B(a)(ii).
\textsuperscript{2060} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.
\textsuperscript{2061} Films, Videos, and Publications Classification Act 1993, s 111(1).
\textsuperscript{2062} Report of the Government Administration Committee, above n 267, at 58.
\textsuperscript{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
Someone is detected viewing child pornography.

A law enforcement agency interact with the offender to determine what their activity has been and what they are prepared to deal.

The law enforcement agency then applies for a Search Warrant under Sections 109, 109A or 109B of the Classification Act 1993.

A Search Warrant is served on the ISP.

The Police will conduct intelligence gathering.

A second Search Warrant is issued to search the Suspect’s Residence.

This search is conducted in accordance with Section 111(1) of the Classification Act 1993.
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.\footnote{2064} All evidence is then sent to the Department of Internal Affairs’ legal team.\footnote{2065} This evidence is then submitted to Crown Law who seeks leave of the Attorney-General to continue the prosecution\footnote{2066} in accordance with Section 144(1) of the Classification Act 1993.\footnote{2067} Once this leave is granted, the file is sent to the relevant Crown Solicitor in whichever District the offence has occurred.\footnote{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.\footnote{2069} Young people sometimes do not understand what they are doing is wrong, so prosecution is not always the best course of action.\footnote{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.\footnote{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.\footnote{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.\footnote{2073}

\footnote{2064} At 8.  
\footnote{2065} At 8.  
\footnote{2066} At 8.  
\footnote{2067} Films, Videos, and Publications Classification Act 1993 s 144(1).  
\footnote{2068} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 8.  
\footnote{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.  
\footnote{2070} At 5.  
\footnote{2071} At 5.  
\footnote{2072} Films, Videos, and Publications Classification Act 1993, s 144(2).  
\footnote{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. Once the prosecution is authorised the matter will proceed before the Courts. Often the evidence before the Court is so compelling that many of the offenders plead guilty. The Police do not have many cases that proceed to trial. 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.

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. The Customs Service must evaluate every person and the risk of any goods that they transport into the country. This demonstrates that Customs Officers can assess the potential risk of any person who is returning or entering New Zealand. Customs Officers have the right to interact with the public at the airport and to examine any media devices travellers have on their persons in accordance with Section 39(3)(b) of the Customs Act 1996. If a person arrives in New Zealand and they are found to have computer hardware which contains child pornography, Customs Officers can then question that person under Section 145(2)(a) of the Customs Act 1996. This questioning is intended to establish the facts as to the origin of the images and how and why they have been

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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).
The images can then be seized and detained in accordance with Section 175D(1)(b) of the Customs Act 1996.\textsuperscript{2086} Section 175D(2) gives Customs Officers several options once goods are seized or detained under Section 175D(1)(b).\textsuperscript{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.\textsuperscript{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.\textsuperscript{2090}

Customs Officers have very similar powers to the Police such as the right to arrest a suspected offender.\textsuperscript{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.\textsuperscript{2092} This Section states that a Customs Officer who suspects that a person has committed an offence against the Act may arrest that person.\textsuperscript{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.\textsuperscript{2094}

The Customs Service can also initiate investigations into the exportation of objectionable material.\textsuperscript{2095} In terms of online investigations, the Customs Service often receives information from other international law enforcement partners who

\textsuperscript{2086} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.
\textsuperscript{2087} Customs Excise Act 1996, s 175D(1)(b).
\textsuperscript{2088} Customs Excise Act 1996, s 175D(2).
\textsuperscript{2089} Customs Excise Act 1996, s 175D(2)(a).
\textsuperscript{2090} Customs Excise Act 1996, s 175D(3)(b).
\textsuperscript{2091} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.
\textsuperscript{2092} Customs Excise Act 1996, s 174(1).
\textsuperscript{2093} Customs Excise Act 1996, s 174(1).
\textsuperscript{2094} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.
\textsuperscript{2095} At 5.
have identified a person in New Zealand who has distributed child pornography overseas.\textsuperscript{2096} Customs Officers have the authority to examine goods that are being exported under Section 49(2)(b) \textsuperscript{2097} and question a suspected offender as per Section 145(2)(a) of the Customs Act 1996.\textsuperscript{2098} The Customs Service can also apply for search warrants under Section 167 of the Customs Act 1996\textsuperscript{2099} which sanctions a search the offender’s home and work premises.\textsuperscript{2100} Customs Officers have the authority to examine media, conduct interviews and arrest the suspected offender on site.\textsuperscript{2101} The investigation would then proceed through the classification and Court process.\textsuperscript{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

\textsuperscript{2096} At 5.
\textsuperscript{2097} Customs Excise Act 1996, s 49(2)(b).
\textsuperscript{2098} Customs Excise Act 1996, s 145(2)(a).
\textsuperscript{2099} Customs Excise Act 1996, s 167.
\textsuperscript{2100} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.
\textsuperscript{2101} At 5.
\textsuperscript{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’). 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. The former Minister of Justice Judith Collins believes that the existing legislation has not kept pace with advances in the information technology age. 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. 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.

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. Its provisions are also intended to adequately protect children in the future from the harm associated with child pornography offending.

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. Clause 6(3) amends Section 131A of the Classification Act 1993 so that possession of child pornography includes intentionally viewing child pornography without the requirement of consciously downloading or saving it. 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. This amendment is also intended to future-proof the offences provisions of the Classification Act 1993 against unforeseeable advances in technology. Detective Senior Sergeant John Michael of the New Zealand Police states that this provision is far broader than the present statutory definition of possession.

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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.
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.\textsuperscript{2116}

The amendment increases the maximum available term of imprisonment from 5 to 10 years.\textsuperscript{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.\textsuperscript{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 offence\textsuperscript{2119} is historically a safeguard against inappropriate public prosecutions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2123} The new Section 144 will also ensure that private

\begin{itemize}
\item \textsuperscript{2116} At 16.
\item \textsuperscript{2117} Objectionable Publications and Indecency Legislation Bill 2013 (124-1), cl 6.
\item \textsuperscript{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.
\item \textsuperscript{2119} Films, Videos, and Publications Classification Act 1993 s 144.
\item \textsuperscript{2120} Objectionable Publications and Indecency Legislation Bill, Explanatory Note.
\item \textsuperscript{2121} Objectionable Publications and Indecency Legislation Bill, Explanatory Note.
\item \textsuperscript{2122} Objectionable Publications and Indecency Legislation Bill, cl 8.
\item \textsuperscript{2123} Objectionable Publications and Indecency Legislation Bill, cl 8.
\end{itemize}
prosecutions, as defined in Section 5 of the Criminal Procedure Act 2011, cannot be instigated without the Attorney-General’s consent. Moreover, prosecutions involving extraterritorial jurisdiction will still require the Attorney-General’s consent.

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. This offence is punishable by imprisonment for a term not exceeding three years. The new offence of indecent communication with a young person is intended to counter deficiencies in New Zealand’s legislation. This inadequacy in child protection exists because of the discrepancy between objectionable publications offences within the Classification Act 1993 and the offence of sexual grooming in accordance with the Crimes Act 1961. The establishment of this new category of offence is intended to deter adults from engaging in indecent communications with children. It is also a response to the increasing use of social networking sites by adolescents and the possibility of the medium being utilised by adults to groom children for sexual abuse. An indecent communication with a child can take a variety of forms, including text messaging and social networking communication. The Government has therefore determined that a specific offence to be established to ensure that this

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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.
2130 Objectionable Publications and Indecency Legislation Bill, Explanatory Note.
2132 Crimes Act 1961 (NZ), s 131B.
2134 At 4.
2136 Objectionable Publications and Indecency Legislation Bill 2013 (124-1), Explanatory Note.
potentially damaging behaviour towards children is criminalised.\textsuperscript{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.\textsuperscript{2138}

In its submission on the Bill the Legislation Advisory Committee has declared that Clause 13 is too broad\textsuperscript{2139} as it has the potential to capture any ‘indecent’ communication.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2143} This criticism by the legislation Advisory Committee is not unwarranted\textsuperscript{2144} as studies indicate that ‘sexting’ has now become a normalised part of adolescent sexual development.\textsuperscript{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’.\textsuperscript{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,
cruelty and violence.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{2147} Internal Affairs and Local Government Select Committee, above n 942, at 7.
\textsuperscript{2148} Jack, Chief Censor, Office of Film and Literature Classification, New Zealand, above n 378, at 6.
\textsuperscript{2149} At 6.
\textsuperscript{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.
\textsuperscript{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. 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. 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. 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.\textsuperscript{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.

\textsuperscript{2155} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 4.

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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 1993\textsuperscript{2156} states that the Act has been enacted to promote and protect individual privacy.\textsuperscript{2157} This Act’s jurisdiction is, therefore, limited to concerns relating to an individual’s personal information\textsuperscript{2158} as the Act’s jurisdiction only extends to a breach regarding this specific aspect of privacy.\textsuperscript{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.\textsuperscript{2160} The Universal Declaration of Human Rights 1948\textsuperscript{2161} affirms that no person should be subjected to arbitrary interference with their right to privacy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2164} This definition encompasses most government departments, companies, and all Internet Service Providers.\textsuperscript{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.\textsuperscript{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

\textsuperscript{2156} Privacy Act 1993.
\textsuperscript{2157} Privacy Act 1993, s Long Title.
\textsuperscript{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.
\textsuperscript{2160} Butler, above n 2132, at 218.
\textsuperscript{2161} Universal Declaration of Human Rights 1948 (un.org).
\textsuperscript{2162} Universal Declaration of Human Rights 1948, art 12.
\textsuperscript{2164} Privacy Act 1993 s 2(1)(a).
\textsuperscript{2165} Privacy Act 1993, s 2(1)(a).
\textsuperscript{2166} Butler, above n 2132, at 222.
the Act. These Privacy Principles govern the responsible collection and disclosure of personal information by any agency. Where any agency breaches a Privacy Principle, an individual may make a complaint to the Privacy Commissioner in the knowledge that their right to privacy has been transgressed. However, a successful complainant must also demonstrate that the breach caused loss or injury as defined in Section 66 of the Act. Moreover, the right to privacy is not an absolute right. The Courts in New Zealand have conceptualised this right and affirmed that it must be balanced against other important values. There are, consequently, numerous countervailing public interests that prevail over compliance with the Privacy Principles. In particular, non-compliance may be necessary in the following situations:

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. 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. The Police and any other law enforcement agency therefore,

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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.
2173 Butler, above n 2132, at 225.
2174 At 225.
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.\textsuperscript{2179} An implied licence is a development in the common law\textsuperscript{2180} 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.\textsuperscript{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 1990\textsuperscript{2182} (Bill of Rights Act 1990).\textsuperscript{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.\textsuperscript{2184} The Supreme Court agrees with this observation and has acknowledged that privacy concerns are protected from State interference\textsuperscript{2185} by Section 21.\textsuperscript{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.\textsuperscript{2187} Moreover, all search powers employed by law enforcement within New Zealand engage the protections contained within Section 21.\textsuperscript{2188} The Courts have also placed particular importance on upholding the right to privacy over digital information.\textsuperscript{2189} Crucially for this thesis, the Supreme Court has also acknowledged the special privacy interests inherent to digital information.\textsuperscript{2190} The Court affirmed that these interests are categorically protected from unreasonable intrusion by Section 21 of the Bill of Rights Act 1990.\textsuperscript{2191}

\textsuperscript{2179} Robson v Hallett (1967) 2 QB 939 (gb); Howden v Ministry of Transport (1987) 2 NZLR 747 (nz CA) at 751.
\textsuperscript{2180} Tararo v R [2010] NZSC 157, 1 NZLR 145 (nz).
\textsuperscript{2181} Police v McDonald [2010], above n 2151, at [35].
\textsuperscript{2182} New Zealand Bill of Rights Act 1990 (NZ).
\textsuperscript{2184} R v Williams (2007) 3 NZLR 207 (nz CA) at [236].
\textsuperscript{2185} Hamed v R (2012) 2 NZLR 305 (nz SC) at [12, 222].
\textsuperscript{2186} At [10].
\textsuperscript{2187} New Zealand Bill of Rights Act 1990, s 21.’
\textsuperscript{2188} Cropp v Judicial Committee (2008) 3 NZLR 774 (nz SC) at [18].
\textsuperscript{2189} Tim Cochrane “Protecting Digital Privacy at the New Zealand Border” (2015) 4 New Zealand Law Journal 138 at 140.
\textsuperscript{2190} Dotcom v Attorney-General [2014] NZSC 199 (nz SC) at [57].
\textsuperscript{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.\textsuperscript{2192} The objective of this limitation is not to shield individuals from State interference, but to protect them from unjustified and arbitrary intrusions.\textsuperscript{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,\textsuperscript{2194} the Films, Videos, and Publications Classification Act 1993 being an example of this manner of restriction.\textsuperscript{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.\textsuperscript{2196} Section 6 requires any enactment to be construed consistently with the rights and freedoms within the Act.\textsuperscript{2197} When this consistency is not feasible, Section 4 of the Act comes into operation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2201} This Section states that these limits must be reasonable and demonstrably justified

\begin{footnotesize}
\textsuperscript{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.
\textsuperscript{2194} Tobin, above n 2157, at 129.
\textsuperscript{2195} Refer to the limitations on the right to freedom of expression discussed within Chapter 3.
\textsuperscript{2197} At 116.
\textsuperscript{2198} At 116.
\textsuperscript{2199} New Zealand Bill of Rights Act 1990 (NZ), s 4.
\textsuperscript{2201} Rishworth, above n 2170, at 116.
\end{footnotesize}
in a free and democratic society. 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. An enactment can be considered to be consistent with the Bill of Rights Act 1990 where it imposes the types of limits that are reasonable and demonstrably justified in a free and democratic society. 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.

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. 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. This right to liberty is intended to protect an individual from any unlawful detention or an abuse of power that results in unwarranted delays in any criminal proceedings. An arrested person also has the right to remain silent together with various other rights as explained in Section 23 of the Act. The objective of the right to remain silent is to protect an individual from being unlawfully coerced into giving evidence under duress. The overall purpose of the rights within Section 23 is to ensure that suspects have

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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.
2208 New Zealand Bill of Rights Act 1990, s 22.
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.\textsuperscript{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.\textsuperscript{2215} This Section also contains a number of rights, including the right to consult and instruct a lawyer.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2218}

Section 25 of the Bill of Rights Act 1990 concerns the minimum expectable standards in any criminal procedure.\textsuperscript{2219} This Section contains various rights consisting of the right to be presumed innocent until proved guilty\textsuperscript{2220} and the right to a fair and independent hearing before a Court.\textsuperscript{2221} The rights within this Section are significant as they ensure that an individual has the right to an impartial trial before the Courts.\textsuperscript{2222} Consequently, the rights within this Section have the potential to impact upon all of New Zealand’s regulatory statues, including the Crimes Act 1961\textsuperscript{2223} and the Films, Videos, and Publications Classification Act 1993.\textsuperscript{2224}

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\textsuperscript{2214} Richard Mahoney “Other Rights of Persons Arrested or Detained Under any Enactment” in Paul Rishworth and Grant Huscroft (eds) \textit{The New Zealand Bill of Rights} (Oxford University Press, Wellington, 2003) at 552.
\textsuperscript{2215} \textit{R v Barlow} (1996) 14 CRNZ 9 (nz CA) at 31.
\textsuperscript{2216} \textit{Law Journal Library - HeinOnline.org} at s 24(c).
\textsuperscript{2217} \textit{MOT v Noort}, above n 2166, at 286.
\textsuperscript{2218} Richard Mahoney “The Right to Counsel” in Paul Rishworth and Grant Huscroft (eds) \textit{The New Zealand Bill of Rights} (Oxford University Press, Wellington, 2003) at 525.
\textsuperscript{2219} New Zealand Bill of Rights Act 1990 (NZ), s 25.
\textsuperscript{2220} New Zealand Bill of Rights Act 1990, s 25(c).
\textsuperscript{2221} New Zealand Bill of Rights Act 1990, s 25(a).
\textsuperscript{2222} Butler, above n 2181, at 367.
\textsuperscript{2223} Crimes Act 1961 (NZ).
\textsuperscript{2224} Butler, above n 2181, at 366.
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Double jeopardy and retroactive penalties are also outlawed by Section 26 of the Bill of Rights Act 1990. 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. The prohibition on retroactive penalties within Section 26(1) of the Act mirrors the recognised common law. 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.

The principles of natural justice and its associated rights to justice are confirmed within Section 27 of the Bill of Rights Act 1990. The objective of Section 27 of the Act is to safeguard procedural protections considered fundamental to the rule of law. 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. The right to natural justice also prohibits bias by the Courts where no one can judge their own cause.

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2225 Double jeopardy prevents a defendant from being tried again on the same or similar charges following a legitimate acquittal or conviction.
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.
2233 At 754.
2234 At 754.
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

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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.
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.\textsuperscript{2241} This information must also be retained no longer than lawfully justified.\textsuperscript{2242} However, these obligations can be annulled by the State’s requirement to detect and investigate crime as a matter of public interest.\textsuperscript{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.\textsuperscript{2244} The Supreme Court has also recognised the special privacy interests inherent to digital information\textsuperscript{2245} and confirmed that these rights are protected from unreasonable intrusion.\textsuperscript{2246} However, the right to privacy within Section 21 is not absolute and this right must not be applied in isolation.\textsuperscript{2247} The objective of this limitation is not to shield an individual from lawful investigations, but to protect them from unlawful intrusions.\textsuperscript{2248} Moreover, the Courts cannot decline to apply any enactment that is inconsistent with Section 21 of Bill of Rights Act 1990\textsuperscript{2249} when the enactment is reasonable and demonstrably justified in a free and democratic society.\textsuperscript{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.

\textsuperscript{2241} Privacy Act 1993, s 6.
\textsuperscript{2242} Privacy Act 1993, s 6.
\textsuperscript{2243} Police v McDonald [2010], above n 2151, at [35].
\textsuperscript{2244} New Zealand Bill of Rights Act 1990 (NZ), s 21.
\textsuperscript{2245} Dotcom v Attorney-General, above n 2164, at [57].
\textsuperscript{2246} At [191].
\textsuperscript{2247} MOT v Noort, above n 2166, at 283; Solicitor-General v Radio New Zealand Ltd, above n 2166, at 59.
\textsuperscript{2248} Optican, above n 2167, at 298.
\textsuperscript{2249} New Zealand Bill of Rights Act 1990, s 4.
\textsuperscript{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.\textsuperscript{2251}

1.32.4 Data Retention in New Zealand

1.32.4.1 The Telecommunications Information Privacy Code 2003

The Telecommunications Information Privacy Code 2003\textsuperscript{2252} (‘Telecommunications Code 2003’)\textsuperscript{2253} governs the retention of data in New Zealand by all telecommunications agencies including ISPs.\textsuperscript{2254} Rule 1 of the Telecommunications Code 2003 states:\textsuperscript{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:\textsuperscript{2256}

Retention of Telecommunications Information

\textsuperscript{2251} New Zealand Bill of Rights Act 1990, s 5.
\textsuperscript{2252} Telecommunications Information Privacy Code 2003.
\textsuperscript{2254} Telecommunications Information Privacy Code 2003, rul. 4(2)(e).
\textsuperscript{2255} Telecommunications Information Privacy Code 2003, rul. 1.
\textsuperscript{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. The Telecommunications Code 2003 sets out specific rules for the industry in its dealings with customers and enables the industry to modify the Information Privacy Principles (Privacy Principles) contained in Parts 2 and 6 of the Privacy Act 1993. 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. These amendments to the Privacy Principles are designed to take into consideration the special characteristics of a particular industry such as telecommunications.

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, 3, 10 and 11 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. However, the major complaint of law enforcement

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2259 Privacy Act 1993, pt 2 and 6.
2260 LawAccess, above n 2232.
2263 Telecommunications Information Privacy Code 2003, rul. 3(4)(i).
2264 Telecommunications Information Privacy Code 2003, rul. 10(1)(c)(i).
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


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
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. 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. Moreover, Thurlow firmly supports the introduction of legislation that contains a mandatory data retention period for ISPs.

Philip Hamlin, a Barrister and Former Crown Prosecutor agrees with this proposal. In Thurlow’s view, a mandatory data retention period would not impose an undue financial burden on ISPs as mass storage is now relatively inexpensive and readily available. Any financial burden would be outweighed by the advantages to be gained by having the material available to law enforcement agencies. This information would be enormously beneficial to investigations as it constitutes a valuable resource and would therefore help to provide children with enhanced protection. However, Thurlow also raises an important point. 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. 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.

\[^{2284}\] 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)’. The purpose and scope of this Data Retention Directive are contained within Article 1. This Article states that the Directive aims to harmonise provisions for Member States with respect to the retention of data. It shall not apply to the content of electronic communications.

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. 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. According to Articles 5 and 6 of the Data Retention Directive, ISPs operating in member states have to store citizens’ telecommunications data for a minimum of six months and a maximum period of 24 months. Under Article 8, law enforcement agencies is able to request access to user information such as the user’s IP address and email details as detailed in Article 5 of the Data Retention Directive. Nevertheless, Article 4 confirms that permission to access this information should only be granted by a Court and can only be given to the

competent national authorities in specific cases and in accordance with the legislation of that country.\textsuperscript{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.\textsuperscript{2306} The Court held that the Data Retention Directive interfered with the rights to privacy and personal data protection\textsuperscript{2307} guaranteed by the European Union Charter of Fundamental Rights.\textsuperscript{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.\textsuperscript{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 2011\textsuperscript{2310} (‘Retention of Data Act 2011’) transposes the European Union’s Data Retention Directive into the Republic’s legislation.\textsuperscript{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.\textsuperscript{2312} Section 3(1) of the Retention of Data Act 2011 requires Internet data to be retained by ISPs for

\textsuperscript{2306} C- 293/12, C- 594/12 Digital Rights Ireland and Seitzinger and Others [2014].
\textsuperscript{2307} At 1.
\textsuperscript{2308} European Union Charter of Fundamental Rights 2009.
\textsuperscript{2310} Communications (Retention of Data) Act 2011 (ie).
\textsuperscript{2312} United Nations, above n 1555.
a 12-month period. However, Section 2 of the Retention of Data Act 2011 does not require the contents of emails or other communications to be retained. The details of the data that must be retained in accordance with Section 3 are contained within Part 2 of the Act. 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. Moreover, the Retention of Data Act 2011 also requires ISPs retaining the above information to take certain security measures to safeguard the retained data. 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). Nevertheless, a grace period of one month after this specified retention period has expired is granted to facilitate any last-minute requests.

Section 6 of the Retention of Data Act 2011 enables the Garda Síochána, members of the Defence Forces, and Revenue Officials to make a disclosure request to access retained information. Disclosure requests can only be made in limited circumstances, including the prevention, detection, investigation or prosecution of a serious offence. Section 6(4) requires that disclosure requests be made in writing, 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. Furthermore, Ireland’s ISPs are not permitted to access the retained data except when they have the consent of the individual to

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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, or to comply with a disclosure request from law enforcement agencies or an order from the Courts.

The Retention of Data Act 2011 also contains a number of safeguards for the retained data. A High Court Judge is designated to review the operation of the Act in accordance with Section 11(1) of the Act. The Judge is responsible for ensuring that law enforcement agencies are complying with the provisions of the Act and for providing the Taoiseach with a report on the general operation of the Act. 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. Moreover, Section 12(2)(b) allows the Judge to access and inspect any official documents relating to that request. These safeguards were implemented in the expectation that the provisions would protect ISPs, and ensure they are not burdened by unreasonable disclosure requests.

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. This mandatory data retention period would be an invaluable aid to law enforcement agencies. It would prevent valuable resources from having to be directed away from

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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.
2338 Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 17.
investigations and provide a readily available pool of information for any potential law enforcement operation. 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. The retention of data would not only allow better tracking but also assist with the investigation of other online crimes. 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. 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. These inadequacies are a serious hindrance to law enforcement investigations. 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. As Thurlow has aforementioned, any burden would be outweighed by the advantages to be gained by having this data available to law enforcement agencies. 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.
As previously noted, the Optional Protocol obligates the State to implement legislation to outlaw child pornography\(^{2349}\) 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 agencies\(^{2351}\) 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 previously 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 absolute\(^{2356}\) and the State can and does supersede these concerns.

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\(^{2351}\) O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.
\(^{2354}\) 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. 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. 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. 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. 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, along with its operating system iOS 8, and Google’s Android Platform will soon be encrypted by default. Apple and Google claim

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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.
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.

they will not be able to access these devices for anyone, including law enforcement agencies.\textsuperscript{2365} This claim is confirmed by Apple as stated on their website:\textsuperscript{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 storage\textsuperscript{2367} to its customers and confirms that the company is committed to making cloud storage as secure as possible.\textsuperscript{2368} To ensure this, all iCloud\textsuperscript{2369} content is encrypted through a number of undisclosed processes.\textsuperscript{2370} When a third party stores any data, Apple encrypts this data and does not allow any third party access to the password keys.\textsuperscript{2371} Apple also provides users with an iCloud Keychain\textsuperscript{2372} which retains all passwords in a format that neither Apple nor anyone else is unable to access.\textsuperscript{2373} Apple firmly believes that the iCloud Keychain is the best way to protect an iCloud account.\textsuperscript{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.\textsuperscript{2375}

The next generation of Google’s Android L\textsuperscript{2376} operating systems will also encrypt data by default.\textsuperscript{2377} Google has offered optional encryption on devices since 2011,

\textsuperscript{2365} Timm, above n 2338.
\textsuperscript{2367} Cloud storage involves storing data on multiple virtual servers that hosted by third-parties.
\textsuperscript{2368} Apple, above n 2340.
\textsuperscript{2369} iCloud is an Apple cloud storage service.
\textsuperscript{2370} Apple, above n 2340.
\textsuperscript{2371} Apple, above n 2340.
\textsuperscript{2372} The iCloud Keychain is a program developed by Apple to improve password management.
\textsuperscript{2373} Apple, above n 2340.
\textsuperscript{2374} Apple, above n 2340.
\textsuperscript{2375} Apple, above n 2340.
\textsuperscript{2376} Android L or Lollipop is a version of the Android operating system developed by Google.
\textsuperscript{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.\textsuperscript{2378} The company has decided to design an activation procedure for new Android devices so that encryption of data happens automatically.\textsuperscript{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.\textsuperscript{2380} These password keys for the device are not stored by Google, so they cannot be shared with law enforcement agencies.\textsuperscript{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.\textsuperscript{2382} The collection of evidence may not be possible even when authorities produce legally binding search warrants.\textsuperscript{2383} Both companies have been actively changing security features in response to the public backlash in the United States against Government surveillance.\textsuperscript{2384} This backlash comes in the wake of Edward Snowden’s\textsuperscript{2385} revelations, including disclosures about the collection of phone records.\textsuperscript{2386} Furthermore, Mr Snowdon’s revelations have also raised concerns in New Zealand about the collection of information by government surveillance agencies such as the Government Communications Security Bureau.\textsuperscript{2387}

\textsuperscript{2378} Timberg, above n 2351.
\textsuperscript{2379} Timberg, above n 2351.
\textsuperscript{2380} Timberg, above n 2351.
\textsuperscript{2382} Timberg, above n 2351.
\textsuperscript{2383} Timberg, above n 2351.
\textsuperscript{2386} Barrett, above n 2358.
\textsuperscript{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').

In response to these concerns, Apple believes that its phones are exempt from Government prying, and states openly on its website that:

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. Comey’s criticism is in response to the difficulties that their security measures pose for legitimate crime detection. 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, even when they have legitimate search warrants. 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. John Escalante, the Chief of


Timberg and Miller, above n 2365.

Barrett, above n 2358.
Detectives for Chicago’s Police Department draws particular attention to the opportunities such devices offer paedophiles.\textsuperscript{2395}

\begin{quote}
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’.
\end{quote}

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.\textsuperscript{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.\textsuperscript{2397} The FBI call this disconnect ‘Going Dark’.\textsuperscript{2398} Going Dark\textsuperscript{2399} occurs when those charged with protecting the public are not always able to access the evidence required to prosecute crime, even with lawful authority.\textsuperscript{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.\textsuperscript{2401} The problem of Going Dark will most surely be amplified by Apple and Google’s new security measures.\textsuperscript{2402}

\textsuperscript{2395} Timberg and Miller, above n 2365.
\textsuperscript{2396} Timberg and Miller, above n 2365.
\textsuperscript{2397} Comey, above n 2364.
\textsuperscript{2398} Comey, above n 2364.
\textsuperscript{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>.
\textsuperscript{2400} Comey, above n 2364.
\textsuperscript{2401} Comey, above n 2364.
\textsuperscript{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 Technology\(^ {2403} \) 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 NetClean\(^ {2410} \) 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.


\(^ {2410} \) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2413}

Christian Sjöberg, the CEO of NetClean reveals that NetClean’s Analyze Digital Investigator\textsuperscript{2414} and PhotoDNA aim to assist law enforcement agencies to expedite efforts to eradicate child pornography.\textsuperscript{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.\textsuperscript{2416} This technology provides a powerful platform for law enforcement agencies to manage digital media investigations at different modulated levels.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2419} Stuart Aston, Chief Security Officer at Microsoft in the United Kingdom, believes that without innovation and demand from the public

\textsuperscript{2411} Harmon, above n 2383.
\textsuperscript{2413} Harmon, above n 2383.
\textsuperscript{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.
\textsuperscript{2415} NetClean Technologies, above n 2386.
\textsuperscript{2417} NetClean Technologies, above n 2390.
\textsuperscript{2418} NetClean Technologies, above n 2390.
\textsuperscript{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. 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. This co-operative approach to assisting law
enforcement agencies would be a significant advantage for any investigation.
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. 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. 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

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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-
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 to 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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

1.3.3.9 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.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\begin{enumerate}
\item At 6.
\item At 15.
\item At 15.
\item At 6.
\item Harmon, above n 2383.
\item 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.
\item Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6; Comey, above n 2364; Barrett, above n 2358.
\end{enumerate}
\end{footnotes}
balanced against the protection of children.\textsuperscript{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.\textsuperscript{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 \textit{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 1996\textsuperscript{2444} (‘Customs Act 1996’) is the primary statutory authority that governs the operations of the New Zealand Customs Service.\textsuperscript{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

\footnotesize{\textsuperscript{2442} Timberg, above n 2351. \\
\textsuperscript{2443} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6. \\
\textsuperscript{2444} Customs Excise Act 1996 (NZ). \\
\textsuperscript{2445} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 1.}

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Issuing Officer. This search warrant is only issued once the Issuing Officer is satisfied there are reasonable grounds to believe that an offence has been committed against this Act or there has been unlawful exportation or importation of goods. However, the provisions of Part 4 of the Search and Surveillance Act 2012 also apply to Section 167 of the Customs Act 1996. 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. 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. If a person refuses to provide Customs with access they can be charged and sentenced to a maximum term of three months’ imprisonment. 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. This has happened on a number of occasions in Houston’s experience. The other concern with encryption is that it is becoming increasingly more secure, readily accessible and is free to download from the Internet. The combined effect of these factors is that encryption will become a more common feature of concern for child pornography investigations.

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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 2009\(^{2459}\) 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 computer\(^{2460}\) 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 6\textsuperscript{2468} and its operating system iOS 8.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2471} Thurlow states: 2472

\begin{quote}
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.
\end{quote}

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.\textsuperscript{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.\textsuperscript{2474} However, this obligation must be balanced with the offender’s right to be silent\textsuperscript{2475} as required by

\textsuperscript{2468} The Apple iPhone 6 a Smartphone release from Apple, for more information see Apple, above n 2335.
\textsuperscript{2469} The iOS 8 is the eighth major release of the iOS mobile operating system designed by Apple.
\textsuperscript{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.
\textsuperscript{2471} Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.
\textsuperscript{2472} At 7.
\textsuperscript{2473} At 7.
\textsuperscript{2474} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.
\textsuperscript{2475} At 7.
Section 23(4)(b) of the New Zealand Bill of Rights Act 1990.\textsuperscript{2476} There are also freedom of expression considerations\textsuperscript{2477} involved with this provision which require the State to balance this right with the right of children\textsuperscript{2478} to be treated with dignity and equality.\textsuperscript{2479} The concept of freedom of expression, as already noted, has limitations. These limitations include concerns such the need to respect children’s rights\textsuperscript{2480} and the State’s responsibility to guarantee the welfare of its citizens.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2485} It would provide an important advancement

\textsuperscript{2476} New Zealand Bill of Rights Act 1990 (NZ), s 23(4)(b).
\textsuperscript{2477} New Zealand Bill of Rights Act 1990, s 14.
\textsuperscript{2478} International Covenant on Civil and Political Rights 1966 (un.org), art 19(2).
\textsuperscript{2479} Universal Declaration of Human Rights 1948 (un.org), art 1.
\textsuperscript{2480} International Covenant on Civil and Political Rights 1966, art 19(3)(a).
\textsuperscript{2481} International Covenant on Civil and Political Rights 1966, art 19(3)(b).
\textsuperscript{2482} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 7.
\textsuperscript{2483} At 7.
\textsuperscript{2484} At 7.
\textsuperscript{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.\textsuperscript{2486} The provision would give investigators the ability to adequately investigate the dissemination of child pornography over the Internet.\textsuperscript{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.\textsuperscript{2488} Child pornographers would no longer be able to utilise encryption as a shield to protect themselves from prosecution.\textsuperscript{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.\textsuperscript{2490} Although legislation is presently available to facilitate access to encrypted information, this legislation is considered to be inadequate.\textsuperscript{2491} It is therefore concluded that an amendment to the Classification Act 1993 should be introduced to compel a suspected child

\begin{footnotes}
\item[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.
\item[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.
\item[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.
\item[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.
\item[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.
\item[2491] Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.
\end{footnotes}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2494} This recognised

\textsuperscript{2492} At 11.
\textsuperscript{2493} At 11.
international instrument contains provisions specifically designed to facilitate improved co-operation between jurisdictions.\textsuperscript{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.\textsuperscript{2496} Article 5 of the Optional Protocol regulates the extradition of a person suspected of committing a child pornography offence.\textsuperscript{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).\textsuperscript{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).\textsuperscript{2499} Article 7 of the Optional Protocol specifically requires States Parties to seize and confiscate goods or instruments when requested by a foreign State.\textsuperscript{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.\textsuperscript{2501} Furthermore, the provisions within Articles 6 and 7 are also reinforced by Article 10(1) of the Optional Protocol.\textsuperscript{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.\textsuperscript{2503} Signatories are also required to provide financial and

\textsuperscript{2495} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, arts 5, 6, 7, 10.  
\textsuperscript{2500} Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000, art 7(b).  
\textsuperscript{2501} UNICEF Innocenti Research Centre, above n 690, at 12.  
technical assistance in accordance with Article 10(4) of the Optional Protocol to aid in the investigation and prosecution of child pornography offending.\textsuperscript{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 \textit{inform other States} of their obligations to provide assistance to other countries with child pornography investigations in accordance with the Optional Protocol.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2509}

\textsuperscript{2506} Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 4.
\textsuperscript{2507} At 4.
\textsuperscript{2508} At 4.
\textsuperscript{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, as the Internet poses unique challenges. 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. 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. 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. 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.

The Internet is an international communication tool that crosses jurisdictional boundaries. 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. An investigation that begins in New Zealand will almost certainly cross jurisdictional boundaries. Correspondingly, almost all investigations of downloaded child pornography involve the co-operation of law enforcement agencies in different jurisdictions, often at an international level.

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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.\footnote{Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.} This shortage of resources is in part attributed to the considerable extent of online offending\footnote{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.} and the fact that the response of law enforcement agencies consists of small teams of investigators\footnote{Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.} who are focusing on child pornography offending at an international level.\footnote{Ministry of Justice, above n 940.} 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.\footnote{Michael, Detective Senior Sergeant, New Zealand Police and Officer in charge of OCEANZ (Online Child Exploitation Across New Zealand), above n 570, at 3.}

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.\footnote{At 3.} 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.\footnote{At 3.} As the Internet is borderless, the sharing of contraband such as child pornography online is an international crime.\footnote{US Department of Homeland Security “Child Exploitation/Operation Predator” (29 September 2011) US Department of Homeland Security <http://www.ice.gov/predator/>.} Homeland Security Investigations\footnote{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.} (‘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.\footnote{US Department of Homeland Security, above n 2501.} HSI recognises that these international resources are essential aids in rescuing victims and also arresting child
pornographers. The Internet Child Exploitation Unit (‘ICE Unit’) of the Peel Regional Police in Canada actively investigates the online abuse of children. 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. The ICE Unit is also active in assisting other agencies with multi-jurisdictional investigations. A substantial amount of the ICE Unit’s investigative information comes from other agencies and international projects. However, the ICE Unit recognises that Interpol becomes increasingly proactive when suspects and victims are identified by investigations. This recognition of the value of Interpol is the primary reason why law enforcement agencies work closely with Interpol. Interpol enables law enforcement agencies to liaise with agencies in a world-wide effort to combat the consumption and distribution of child pornography.

In Australia, the Australian Government recognises that the Australian Federal Police have a significant role to play in keeping children and young people secure. 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. The Australian Federal Police Child Protection Operations Team (‘CPO’) undertakes investigations and a co-ordination role. This role includes co-ordinating investigations that are multi-jurisdictional and relate to the trading of child pornography within the online

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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  
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)  
2539 Australian Federal Police, above n 2512.  
2540 Australian Federal Police “Online Child Exploitation” (30 September 2014)
The CPO’s role consists of engaging with the Virtual Global Taskforce, international law enforcement agencies and Interpol. 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.

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. 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. 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. 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. Tim Houston, an Investigator with the New Zealand Customs Service agrees and believes that international co-operation internationally could be improved. 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. 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

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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.
2549 At 6.
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. These comments by Houston have already been supported by foreign law enforcement agencies who are actively seeking new relationships with other agencies.

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. 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. The Minister of the Department of Internal Affairs, Peter Dunne revealed that the CCU also works very closely with the FBI and the

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2550 O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 20.
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. The Minister also stated:

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.

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. 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. 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. 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.

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2566} Houston believes that the allocation of more resources will enhance co-operation between the Customs Service, Internal Affairs and the Police.\textsuperscript{2567} As previously noted, the Customs Service works very closely with the other two agencies in a taskforce.\textsuperscript{2568} This taskforce ensures that investigations are more efficient as no agency is working in isolation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2571} Collaborating with law enforcement partners around the world brings together an array of resources to target child

\textsuperscript{2563} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 10.  
\textsuperscript{2564} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640.  
\textsuperscript{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.  
\textsuperscript{2566} At 10.  
\textsuperscript{2567} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6.  
\textsuperscript{2568} At 6.  
\textsuperscript{2569} At 14.  
\textsuperscript{2570} At 6.  
\textsuperscript{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. 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. 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. Moreover, Houston confirms that this co-operation between jurisdictions is based on an informal reciprocal agreement. Houston states:

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.

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

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2573 Wortley and Smallbone, above n 1683, at 2.
2574 Ministry of Justice, above n 940.
2576 At 16.
2577 Ministry of Justice, above n 940.
directly with other States’ law enforcement agencies. 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. This is why New Zealand’s law enforcement agencies require the resources to actively participate in training courses and conferences. One such conference was the Virtual Global Taskforce’s Sixth Biennial International Conference, held in Amsterdam in 2014. New Zealand’s participation at this conference would have been duly noted by other law enforcement agencies. 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. 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 cooperative approach to investigations is not only maintained but built upon with the assistance of new partners from around the world.

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. 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.
2580 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. Further resources would also enable the Police to carry out additional preventative work in the community. 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. Enabling staff to participate in consultation events such as the Children in Crisis Conference 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. 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. The volume of such material available all over the world indicates that it is a growing phenomenon with no signs of abating. The Internet has transformed child pornography from a local issue to a transnational problem. 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.

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.

2593 Esposito, above n 650, at 546.
international problem, and any adequate response to it must be based at the international level of policing.\textsuperscript{2594} With Internet investigations involving multiple jurisdictions, continuing co-operation and information-sharing are required to guarantee that law enforcement activities remain effective.\textsuperscript{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.\textsuperscript{2596} It is the importance of such relationships that justifies the argument for additional resources.\textsuperscript{2597} Further resources would also strengthen New Zealand’s international enforcement reputation\textsuperscript{2598} and help provide more prevention messaging to the local community.\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{2596} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 9.

\textsuperscript{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.

\textsuperscript{2598} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 6, 9.

\textsuperscript{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

[Footnotes]

2600 At 14.
2601 At 14.
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, London, Washington, and various other locations around the world. 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. The Customs Service utilises the services of its Liaison Officers when interacting with international partners in investigations.

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. These threats resulted in an increased focus on international crime, such as counter terrorism and the drug trade. 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. 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. Moreover, Mr Orange noted that the Liaison Officer’s position in Bangkok is predominantly focused on the drug trade.

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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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2621} This support consists of sending personnel to attend international conferences overseas, which improves New Zealand’s intelligence-collecting networks.\textsuperscript{2622} Bezett is also certain that Internal Affairs has exceptional networking capabilities which is a significant aspect in child pornography investigations.\textsuperscript{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.\textsuperscript{2624} The New Zealand Police are not always aware of who the main figures are in criminal organisations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2627} Mr Orange also clarified the importance of having a Liaison Officer in Washington.\textsuperscript{2628} This

\textsuperscript{2619} At 3.
\textsuperscript{2620} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 5.
\textsuperscript{2621} At 5.
\textsuperscript{2622} At 5.
\textsuperscript{2623} At 5.
\textsuperscript{2624} Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.
\textsuperscript{2625} At 3.
\textsuperscript{2626} At 3.
\textsuperscript{2627} At 3.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{2630}

Thurlow explains that the Liaison Officers in the Customs Service have a dual function.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2633} This is now all the more important as child pornography investigations are now international by nature.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2637} This mode of

\begin{thebibliography}{99}
\bibitem{2629} At 3.
\bibitem{2630} At 3.
\bibitem{2631} Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.
\bibitem{2632} At 7.
\bibitem{2633} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 15.
\bibitem{2634} At 15.
\bibitem{2635} At 15.
\bibitem{2636} At 15.
\bibitem{2637} At 13.
\end{thebibliography}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2640} Tohill is convinced that New Zealand must seriously consider stationing further Liaison Officers with specialist Internet experience overseas in strategically significant jurisdictions.\textsuperscript{2641} These jurisdictions would be countries where there is major capacity to undertake investigations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2645}

\begin{flushright}
\textsuperscript{2638} At 13.
\textsuperscript{2639} At 13.
\textsuperscript{2640} Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 4.
\textsuperscript{2641} At 4.
\textsuperscript{2642} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 13.
\textsuperscript{2643} At 13.
\textsuperscript{2644} Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 4.
\textsuperscript{2645} Thurlow, Senior Enforcement Policy Advisor, New Zealand Customs Service, above n 2210, at 7.
\end{flushright}
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.\textsuperscript{2646} This assistance to law enforcement agencies would be invaluable due to the international nature of child pornography offending.\textsuperscript{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.\textsuperscript{2648}

It is also argued that there is no greater justification for extra funding than the protection of children in New Zealand and overseas.\textsuperscript{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.\textsuperscript{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 information\textsuperscript{2651} and facilitate the flow of

\textsuperscript{2646} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 13.
\textsuperscript{2647} At 15.
\textsuperscript{2648} At 15.
\textsuperscript{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.
\textsuperscript{2650} Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.
\textsuperscript{2651} At 3.
criminal intelligence between jurisdictions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2654} These MoU are allocation

\textsuperscript{2652} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 23.
\textsuperscript{2653} Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.
\textsuperscript{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 information but have no legal status. Moreover, in accordance with the terms of the MoU, signatory agencies agree to proactively assist each other within the limits defined within the agreement. This assistance is intended to facilitate the improved allocation of resources and the exchange of investigative information. 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. 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.

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. MoU with foreign law enforcement agencies are considerably more robust. The Department of Internal Affairs devotes significant resources to establishing personal relationships with law enforcement agencies around the world in accordance with the MoU. Bezzet also contends that these informal interactions tend to produce positive results and are therefore more productive than most other

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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 Bezett, 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 Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 6.
agreements. The building of meaningful relationships with other authorities also supports the facilitation of MoU. A number of overseas jurisdictions do advocate for MoU as they provide their agencies with the justification for implementing investigative collaboration. They also operate as a buffer for their own internal auditing processes which are understood to be beneficial for the allocation of resources.

These MoU are implemented to establish New Zealand’s presence in those foreign countries as a recognised partner in law enforcement. 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. 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. The precise forms of assistance that these agreements promise include details concerning requests for the criminal history of offenders. 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. 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.

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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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2677}

Mr Orange is aware that these agreements are highly useful in drug importation and child trafficking investigations.\textsuperscript{2678} The vast majority of the information required in international criminal investigations that Mr Orange witnessed was assembled by Liaison Officers in Thailand.\textsuperscript{2679} These Liaison Officers operated in accordance with a Memorandum of Understanding between New Zealand authorities and the Royal Thai Police in Bangkok.\textsuperscript{2680} Mr Orange reveals that the Thai officials appointed their own officers, who had direct contact with the New Zealand Police’s Liaison Officers.\textsuperscript{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.\textsuperscript{2682}

The Customs Service also benefits from its interactions with other law enforcement agencies through MoU.\textsuperscript{2683} Brian Thurlow notes that the Customs Service interacts
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.\textsuperscript{2690} The experience of law enforcement personnel confirms that these relationships produce more positive results than most other formal agreements.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{2690} Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.
\textsuperscript{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.
\textsuperscript{2692} Mr Orange, Former Regional and District Commander of the New Zealand Police, above n 2579, at 3.
\textsuperscript{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.\textsuperscript{2694} In New Zealand, these formal requests are governed by the Mutual Assistance in Criminal Matters Act 1992\textsuperscript{2695} (‘Mutual Assistance Act 1992’) and its subsequent Amendments.\textsuperscript{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.\textsuperscript{2697} The Act also permits requests from other countries for assistance from New Zealand’s law enforcement agencies in criminal investigations.\textsuperscript{2698} Common forms of assistance provided under the Mutual Assistance Act 1992 include:\textsuperscript{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;

\textsuperscript{2695} Mutual Assistance in Criminal Matters Act 1992.
\textsuperscript{2696} Crown Law Office, above n 2668.
\textsuperscript{2697} Mutual Assistance in Criminal Matters Act 1992, pt 2.
\textsuperscript{2698} Mutual Assistance in Criminal Matters Act 1992, pt 3.
\textsuperscript{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. The capacity for crimes such as the dissemination of child pornography over the Internet to be conducted on an international scale has transformed international attitudes to the provision of mutual assistance in criminal matters. In addition, New Zealand’s law enforcement agencies must ensure that child pornographers cannot evade prosecution and confiscation of child pornography even though the evidence or proceeds of their crimes are concealed in diverse countries around the world. This stance on child pornography offending requires a responsive, streamlined mutual assistance system. Such a streamlined system must be able to effectively combat both domestic and transnational crime, including child pornography, while operating within the appropriate safeguards of the law.

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. However,

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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. The amended Section 61 states:

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. A production order is an order made under Section 105 of the Criminal Proceeds (Recovery) Act 2009. Section 105 of the Criminal Proceeds (Recovery) Act 2009 states that a Judge may issue an order to recover documentation when

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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.\textsuperscript{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.\textsuperscript{2716} However these foreign countries must be ‘prescribed foreign countries’\textsuperscript{2717} and ‘convention countries’\textsuperscript{2718} as required by Part 3 of the Mutual Assistance Act 1992.\textsuperscript{2719} All other foreign countries can also make requests\textsuperscript{2720} but these are processed on a case-by-case basis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2724}

\textsuperscript{2715} Criminal Proceeds (Recovery) Act 2009, s 105(1).
\textsuperscript{2717} Mutual Assistance in Criminal Matters Act 1992 s 24(1)(a).
\textsuperscript{2718} Mutual Assistance in Criminal Matters Act 1992, s 24(1)(b).
\textsuperscript{2719} Crown Law Office, above n 2690.
\textsuperscript{2720} Mutual Assistance in Criminal Matters Act 1992, s 25A.
\textsuperscript{2721} Crown Law Office, above n 2690.
\textsuperscript{2722} Crown Law Office, above n 2690.
\textsuperscript{2723} Crown Law Office, above n 2690.
\textsuperscript{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.\textsuperscript{2725} However, whether the request is accepted will depend on the compatibility of the domestic laws of that country with New Zealand’s legislation.\textsuperscript{2726} All such requests are subject to the conditions set out in Section 25A\textsuperscript{2727} of the Mutual Assistance Act 1992 as inserted by Section 4 of the Mutual Assistance in Criminal Matters Amendment Act 1998.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2731} This arrangement is governed by common law rules and a number of statutes, including Part 4 of the Evidence Act 2006.\textsuperscript{2732} New Zealand’s legal system has strict requirements regarding the presentation of documents in order for them to be admissible in Court.\textsuperscript{2733} The outcome is that requests from New Zealand specify in some detail the form and procedure that a response should follow.\textsuperscript{2734}

\textsuperscript{2726} Crown Law Office, above n 2699.
\textsuperscript{2727} Crown Law Office, above n 2699.
\textsuperscript{2728} Mutual Assistance in Criminal Matters Amendment Act 1998.
\textsuperscript{2729} Mutual Assistance in Criminal Matters Act 1992 s 25A(2).
\textsuperscript{2730} Mutual Assistance in Criminal Matters Act 1992, s 25A(3).
\textsuperscript{2731} Crown Law Office, above n 2690.
\textsuperscript{2732} Evidence Act 2006 pt 4.
\textsuperscript{2733} Crown Law Office, above n 2690.
\textsuperscript{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. Crown Law Office Counsel Jo Mildenhall states that all formal requests for mutual assistance are processed by the Crown Law Office on behalf of the Attorney-General. 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. 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.

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 countries and the Mutual Assistance Act 1992 sets out the criteria under which New Zealand can administer this assistance. Section 5 also allows for other forms of assistance to be arranged on a case-by-case basis. 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.

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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).
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 documents\(^{2748}\) or other evidence\(^{2749}\) 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 assistance.

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2754 Mutual Assistance in Criminal Matters Act 1992, s 43(1).
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.
2760 Crown Law Office, above n 2629.
2761 Crown Law Office, above n 2629.
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.\textsuperscript{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.\textsuperscript{2767} The CCU was then able to execute a search warrant on an Internet Service Provider which eventually led them to Moore.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2772} Steve O’Brien, National Manager of the Censorship Compliance Unit of the Department of Internal Affairs agrees.\textsuperscript{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.\textsuperscript{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

\begin{thebibliography}{99}
\bibitem{2767} Otago Daily Times, above n 2740.
\bibitem{2768} Otago Daily Times, above n 2740.
\bibitem{2769} Crown Law Office, above n 2629.
\bibitem{2770} Crown Law Office, above n 2629.
\bibitem{2771} Crown Law Office, above n 2629.
\bibitem{2772} Wortley and Smallbone, above n 1683, at 1.
\bibitem{2773} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 4.
\bibitem{2774} O’Brien, National Manager Censorship Compliance Unit, above n 1494, at 4.
\end{thebibliography}
Many of these obstacles, including variances in legislation, are compounded by the Internet being borderless. Michael further states:

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. 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. This issue is compounded by the fact that any law enforcement investigation often has to source information from a whole range of organisations. These organisations include Internet Service Providers, email providers and numerous foreign Government Departments.

Detective Senior Sergeant John Michael would like to see some new initiatives to assist law enforcement agencies to obtain information from other countries. 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. Michael stresses that the international law enforcement agencies do work very well together. However, problems arise in terms of the gathering of evidence and the

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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 countries do not investigate child pornography offending. 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. 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. The current formal mechanism for this kind of material, known as the Mutual Legal Assistance Treaty (‘MLAT’), is actionable under the Mutual Assistance Act 1992. Brezett revealed that using the MLAT can be very slow in terms of responding to the dynamic nature of obtaining information from overseas. 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.

Tim Houston, an Investigator with the Child Exploitation Team of the New Zealand Customs Service, has had similar experiences and revealed:

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

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2785 Tim Houston revealed that one such county 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.
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. Consequently, Brezett argues for improved and streamlined mechanisms to allow law enforcement agencies to conduct their investigations more effectively. 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. Therefore, the implementation of further streamlined mutual production orders is so critically important. The ability to institute these measures universally will confirm that law enforcement agencies can prosecute child pornographers anywhere in the world. This enhanced mutual production procedure will also be a major asset to law enforcement agencies around the world.

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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.\textsuperscript{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.\textsuperscript{2800} Additional streamlined mutual production orders with updated processes will reduce the time required.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{2799} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 18.
\item \textsuperscript{2800} Bezett, Senior Policy Analyst, Department of Internal Affairs of New Zealand, above n 1131, at 7.
\item \textsuperscript{2801} At 7.
\item \textsuperscript{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.
\end{itemize}
investigate and prosecute child pornography offending anywhere in the world.\textsuperscript{2803} Streamlined mutual production orders will increase the speed and efficiency of investigations which will reduce the potential for further harm to more children.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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

\textsuperscript{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.
\textsuperscript{2804} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 18.
\textsuperscript{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.
\textsuperscript{2807} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 5.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{2810} These disclosures should act as a model for other jurisdictions to improve their capability to assist with child pornography investigations.\textsuperscript{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.\textsuperscript{2812}

\textsuperscript{2809} At 11.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{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. 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. 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

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2813 Objectionable Publications and Indecency Legislation Bill 2013 (124-1).
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.  

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. Government statistics demonstrate that between 2004 and 2011, 393 people were convicted for objectionable publication offences. However, these offences were not limited to child pornography offending because New Zealand does not have a distinct child pornography provision. Only 131 or 33 percent of these individuals convicted were sentenced to a custodial sentence. Approximately 50 percent of these offenders had been sentenced to less than 20 percent of the maximum sentence available to the Courts. In all but 14 cases, the offender was sentenced to a term of imprisonment less than 40 percent of the maximum available sentence. 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.

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2815 Blue, Convicted Child Sexual Offender, above n 105, at 2.
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 2002 explains the purposes of sentencing of offenders in New Zealand. The Act is premised on a just deserts method of sentencing, commonly referred to as retribution. The foundation stone of retribution is the principle of proportionality. 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. Sentences must also reflect a number of considerations that may be in conflict, such as consistency in sentencing and the interests of the victim. Nevertheless, offenders should be adequately sentenced for their criminal behaviour and should receive their lawful punishment. The principle of proportionality also places a constraint on the utilitarian notions of deterrence and other forms of punishment.

Section 7 of the Sentencing Act 2002 encapsulates the purposes and principles of sentencing as required by the Act. The Court is required to hold the offender to account for the harm that they have done to their victims and the community. This accountability is intended to promote a sense of responsibility and acknowledgement of the harm caused by the offender’s actions. The Sentencing Act 2002 recognises the interests of the victim of the offence and the requirement for reparation for the harm caused by the offender’s actions.

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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.\footnote{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.} These principles consist of imposing the least restrictive outcome that is appropriate in the circumstances\footnote{Sentencing Act 2002, s 8(g).} and ensuring this outcome is in accordance with the hierarchy of sentencing and orders.\footnote{Sentencing Act 2002, s 8(g).} 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.\footnote{Sentencing Act 2002, s 8(h).} The offender’s personal circumstances\footnote{Sentencing Act 2002, s 8(i).} and the requirement for consistency of sentencing must also be acknowledged by the sentencing Judge.\footnote{Sentencing Act 2002, s 8(e).} 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.\footnote{Hall, above n 2799, at 253.} Section 16 of the Act also has a strong presumption against imprisonment, and recognises the desirability of keeping offenders in the community.\footnote{Sentencing Act 2002, s 16(1).} This Section also requires that a sentencing Judge does not impose a sentence of imprisonment\footnote{Sentencing Act 2002, s 16(2)(a).} unless the purposes of the Sentencing Act 2002 cannot be achieved by a sentence other than imprisonment.\footnote{Sentencing Act 2002, s 16(2)(b).} 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.\footnote{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’).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2853} The former Minister of Justice Judith Collins also stated in Parliament:\textsuperscript{2854}

\begin{footnotesize}
\begin{enumerate}
\item[{\textsuperscript{2850}}] Films, Videos, and Publications Classification Act 1993.
\item[{\textsuperscript{2851}}] Objectionable Publications and Indecency Legislation Bill 2013 (124-1), Explanatory Note.
\item[{\textsuperscript{2852}}] Objectionable Publications and Indecency Legislation Bill, Explanatory Note.
\item[{\textsuperscript{2853}}] Office of Film and Literature Classification Submission on the Objectionable Publications and Indecency Legislation Bill (2014) at 1.
\item[{\textsuperscript{2854}}] Hansard, above n 2078, at 15102.
\end{enumerate}
\end{footnotesize}
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. 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. 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. Therefore, their actions should be treated as in the most serious category of criminal offending.

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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.\(^\text{2859}\) This Clause increases the maximum term of imprisonment from 10 years to 14 years.\(^\text{2860}\) 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.\(^\text{2861}\) Moreover, an offence against Section 124 is considered to be a higher-tier offence\(^\text{2862}\) due to the offender’s decision to distribute child pornography.\(^\text{2863}\) The reason for this provision is, as previously noted, that the exchange of images fuels demand for additional child pornography.\(^\text{2864}\) 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.\(^\text{2865}\) This deterrent is anticipated to emphasise the seriousness of such offending, and also discourage recidivism.\(^\text{2866}\) The presumption of imprisonment for repeat offenders could also be seen as a

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\(^\text{2859}\) Objectionable Publications and Indecency Legislation Bill, cl 4.
\(^\text{2860}\) Objectionable Publications and Indecency Legislation Bill, cl 4.
\(^\text{2861}\) 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.
\(^\text{2862}\) R v Spark, above n 961, at [16].
\(^\text{2863}\) Espinosa v Department of Internal Affairs, above n 1734, at [15].
\(^\text{2864}\) R v Oliver & Ors (2003) 1 CrAppR 28 (gb;england.and.wales) at 467.
\(^\text{2865}\) Objectionable Publications and Indecency Legislation Bill, Explanatory Note.
\(^\text{2866}\) 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. Section 132B contains a presumption of imprisonment for certain repeat offenders. 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.

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. The Court must also have regard to the particular circumstances of both the repeat offence and the offender. These particular circumstances comprise without limitation the age of the offender when they are under 20 years of age.

The New Zealand Law Society (‘Law Society’) has recommended that Clause 7 should be given further consideration. This recommendation has been submitted because the Sentencing Act 2002 already recognises that previous convictions are an aggravating factor when determining sentences. Nevertheless, the Law Society is doubtful the new proposal would have any efficacy impact in practice. The presumption of imprisonment for repeat offenders within Clause 7 of the Bill is triggered by the fact of a previous conviction. The Law Society believes Clause 7 would produce the same outcome as the Sentencing Act 2002.

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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.
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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{2879} At 3.
\item \textsuperscript{2880} At 3.
\item \textsuperscript{2881} Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 5.
\item \textsuperscript{2882} Objectionable Publications and Indecency Legislation Bill 2013 (124-1), cl 7.
\item \textsuperscript{2883} Blue, Convicted Child Sexual Offender, above n 105, at 7.
\end{itemize}
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 1993\(^ {2887}\) 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 adolescents\(^ {2890}\) 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

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\(^{2884}\) 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.
\(^{2888}\) 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.\textsuperscript{2894}

In its submission on the Bill, the Legislation Advisory Committee has declared that Clause 13 is too broad\textsuperscript{2895} as it has the potential to capture any ‘indecent’ communication.\textsuperscript{2896} This could include images or text messages sent deliberately by a person aged over 16 to another person who is aged under 16.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2899} This criticism by the legislation Advisory Committee is not unwarranted\textsuperscript{2900} as studies indicate that sexting has now become a normalised part of adolescent sexual development.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{2903} The inclusion of the term ‘indecent’ has the potential to add significant and unwarranted complexity to the application of the Classification Act 1993.

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\textsuperscript{2894} Objectionable Publications and Indecency Legislation Bill, Explanatory Note.  \\
\textsuperscript{2895} Legislation Advisory Committee, above n 2113, at 3.  \\
\textsuperscript{2896} At 3.  \\
\textsuperscript{2897} At 3.  \\
\textsuperscript{2898} At 3.  \\
\textsuperscript{2899} At 3.  \\
\textsuperscript{2900} See O’Callaghan, above n 2118; OneNews, above n 2118.  \\
\textsuperscript{2901} Temple and Choi, above n 2119, at 5.  \\
\textsuperscript{2902} Greig, above n 866, at [8].  \\
\textsuperscript{2903} Internal Affairs and Local Government Select Committee, above n 942, at 7.
\end{flushleft}
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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2907} The effectiveness of Section 132B is that it will send a clear and undeniable signal to the community that repeat child...
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. 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. According to Section 1 of the Protection of Children Act 1978, it is an offence to produce an indecent photograph of a child to distribute that indecent photograph and to have in your possession such indecent photographs. This Act and a number of amendments such as Section 160(1) of the Criminal Justice Act 1988 which clarified possession of child pornography as an offence, 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. The COPINE research project was based at the University of Cork in the Republic of Ireland. This project has made a significant contribution to the knowledge available to law enforcement agencies about child pornography offending through the establishment of an archive of images to assist with the identification of child

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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).
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.
The archive from the COPINE project has now been integrated into an Interpol Database known as the International Child Sexual Exploitation Image Database. Furthermore, a modified version of the COPINE scale was adopted in 2002 by the Sentencing Advisory Panel in the United Kingdom. The COPINE scale was revised to assimilate the punitive responses required by the legal system. This modified version of the COPINE scale is intended to provide the Courts with guidance on the appropriate sentencing for child pornography offenders.

In relation to offences involving child pornography, the Court of Appeal in *R v. Wild* sought the views of the English and Welsh Sentencing Advisory Panel (‘the Panel’) in relation to the threshold of a custodial sentence for child pornography offenders. The Court of Appeal stated that:

> 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.

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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.
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 recommendations\textsuperscript{2931} in 2002.\textsuperscript{2932} These recommendations comprised sentencing guidelines for child pornographers,\textsuperscript{2933} formulated as part of a consultation paper.\textsuperscript{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.\textsuperscript{2935} The Panel endorsed a structured approach to assessing the seriousness of the offence and utilising the seriousness for determining the appropriate penalty.\textsuperscript{2936} The Court could then focus on the additional aggravating factors found to be relevant.\textsuperscript{2937} The Panel proposed that the two primary factors for determining the serious of an offence should be:\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2941} These offences would then be subject to some form of diversion.

\textsuperscript{2932} Akdeniz, above n 148, at 68.
\textsuperscript{2933} At 68.
\textsuperscript{2934} Gillespie, above n 436, at 243.
\textsuperscript{2935} Akdeniz, above n 148, at 68.
\textsuperscript{2936} At 68.
\textsuperscript{2937} Gillespie, above n 436, at 244.
\textsuperscript{2938} Sentencing Advisory Panel, above n 2905, at 5.
\textsuperscript{2939} Akdeniz, above n 148, at 69.
\textsuperscript{2940} At 69.
\textsuperscript{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,\textsuperscript{2942} every sentencing Court in England and Wales must have regard to the Sentencing Guidelines for any child pornography offence.\textsuperscript{2943} The seminal case in this regard is the Court of Appeal case of \textit{R v Oliver & Ors}.\textsuperscript{2944} In this instance, the Court considered the Panel’s advice\textsuperscript{2945} and agreed with the Panel that the distinction between a custodial and non-custodial sentence is particularly ambiguous.\textsuperscript{2946} This complication was exacerbated by the increase in penalties by Parliament and the limited availability of sex offender treatment programmes for offenders.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2949} However, the Court disagreed with the Panel’s decision that COPINE typologies 2 and 3 are consistent with Level 1.\textsuperscript{2950} According to the Court, neither nakedness in a legitimate setting nor the clandestine procuring of an image, gives rise, to a pornographic image.\textsuperscript{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:\textsuperscript{2952}

1. images depicting erotic posing with no sexual activity;

\textsuperscript{2942} Criminal Justice Act 2003 (gb).
\textsuperscript{2943} Criminal Justice Act 2003, s 172.
\textsuperscript{2944} \textit{R v Oliver & Ors}, above n 2838.
\textsuperscript{2945} At 465–470.
\textsuperscript{2946} At 467.
\textsuperscript{2947} At 467.
\textsuperscript{2948} At 467.
\textsuperscript{2949} At 466.
\textsuperscript{2950} Akdeniz, above n 148, at 71.
\textsuperscript{2951} \textit{R v Oliver & Ors}, above n 2838, at 467.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2957} The Court also recommended an increase in the degree of sentencing for the possession of higher-level material.\textsuperscript{2958} Sentences approaching the ten-year maximum would be appropriate where the defendant has a previous conviction for dealing in child pornography.\textsuperscript{2959} The maximum sentence would also be applicable for sexually abusing children, or where the accused is recognised to

\textsuperscript{2953} At 466.
\textsuperscript{2954} At 466.
\textsuperscript{2955} At 466.
\textsuperscript{2956} At 466.
\textsuperscript{2957} At 468.
\textsuperscript{2958} At 468–469.
\textsuperscript{2959} At 469.
have used violence in the commission of the offence. The Court of Appeal also found that the presence of specific factors is capable of aggravating the seriousness of an offence. The Court identified these factors as follows:

(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. For under 18-year-olds the appropriate sentence is likely to be a supervision order within a designated treatment programme. 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.

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

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2960 At 469.
2961 At 469.
2962 At 469.
2963 At 470.
2964 At 470.
2965 At 470.
been disregarded. The original COPINE Scale was only designed to categorise child pornography for research. It was never intended to offer any indication of the severity of contrasting categories of pornography. Moreover, the five-level scale adopted by the Panel is based on what an offender has in their possession. ‘Mr White’, a Registered Psychologist with eight years’ experience dealing with child pornographers, states:

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. 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. Mr White is certain that the risk to the community is actually inverse. 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. Mr White also states:

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

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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.
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. 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* was an appeal against sentencing for supplying and possessing child pornography. The appellant in this case had been supplying DVDs of children engaging in sexual acts which resulted in his arrest by Police. The appeal was based on the contention that a lesser sentence was justified given the circumstances of the appellant’s offending which was rejected by the Court of Appeal. 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. The Court of Appeal agreed with the Judge’s sentencing and stated in relation to the report:

> 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.

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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\textsuperscript{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.\textsuperscript{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.\textsuperscript{2987} The material in question included over 200,000 images and films portraying bestiality and the sexual abuse of children.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2992} The Crown and the District Court Judge examined material from England and Wales for analogous sentencing levels.\textsuperscript{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
sentenced in England and Wales a starting point of four years would be warranted.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{R v Oliver & Ors}.\textsuperscript{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.\textsuperscript{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

\textsuperscript{2994} At [16].
\textsuperscript{2995} At [17].
\textsuperscript{2996} At [18].
\textsuperscript{2997} At [18].
\textsuperscript{2998} At [20].
\textsuperscript{2999} At [22].
\textsuperscript{3000} At [23].
Sections 131A and 124 of New Zealand’s Classification Act 1993.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{3001} At [25].
\textsuperscript{3002} At [26].
\textsuperscript{3003} At [26].
\textsuperscript{3004} At [55].
\textsuperscript{3005} At [58].
\textsuperscript{3006} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 11.
\textsuperscript{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.\footnote{3008} In supporting this view, Michael referred to the New Zealand Court of Appeal’s decision in \textit{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 \textit{Zhu}.\footnote{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.\footnote{3010} Philip Hamlin, a Barrister and former Crown Prosecutor with 23 years’ experience of prosecuting sexual offending against children agrees.\footnote{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.\footnote{3012} Another important aspect in a prosecution is demonstrating to the Court the level of the offender’s involvement with the material.\footnote{3013} Michael also further states:\footnote{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.\footnote{3015} Houston is not an enthusiast of these guidelines and believes:\footnote{3016}

\begin{itemize}
\item \footnote{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.
\item \footnote{3009} At 10.
\item \footnote{3010} At 5.
\item \footnote{3011} Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 7.
\item \footnote{3012} At 7.
\item \footnote{3013} At 7.
\item \footnote{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.
\item \footnote{3015} Houston, Investigator, Child Exploitation Operations Team, New Zealand Customs Service, above n 640, at 11.
\item \footnote{3016} At 11.
\end{itemize}
…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. 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. 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. Houston states that this is irrelevant as they are clearly images of the sexual exploitation of a child.

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. 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. The sentencing guidelines in fact support this stance as they recognise various aspects of child pornography offending. Furthermore, the guidelines also recognise commercial gain as an offence at the higher level of seriousness 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.\textsuperscript{3025} Merely locating an image on the Internet is considered to be less serious than downloading it.\textsuperscript{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 \textit{R v Oliver & Ors} where Lord Justice Rose states:\textsuperscript{3027}

\begin{quote}
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.
\end{quote}

The underlying purpose of the guidelines is, as previously stated, simply to provide guidance to the Court on where a custodial sentence is appropriate.\textsuperscript{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.\textsuperscript{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.\textsuperscript{3030} This requirement however, has been recognised by the English and Welsh Sentencing Advisory Panel and the English Court of Appeal in \textit{R v Oliver & Ors}, as previously explained.\textsuperscript{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.\textsuperscript{3032} O’Brien explained during the interview phase of this thesis that psychological supervision and mental health interventions

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{3025} At 467.
\item \textsuperscript{3026} At 467.
\item \textsuperscript{3027} At 467.
\item \textsuperscript{3028} At 467.
\item \textsuperscript{3029} At 468–469.
\item \textsuperscript{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.
\item \textsuperscript{3031} Akdeniz, above n 148, at 68; \textit{R v Oliver & Ors}, above n 2838, at 466.
\item \textsuperscript{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.
\end{itemize}
\end{footnotesize}
would be a more constructive alternative to prison for some younger offenders. 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. 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. Hamlin also believes that this is a very useful notion. 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. Brandon Wilson, a Registered Psychologist with the Stop Adolescent Programme, agrees with Hamlin. 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. This stance is based on the understanding that with adolescents, behaviour is less entrenched than with adults. 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.

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3033 O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 5.
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 Zealand\(^{3043}\) 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.\textsuperscript{3052} An offender is noticeably more likely to go to prison for their first child pornography offence in Christchurch than in Auckland.\textsuperscript{3053} The Courts in Auckland are considerably more liberal than elsewhere in New Zealand.\textsuperscript{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.\textsuperscript{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 \textit{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 merits\textsuperscript{3056} and accord due recognition to how the offender has interacted with the objectionable publication.\textsuperscript{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.\textsuperscript{3058}

\textsuperscript{3052} Hamlin, Barrister and former Crown Prosecutor, New Zealand, above n 1698, at 3.
\textsuperscript{3053} At 3.
\textsuperscript{3054} At 3.
\textsuperscript{3055} Sentencing Act 2002.
\textsuperscript{3056} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.
\textsuperscript{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.
\textsuperscript{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 2002 defines the principles of sentencing offenders in New Zealand. Section 7 contains the philosophy and fundamental principles of sentencing as required by the Act. This Section also contains other reasoning such as denunciation, deterrence and rehabilitation. 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. These specified programmes include attendance at a psychological or therapeutic programme as required by Section 54H(b) of the Sentencing Act 2002 and as amended by Section 24 of the Sentencing Amendment Act 2007.

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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 54H(a).
3068 Sentencing Act 2002, s 54H(b).
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* and the *Te Piriti* Special Treatment Programmes. Kia Marama, a 60-bed unit at Rolleston prison near Christchurch, takes offenders who have been convicted and imprisoned for child sexual offences. Attendance at Kia Marama is voluntary and some offenders choose not to participate. Kia Marama was established in 1989 as the first specialist prison treatment programme for child sexual offenders in New Zealand. The programme is based on the Atascadero Sex Offender Treatment and Evaluation Programme in the United States. Kia Marama is established as a therapeutic community that provides group-based interventions to convicted child sexual offenders.

The Te Piriti Programme was established at Auckland prison in 1994. Although this programme is closely modelled on the Kia Marama Programme, it is specifically designed for Maori offenders convicted of sexual offences against children. Te Piriti can be been distinguished from most other Department of Corrections (‘Corrections’) initiatives as it has seen a concentrated effort by staff to

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3070 *Kia Marama* means insight or let there be light.
3071 *Te Piriti* means the bridge or the crossing over to a better life.
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* framework.  

The programmes provide professional counselling services to individuals who are imprisoned for sexual offences against children that aim to prevent relapses by teaching offenders that their offending is the result of connected steps of thought and behaviour. ‘Mr Blue’, 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. Once these patterns or processes are identified, the programme provides opportunities to change the behaviour of an offender through targeted treatment initiatives. The targeted treatment initiatives begin with the initial assessment of the offender and can continue through to post release.

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. Generally, the prison sentences for younger offenders are less severe and Judges usually mandate some rehabilitation programme for them. The concern about this method of sentencing is its implementation by Corrections. 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.

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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.\textsuperscript{3092} However, the application of the orders by Corrections can be very erratic.\textsuperscript{3093} Several offenders known to Mr Blue informed him that they were placed into treatment programmes towards the end of their custodial sentence.\textsuperscript{3094} These placements were perceived by these offenders as an afterthought by Corrections and resulted in no efficacy for the offenders whatsoever.\textsuperscript{3095} Mr Blue also states that this is not at all uncommon.\textsuperscript{3096}

Bronwyn Rutherford, the Chief Psychologist for Corrections, responds to this criticism by stating that Corrections prioritises the treatment of offenders.\textsuperscript{3097} The priority is determined by an offender’s level of risk to the community and their intended release date.\textsuperscript{3098} Sexual offenders who are considered to be the highest risk to the community receive treatment first.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{3102} The application of such as legislative mechanism would ensure that the Court’s sentencing orders are being given due and meaningful consideration by

\begin{footnotesize}
\begin{enumerate}
\item[3092] At 12.
\item[3093] At 14.
\item[3094] At 14.
\item[3095] At 14.
\item[3096] At 14.
\item[3097] Interview with Bronwyn Rutherford, Chief Psychologist, Department of Corrections, New Zealand at 1.
\item[3098] At 1.
\item[3099] At 1.
\item[3100] At 2.
\item[3101] At 2.
\item[3102] Blue, Convicted Child Sexual Offender, above n 105, at 15.
\end{enumerate}
\end{footnotesize}
Corrections. This mechanism would also provide greater protection to the community from the harm associated with the recidivism of child sexual offenders.

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. The implementation of such a provision would ensure that Corrections provides adequate treatment services to offenders so that their risk of recidivism is reduced. 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. 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. 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

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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.\textsuperscript{3109} Any inadequacy in sentencing has the potential to greatly increase the risk of harm to New Zealand’s children.

\textbf{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 \textit{constantly critiqued} to guarantee that it is conversant with technology and also that it provides law enforcement agencies with the ability to \textit{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.\textsuperscript{3110} Some offenders are being caught with hundreds of thousands of images\textsuperscript{3111} and do not receive a custodial sentence.\textsuperscript{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.

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\textsuperscript{3109} Blue, Convicted Child Sexual Offender, above n 105, at 14.
\textsuperscript{3110} Tohill, Interim General Manager, Ecpat Child Alert New Zealand, above n 409, at 5.
\textsuperscript{3111} O’Brien, National Manager of the Censorship Compliance Unit, Department of Internal Affairs of New Zealand, above n 269, at 9.
\end{flushright}
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.\textsuperscript{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 1993\textsuperscript{3114} 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.\textsuperscript{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

\textsuperscript{3113} Universal Declaration of Human Rights 1948 (un.org), art 1.
\textsuperscript{3114} Films, Videos, and Publications Classification Act 1993.

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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 1989\(^\text{3116}\) 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 2000\(^\text{3117}\) to assist the international community to respond to this concern. The Optional Protocol expands

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\(^{3116}\) Convention on the Rights of the Child 1989 (UN).
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.
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’).\textsuperscript{3120}

This Bill facilitates the Act to provide law enforcement agencies with the means to respond to advances in technology\textsuperscript{3121} 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.\textsuperscript{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

\textsuperscript{3120} Objectionable Publications and Indecency Legislation Bill 2013 (124-1).
\textsuperscript{3121} Hansard, above n 2078, at 15102.
\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.
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

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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
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