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9 December 2013

Chair  
Justice and Electoral Committee  
Parliament Buildings  
P O Box 18 041  
**WELLINGTON 6160**

Dear Mr Simpson

**OBJECTIONABLE PUBLICATIONS AND INDECENCY LEGISLATION  
BILL 124-1**

**Introduction**

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
3. The terms of reference of the LAC include:
  - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
  - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
4. The LAC considered the Objectionable Publications and Indecency Legislation Bill at its meeting on 31 July 2013. This submission relates to the offence of indecent communication with a young person under 16 and the inclusion in legislation of presumptions of imprisonment.

## **Offence of indecent communication with a young person under 16**

5. Clause 13 of the Bill creates a new Crimes Act 1961 offence of indecent communication with a young person under 16. The offence is broadly drafted. It states:

“124A Indecent communication with young person under 16

(1) A person of or over the age of 16 years is liable to imprisonment for a term not exceeding 3 years if he or she intentionally exposes a person under the age of 16 years (the young person) to indecent material (whether written, spoken, visual, or otherwise, alone or in combination) in communicating in any manner, directly or indirectly, with the young person.

(2) A reference in subsection (1) to a person under the age of 16 years, or to the young person, includes a reference to a constable (as defined in section 2(1)) who pretends to be a person under the age of 16 years (the fictitious young person) if the person charged with an offence against subsection (1), when communicating with the fictitious young person and exposing the fictitious young person to indecent material, believed that the fictitious young person was a person under the age of 16 years.

(3) It is a defence to a charge under subsection (1) if the person charged proves that,—

(a) before communicating with the young person and exposing the young person to the indecent material, the person charged had taken reasonable steps to find out whether the young person was of or over the age of 16 years; and

(b) at the time of communicating with the young person and exposing the young person to the indecent material, the person charged believed on reasonable grounds that the young person was of or over the age of 16 years.

(4) It is no defence to a charge under subsection (1) that the person charged did not know that the material to which the charge relates was indecent, unless the person charged also proves—

(a) that the person charged had no reasonable opportunity of knowing it; and

(b) that in the circumstances the ignorance of the person charged was excusable.

...”

6. The purpose of the clause is to address a gap in the law between objectionable publications offences, which the explanatory note states only apply if the offender makes a record of a communication with a young person, and the sexual grooming offence, which only applies if the offender intentionally meets (or travels with the intention of meeting) the young person, or arranges for or persuades the young person to travel with the intention of meeting him or her.
7. The LAC agrees that there is a gap in the law which needs to be remedied, however it considers that the explanatory note does not accurately describe the gap. In addition, it has concerns about the breadth of the proposed offence.
8. It is not clear to the LAC that objectionable publication offences only apply if the offender makes a record of the communication. Section 123 of the Films, Videos, and Publications Classification Act 1993 (FVPCA) contains a strict liability offence of supplying or distributing an objectionable publication.

“Distribute” includes by means of electronic transmission (“whether by ... electronic mail or other similar means of communication” – s 123(4)). It appears to the LAC that this would capture the same action required for the proposed new offence.

9. Instead, the problem with the s 123 offence is that the publication be must be “objectionable” as that term is defined under the FVPCA, rather than merely “indecent”. The term “indecent” as it has been interpreted by the courts potentially captures a broader range of material than that addressed by the term “objectionable” under the FVPCA. Section 3(2) of that Act states that:
 

“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.”
10. The content of a communication must meet this high threshold before a s 123 offence is committed. In the LAC’s view, it is this high threshold which means that there is a gap in the law between s 123 and the sexual grooming offence in the Crimes Act, and that a new offence is desirable.
11. The LAC submits that the proposed offence is too broad. It will capture any “indecent” communication sent intentionally by a person aged over 16 to a person aged under 16.
12. Framed as it is, there is a risk it will capture the immature sharing of “indecent” jokes, pictures or videos between teenage friends, where the sender is over 16 and the recipient under 16. Given the very high volumes of electronic communication by this age group, it appears to the LAC that the number of potential breaches of the provision is very substantial.
13. This risk is exacerbated by the lack of definition of the term “indecent”. It is not defined in the Crimes Act 1961. In the context of section 124 (Distribution or exhibition of indecent matter) of that Act the courts have held that for an act to be indecent it “must be something which will warrant the sanction of the law, not some trifling or unimportant episode”. Indecency must be judged in light of time, place and circumstances. Whether something is indecent “is an objective question to be answered by what the jury assesses to be the standards of right-thinking members of the community.” (see *R v Dunn* [1973] 2 NZLR 481 (CA) at 482, 484 and *R v Annas* [2008] NZCA 534 at [56].)

14. The boundaries of what is or is not indecent will be difficult for anyone to draw, and particularly so for younger people. The provision therefore gives rise to two risks. First, it will be difficult for individuals to assess whether they are falling foul of the law. Second, a substantial amount of conduct (the immature exchange of offensive images, videos or jokes) may unintentionally be captured by the provision and so, in practice, will never be prosecuted.
15. It is possible that the first risk is mitigated to an extent by the reasonable exercise of prosecutorial discretion; and by the defence set out in proposed section 124A(4) (the person charged must prove they had no reasonable opportunity of knowing it was indecent; and that in the circumstances their ignorance was excusable.) However, the LAC considers that these protections are inadequate, and do not mitigate the second risk.
16. The LAC submits that an alternative formulation which meets the policy aim without giving rise to these risks ought to be adopted. Three possible options are:
- The offence could require some additional element of harmful or exploitative intent on the part of the offender.
  - There could be an additional defence that relates to the circumstances of the offending.
  - An attempt could be made to define “indecent” for the purposes of the offence.
17. The LAC suggests that the first of these options would be preferable. The second option leaves the onus on the defendant which, given the large range of potential illegitimate conduct seems undesirable in any event. And a satisfactory definition of “indecent” may be hard to achieve.
18. A more specifically stated offence which targets the conduct identified (the process of grooming, rather than, for example, the immature exchange of electronic communication with coarse sexual content) should be achievable. Such a provision can be found in the Crimes Act 1900 (NSW), s 66EB(3), which makes it an offence to:
- “(a) engage in any conduct that exposes a person under the age of 16 years (the young person) to indecent material; and
  - (b) do so with the intention of making it easier to procure the young person for unlawful sexual activity with him or her or any other person.”

### **Presumption of imprisonment**

19. The LAC would like to comment on the provision in clause 7 of the Bill for a presumption of imprisonment for repeat offences involving child pornography. The presumption will arise whether or not the prior offence was committed before the amendment comes into force. It can be displaced if the sentencing judge considers that the offender should not be imprisoned having regard to:
- “(a) the particular circumstances of the repeat offence; and

(b) the particular circumstances of the offender (including, without limitation, his or her age if he or she is under 20 years of age).”

20. The presumption will apply to “specified publications offences” which are the offences of distributing, possessing, or exhibiting objectionable publications that are objectionable because of their depiction of the sexual exploitation of children and young persons. Those offences contain a mens rea element (knowledge that the publication is objectionable) and carry a maximum sentence of 5 or 10 years imprisonment.
21. Precedents for presumptions of imprisonment exist in ss 86A to 86I (three strikes rules for repeated serious violent offending) and s 102 (presumption in favour of life imprisonment for murder) of the Sentencing Act 2002.
22. The LAC notes that the proposed provision is graver than the “three strikes” rule in the sense that the presumption arises on only the second conviction. It is possible, therefore, that two comparatively minor instances of offending behaviour could give rise to the presumption. However, it considers that this concern is countered by the restriction of the presumption to the “specified publications offences”; and because the judicial discretion is broader than under ss 86A to 86I and 102 of the Sentencing Act 2002 which provide that the presumption can be shifted only where imprisonment would be “manifestly unjust”.
23. However, the LAC has concerns that there may be a growing appetite for sentencing presumptions in legislation. It suggests that the circumstances when such a presumption might be justified are limited. In the LAC’s view, in the future such presumptions ought only to be adopted where:
  - the offending is such that early imprisonment is required to protect the public from ongoing harm by preventing offending during the term of imprisonment;
  - early imprisonment will provide an opportunity for intervention and rehabilitation for the offender; and/or
  - public opinion about the harm of the offending is such that it would support the presumptive imprisonment of the offender.
24. The LAC intends to amend the LAC guidelines to reflect this advice.
25. We consider that whether the form of offending dealt with by the Bill meets these bullet points is open to debate. In particular, in relation to the first two bullet points, the RIS itself acknowledges that:
 

“Child pornography offenders already have very low rates of recidivism. Statistics show that over a ten year period between 2001 and 2010 only 8 people were convicted of a repeat objectionable publication offence under the Classification Act (there are not any statistics available on what penalty these 8 recidivists received). If most offenders do not re-offend this may indicate that the current penalties, along with the social stigma of a child pornography conviction, are adequate deterrents to re-offending.”

26. And,

“Child pornography offenders sent to prison will receive child sex offending rehabilitation only if they meet relevant risk-based eligibility criteria. Child pornography offenders do not usually meet this risk-based criteria and will therefore not usually receive this treatment.”

**Conclusion**

27. Thank you for taking the time to consider the Committee’s submission. The Committee does not wish to be heard on this submission.

Yours sincerely

A handwritten signature in black ink that reads "Grant Hammond". The signature is written in a cursive style with a large initial 'G'.

Hon Sir Grant Hammond  
Chair