WHEN SELFIES ARE TOTES INAPPROPES[1]: INDECENT COMMUNICATION WITH A YOUNG PERSON

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[1] Totally inappropriate.

Take care of our children

Take care of what they hear

Take care of what they see

Take care of what they feel

For how the children grow

So will be the shape of Aotearoa

– Dame Whina Cooper

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Introduction

Technology has created an unprecedented realm for new types of communication. Some of these types of communication are more established such as 'txting', 'pxting', instant messaging and emailing. More recent developments include communication platforms and apps[2] such as Facebook, Twitter, Instagram, Flickr, Tinder, Skype and Snapchat.

Snapchat for example is a free messaging application that allows users to send images or video messages coined "Snaps" to other users. The application has a demographic of users aged between 13 and 25-years-old.[3] The sender makes the image or video available to view for between one and ten seconds. After this time, the image self-destructs and is theoretically unable to be viewed again.[4] Users of Snapchat can add other users by entering their cell phone number or Snapchat username and upon acceptance by the other user, they become instantly available to photo or video message.[5] Skype is an application which offers a range of services, many of them free to users including instant messaging, phone calling over the Internet, and real-time video employing the use of a device's webcam.[6,7] Coinciding with the evolution of such technology has been the expansion of the modern day lexicon to include 'selfie' (the act and product of taking a photo of oneself), 'sexting' (the sending of sexually explicit text or photo messages), 'screenshotting' (taking an image of what is being presented onto a device screen) and 'streaming' (the transmission of video over the internet).

The drawcards of such technologies include their instantaneous nature, potential for anonymity and the unparalleled accessibility to others that they afford. As noted by Laurenson J in *Overend v Department of Internal Affairs*:

> … technology has enabled an interchange of information which only a few years ago would not have seemed possible. In its simplest terms it has meant that anyone,

[2] An application/software program that is downloadable onto an Internet capable device.
[3] Marcelo Ballve "Snapchat's Explosive Growth Among Teens And Millennials Means It's Emerging As A Powerful Brand Platform" (11 July 2014) Business Insider Australia <http://www.businessinsider.com.au/a-primer-on-snapchat-and-its-demographics-2014-7>
[4] Ibid.
[5] Snapchat, Inc "How to Find and Add friends" Snapchat Support <https://support.snapchat.com/a/find-friends>
[6] A webcam is a camera embedded into an Internet capable device.
[7] Skype Technologies "What is Skype?" Skype <http://www.skype.com/en/what-is-skype/>

> anywhere in the world, who has access to a computer, together with a modem connecting it to a telephone, can with the minimum of effort and expense, communicate with others virtually anywhere in the world. The restraints of time and cost in relation to the interchange of information have largely gone. This revolution has brought with it problems in many fields.[8]

New forms of communication have also created new virtual spaces for sexual interaction and expressions of sexuality to occur. People are now able to exchange sexual content instantly and with ease transcending those former restrictions imposed by traditional sharing within the physical environment. The phenomenon of sexting (the sending of sexually explicit text or photo messages) has launched into the social sphere and popular culture. Cosmopolitan magazine features articles such as "How To Sext: Tips for Sexting 101",[9] and GQ Magazine – "A GQ Guide To Sexting".[10] The media has publicised high-profile celebrities revealed to be engaging in sexting including sports people such as Tiger Woods and pop stars such as Rihanna.[11]

Whilst new forms of communication have created these opportunities for sexual interaction, simultaneously insidious opportunities have arisen for the exploitation of young people and children. Specifically, these new mediums have facilitated access to children and young people as well as the means for children and young people to be exploited.[12] For example, an adult can now use a cell phone to take and send to a child an indecent photograph of him or herself in mere seconds. Children and young people may also be particularly vulnerable to exploitation via technological means because the private nature of the technologies available (such as their being personal to the user or apps that are password protected) often means that there is less parental control and supervision of the child's activities.[13] For example, were an

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[8] *Overend v Department of Internal Affairs* (1998) 15 CRNZ 529 at [4].
[9] Ariel Nagi "How To Sext: Tips for Sexting 101" (6 March 2013) Cosmopolitan <http://www.cosmopolitan.com/sex-love/how-to/a4246/how-to-sext/>
[10] Morgan Murphy "A GQ Guide To Sexting" (August 2011) GQ <http://www.gq.com/news-politics/mens-lives/201107/sexting-rules-when-to-sext>
[11] Elizabeth Ryan "Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults" (2010) 96 Iowa L. Rev at 20.
[12] See Lee Tien "Children's Sexuality and the New Information Technology: a Foucaultian Apporach" (1994) 3 S.& L.S. 121 at 122.
[13] Terhi-Anna Wilska "Mobile Phone Use as Part of Young People's Consumption Styles" (2003) 26 JCP 441 at 442.

adult to send a child a photo on Snapchat, this could be on the child's personal phone for a maximum of only ten seconds before disappearing.[14]

The uptake of new technologies among young people is swift, particularly given that for young people mobile phone and Internet use is ubiquitous. A New Zealand based study found that 94.6% of those secondary school students surveyed frequently used the Internet or a mobile phone to communicate.[15] Nearly one in five participants in this study reported experiencing an unwanted sexual solicitation via mobile phone or the Internet in the year prior to being surveyed.[16] Notably, this research was aimed only at secondary school aged students and further did not elucidate specificities as to potentially indecent communications such as the age of the sender. Notwithstanding limitations, it is accepted that such communications take place and are harmful to children and young people, as well as wider society.

Recognising the potential for harm to occur, internationally, legislators have responded to the exploitation of children and young people via technological means in a variety of ways. Some jurisdictions such as Scotland and some Australian states have created new legislation specifically targeting offending of this type.[17,18] Other jurisdictions such as Pennsylvania and Florida have attempted to use existing legislation such as offences relating to child pornography to criminalise this type of offending.[19,20]

This paper considers New Zealand's response to indecent communication with children and young people.

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[14] Images can be screenshot manually by the user and so saved onto the user's device as well as apps that can be installed to save images sent via Snapchat. Sean Ludwig "Yikes: This new app saves Snapchats without letting the sender know" (9 August 2013) VB News <http://venturebeat.com/2013/08/09/app-to-save-snapchat-messages/>

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

[16] Ibid.

[17] The Sexual Offences (Scotland) Act 2009, s 24.

[18] Australian Commonwealth Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth), s 474.27A.

[19] Pennsylvania Code, title 18 § 6312(c) and (d).

[20] Florida Statute, title 46 § 827.071(3).

Chapter I considers New Zealand's current regulatory framework and identifies that this is inadequate in responding to child exploitation of this type. This chapter then introduces the proposed offence of 'indecent communication with a young person' to ensure this behaviour is criminalised.

Chapter II considers the scope of the provision and suggests where it is both too broad and too narrow. The provision is worded in a broad way that captures young people who are using technological communications as a form of sexual expression. However, the provision appears too narrow in that liability is not imposed on an adult who incites a child or young person to send a communication intended for indecent purposes. The expression of 'indecent' is considered and it is suggested that legislative guidance is required in terms of its meaning. Finally a comment is made on the penalty for the provision.

Chapter III concludes by suggesting drafting changes to the proposed provision to ensure any inadequacies that have been identified in this paper are remedied.

Chapter I: New Zealand's position – The current regulatory framework

The current regulatory framework surrounding the exploitation of children and young people has been outpaced by technological means of communication such as texting, pxting and instant messaging. Currently only limited and inadequate provisions exist within New Zealand legislation that would require strained interpretation in order to encapsulate indecent communication with children or young people. Such provisions exist under the Crimes Act 1961, namely s 131(B), s 132 and s 134 and the Films, Videos, and Publications Classification Act 1993, specifically s 123.

A Liability under the Crimes Act 1961

(i) Section 131(B)

Section 131B is the offence of 'Meeting young person following sexual grooming, etc'.[21] This provision states that a person is liable for the offence if he or she having met or *communicated* with a person under the age of 16 years does one of the following three things: intentionally meets this person 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 and does so with the intention to offend against that young person [emphasis added].[22]

The ingredients of the offence are discussed in *R v S*.[23] The essential ingredients as outlined in the statute are threefold: that communications or meetings between the offender and victim took place, there was a subsequent meeting (or travelling with a view to a meeting) and that at this subsequent meeting or travelling, the offender had an intention to commit a relevant sexual offence.[24] Whist communications are an ingredient of the offence, these in isolation will not amount to grooming as indicative by the legislative wording and comments made by

[21] Crimes Act 1961, s 131B.
[22] Specifically Crimes Act 1961, 131B(1)(b):
> at the time of taking the action, he or she intends—
> (i) to take in respect of the young person an action that, if taken in New Zealand, would be an offence against this Part, or against any of paragraphs (a)(i), (d)(i), (e)(i), (f)(i), of section 98AA(1); or
> (ii) that the young person should do on him or her an act the doing of which would, if he or she permitted it to be done in New Zealand, be an offence against this Part on his or her part.

[23] *R v S* [2009] NZCA 64.
[24] Ibid, at [7].

the Court of Appeal in *R v S*. Thus for the purposes of indecent communication with a child or young person, the provision fails to capture offenders who exploit the young person through communication but do not have the required intent to meet with them coupled with the intent to offend against that young person.

The Canadian and some Australian grooming offence equivalents are in contrast to s 131B in that these offences explicitly impose liability for using forms of technology to communicate with children for the purpose of committing a sexual offence.[25] Moreover, these offences do not have a requirement that the person travel to meet the child or young person or arrange travel for the child or young person to meet with them (or the intention to do such things). However, these offences still require that the children be groomed for the purpose of committing a sexual offence as opposed to the communication being effected for an indecent purpose in and of itself. Interestingly the Western Australian offence of using technology to groom a child takes a different approach. This offence requires that the child be groomed with the intent of committing a sexual offence *or* that the offender uses an electronic communication with the intent to expose the child to an indecent matter.[26] This latter purpose could function to criminalise indecent communication with a young person as it makes the sending of the communication itself criminal provided it is sent with the intent to expose the young person to material that is indecent.

(ii) Section 132 and section 134

Section 132[27] and s 134[28] are sections that make it an offence to do an indecent act on a child under 12-years-old and young person under 16-years-old respectively. Indecent act is defined in s 2(1B):

> For the purposes of this Act, one person does an indecent act on another person whether he or she—
>
> (a) does an indecent act with or on the other person; or
>
> (b) induces or permits the other person to do an indecent act with or on him or her.[29]

[25] Criminal Code RSC 1985 c C-46, s 172.1; Criminal Code Act 1995 (Cth), s 474.26; Criminal Code Act 1899 (Qld), s 218A; Crimes Act 1900 (NSW), s 66EB.
[26] Criminal Code Act Complication Act 1913 (WA), s 204B.
[27] Crimes Act 1961, s 132.
[28] Crimes Act 1961, s 134.
[29] Crimes Act 1961, s 2(1B).

In the case of *Walker*,[30] an adult man sent sexually explicit text messages to children and it was advanced that sending these text messages may fall within the ambit of doing an indecent act. Walker was initially charged with doing indecent acts and he admitted these charges. However, on sentencing in the Christchurch District Court Judge Crosbie found that sex-texting did not satisfy the ingredients of indecent act charges under the Crimes Act.[31] Judge Crosbie considered that there was no physical proximity or contact between Walker and his victims.[32]

However, it was recently held in the Supreme Court decision of *Y v R*[33] that physical contact is not necessary for liability to be established for the purposes of doing an indecent act. The decision of *Y v R* came out not long after *Walker* and so it remains to be seen whether a future judge bound by this Supreme Court decision would rule differently on whether text messages could constitute doing an indecent act. One distinction however can be drawn between the facts of *Y v R* and a factual scenario concerning text messaging. In *Y v R* the defendant was in the physical presence of the victims[34] whereas this is unlikely to be so where the communication takes place over technological means. If physical presence is required, then text messages are not going to amount to doing an indecent act. The Supreme Court did discuss presence in terms of whether an indecent act was performed "with or on" a child. For future jury directions, the Supreme Court suggested that the jury should assess the "with or on" question by addressing "whether the presence of both child and defendant was fundamental to what happened."[35] Further, the Supreme Court did recognise that the defendant in that case was "…physically involved, at least in a peripheral way…".[36] These factors suggest that presence is required, lending support to the conclusion that Judge Crosbie came to in that text messages cannot constitute the charge of indecent act.[37]

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[30] Re *Walker* Film and Literature Board of Review, 29 January 2014.
[31] Anne Clarkson "Sex-texting charges dropped" (14 March 2014) Christchurch Court News <http://courtnews.co.nz/2014/03/14/sex-texting-charges-dropped/#.VC8kVS6SwVk>; Ian Steward "Sex txts can end with jail" *Sunday Star Times* (online ed, Auckland, 8 June 2014).
[32] Clarkson, above n 31.
[33] In this case the appellant had induced and permitted three boys aged between 11 and 12 to masturbate in his presence. No physical contact occurred between him and the children, nor did he engage in any contemporaneous sexual activity. *Y v R* [2014] NZSC 34.
[34] Specifically he and the victims were in his garage. Ibid, at [4].
[35] Ibid, at [22].
[36] Ibid, at [17].
[37] In relation to s 2(1B)(b), the Court stated: "A defendant may have induced the child to do an indecent act in another place (that is, with the defendant not present) or with another person. In such circumstances, the conclusion may be that the acts in question were not "with or on" the defendant."

This is in contrast to the New South Wales position on sexting and indecency, discussed in the case of *Eades v Director of Public Prosecutions*.[38] The facts of this case concerned an 18-year-old man who during a series of text message exchanges with a 13-year-old girl, requested naked photos of the girl to which she obliged. He was charged with inciting a person under 16 years of age to commit an act of indecency towards him by virtue of him inciting her to send a naked photo. The Court held that surrounding context could be considered as to whether it was an indecent act.[39] Whilst this pertained to inciting an indecent act, rather than his requests themselves being the performance of an indecent act, it follows that the idea of indecent acts being committed over technological means may not be an impossibility in New South Wales.

However, in the New South Wales provision a different expression is used. Instead of "with or on", the words "with or towards" are used. The exact words of the New South Wales provision state:

> any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency *with or towards* that or another person, is liable to imprisonment for 2 years [emphasis added].[40]

This difference in legislative wording (specifically the use of the word "towards" instead of "on") may allow for the New South Wales provision to more conceivably be applied to situations of indecent acts being committed over technological means. The ordinary meaning of "towards" denotes being in the direction of[41] whereas the ordinary meaning of "on" denotes some kind of physicality.[42] Thus in terms of technological communications, these are directed at someone and hence can be towards them but these communications do not take place on someone.[43] As such, it would seem that the New South Wales provision is a better

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Ibid, at [19]. Whilst this relates inducing a person to doing an indecent act, this may also lend support to presence being required for s 2(1B)(a).

[38] *Eades v Director of Public Prosecutions* (2010) (NSWCA) 241.

[39] Crimes Act 1900 (NSW), s 61N(1).

[40] Crimes Act 1900 (NSW), s 61N(1).

[41] Angus Stevenson (ed) *Oxford Dictionary of English* (3rd ed, Oxford University Press, Oxford, 2014).

[42] Ibid.

[43] "with or on" were considered together in *Y v R* and so limited guidance is available as to what "on" means in isolation. Notwithstanding this, the Court did say that the "with or on" element will be

fit for indecent act offences in relation to technological communications because of this difference in legislative wording.

B Liability under the Films, Videos, and Publications Classification Act 1993

(i) Section 123 and s 124

Section 123 specifies offences for those who make, copy or distribute objectionable publications.[44] Section 123 outlines these offences in relation to strict liability whilst s 124 details the same offences but concerns instances when the offender has knowledge or reasonable cause to believe the publication is objectionable.[45] On initial review it may be hypothesised that these sections would make liable those adults who send objectionable publications to children. However, two hurdles would need to be overcome to impose liability under this section for this type of behaviour. Firstly, what the adult sends would need to be regarded as a 'publication' and secondly would have to meet the threshold of 'objectionable', which has been given a restricted legal definition in s 3 of the Act. A publication is deemed 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.[46]

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satisfied by "direct contact or simultaneous and related activity" thereby lending support to the idea that "on" can be referred to as requiring physical contact. *Y v R*, above n 33, at [22].

[44] 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
(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.
Films, Videos, and Publications Classification Act 1993, s 123.

[45] Films, Videos, and Publications Classification Act 1993, s 124(1).

[46] Further, without limiting this, a publication deals with a matter such as sex for the purposes of that subsection if—

In *Walker*,[47] touted as a "landmark decision" by a media outlet, it was held by the District Court that a text message could be deemed a 'publication' for the purposes of the Act and offences therein.[48] The facts of *Walker* concerned the following sexually explicit text messages being sent to five girls, aged 11 and 12-years-old:

a. "And have three sum u have big pussy lips of little tight 1s"
b. "Do you have hair on your pussy?"
c. "Maybe tomorrow a pic of your tits and something up your pussy."
d. "You touch your pussy often."
e. "So hows your little pussy lips feeling?"

These text messages were referred by the District Court to the New Zealand Film and Literature Board of Review, the body tasked with reviewing decisions made by The Office of Film and Literature Classification on their determination of whether a publication is objectionable for the purposes of the Act. The Board ruled that the text messages were not legally objectionable, giving four primary reasons.[49] Firstly, the board considered that the publication itself needs to be objectionable as opposed to a course of conduct, communication or other broader concept. Secondly, publication is defined in strict terms that does not allow for wider factors to be considered. Thirdly, other instances in the statute expressly allow for broader consideration so it follows that unless there is an express provision, context is not to be taken into account. Finally, this statute is one of a penal nature and further encroaches on the right of free speech and as such gives weight to the view that in ambiguous cases, a narrow interpretation is to be favoured.

The Board stated that Walker's conduct was "abhorrent or reprehensible".[50] However, the term 'publication' meant that the context of the publication and the purposes for its creation could not be considered when determining if the publication was objectionable.[51]

(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.
Films, Videos, and Publications Classification Act 1993, s 3.

[47] Re *Walker*, above n 30.
[48] Steward, above n 31.
[49] Re *Walker*, above n 30, at [22].
[50] Ibid, at [13].
[51] Ibid, at [20].

Additionally, the Board considered the five text messages in isolation, as opposed to considering them within five series of text messages. This again removes context and would seem problematic when applying this stringent definition to the content of communications sent to children and young people. A text on its own may not necessarily seem objectionable but when considered as part of a series, may attract this label.

The Board also said that these publications could not be considered to "promote[s] or support[s], or tends to promote or support the exploitation of children, or young persons, or both, for sexual purposes"[52] as prima facie these publications did not refer to nor imply the exploitation of children or young persons.[53] They further commented that had the publications made specific reference to the age of the children, they would have been far more likely to be classified as objectionable. This requirement of having to make explicit references to the child's age would make it difficult for many communications between an adult and a child or young person to be classified as objectionable, hence giving further support that this provision is not a good fit with indecent communications between an adult and child or young person.

Finally, whilst a text message was classified as a publication, it remains to be seen as to whether other more recent forms of communication such as video streaming or sending an image via the likes of Snapchat would be deemed a 'publication' and could then be subject to a determination on whether it is objectionable. Publication is defined within the interpretation section of the provision, s 2, as —

> (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

[52] Films, Videos, and Publications Classification Act 1993, s 3(2)(a).
[53] Re *Walker*, above n 30, at [24].

> capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words.[54]

In *Walker*, for the first time a text message was found to be a publication by the District Court for the purposes of the Act and offences therein.[55] However it remains to be seen if other forms of communication would be classified as such. For example, live video streaming over a webcam or cell phone camera may not fall within the word film. Film is defined in s 2 of the Act as:

> a cinematograph film, a video *recording*, and any other material *record* of visual moving images that is capable of being used for the subsequent display of those images; and includes any part of any film, and any copy or part of a copy of the whole or any part of a film [emphasis added].[56]

Certain technologies allow for video to be shown in real time without a recording being required or record made such as live video streaming transmitted via the likes of a webcam. Some cell phones also have the capability to do what is known as video calling. This is an extension on normal phone calling but the people talking can see and hear each other and being tethered to the phone call means that it occurs in real time and no record is made. Unless targeted efforts are made to record these types of communications, they are unable to be displayed again. Hence these types of technologies are unlikely to be considered film for the purposes of the Act given that the images are not recorded and cannot be subsequently displayed.

The courts have considered whether the nature of technological images means they can fall within the ambit of publication. For example, in *S v Auckland District Court and New Zealand Police*,[57] "computer images and computer film" were the subject of a publication determination. These images were in a graphics file that is known as jpg file format. These were considered publications. Likewise in *R v Millward*[58] electronic photos were deemed akin to still photographs so encompassed within the word 'photograph' in the definition of

[54] Films, Videos, and Publications Classification Act 1993, s 2.
[55] Steward, above n 31.
[56] Ibid.
[57] *S v Auckland District Court and New Zealand Police* HC Auckland M310/SW99, 11 March 1999.
[58] *R v Millward* [2000] DCR 633.

publication. Further, movie files known as mpgs were deemed akin to movie clips. However, unlike in *R v Millar*, in *Goodwin v Department of Internal Affairs*[59] the contents of a jpg file on a computer disk were not held to be akin to a photograph for the purposes of 'photograph' as included within the definition of publication. The judge held a jpg file could not be considered a photograph for the purpose of the Act given that "…the intention of the legislation must have been that the reference to a photograph is only to a photograph in hard copy form and not a file containing a replica of a photograph stored in a computer disk."[60] The judge's view was further supported by references made within the definition of publication to negatives, slides and plates. Nonetheless, this finding had little effect as the judge concluded that such files were a 'picture' or alternatively 'other thing' within the definition of publication so could be determined as such.[61,62] Of note is that the judge did comment on equivalent legislation in other jurisdictions that "may serve as useful models for the clarification of the law in New Zealand" thus perhaps inferring this provision is somewhat unclear when it comes to computer files.[63] Section 7, Protection of Children Act 1978 (UK)[64] and s 5, Commonwealth Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Cth)[65] directly reference computer generated images.

However, whilst these cases refer to images stored on a computer (which may extend to those sent on messaging applications such as Facebook or Instagram), they do not consider when these images are not stored. As aforementioned, some technologies do not leave a record of a communication's existence. The more catch all provision of 'other thing' also has this element of recording present in that the thing must be capable of being reproduced. Again, a live video stream or video call cannot be reproduced. Hence it may be unlikely that new forms of technology are able to attract the label 'publication' and consequently provisions in the Films, Videos, and Publications Classification Act 1993 will not apply.

[59] *Goodwin v Department of Internal Affairs* [2003] NZAR 434.
[60] Ibid, at [36].
[61] Ibid, at [39].
[62] Ibid, at [42].
[63] Ibid, at [45].
[64] Protection of Children Act 1978 (UK), s 7.
[65] Commonwealth Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Cth), s 5.

As noted, determinations as to whether publications are objectionable are made by The Office of Film and Literature Classification[66] (or by review by the New Zealand Film and Literature Board of Review[67]), a body which is responsible for classifying publications that may need to be restricted or banned prior to public consumption as opposed to classifying private communications.[68] In *Walker*, the text messages were given an R18 rating albeit it was noted that this was futile given that the text messages were private communications. Hence in sum a strained interpretation of the law would be required to encapsulate indecent communication with a young person under the Films, Videos, and Publications Classification Act 1993. Further this would require ill-fitting intervention by the classification body.

Significantly, these provisions fail to adequately capture offending of the nature that new technologies have enabled. The grooming offence requires intent to meet the young person for sexually exploitive purposes and is thus an ill-fitting offence given that the nature of electronic communication allows for a young person to be exploited without such intent. Sending text messages has previously been ruled by the District Court to not constitute an indecent act and if the courts were to rule this way in future, it may be conjectured that these provisions are unsuitable for this type of offending.[69] Finally, in order to apply objectionable publications offences, the communication would need to be classified as a publication as well as meeting the threshold of objectionable. Due to the nature of technological communications and the variety of such communications it remains to be seen whether these would be considered publications. Further, given that the body tasked with reviewing communications does not consider context on making a determination of objectionable, it would seem that indecent communications would circumvent these provisions.

In order to reconnect the regulatory framework, the offence of 'indecent communication with a young person under 16' has been posed. This offence is included within the Objectionable Publications and Indecency Legislation Bill and if passed would see the imposition of a new section into the Crimes Act 1961, specifically s 124A.[70]

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[66] As established under the Films, Videos, and Publications Classification Act 1993, s 76.
[67] As established by the Films, Videos, and Publications Classification Act 1993, s 47(1).
[68] Office of Film and Literature Classification "About the Classification Office" Office of Film and Literature Classification <http://www.classificationoffice.govt.nz/classification-in-nz/about-the-classification-office.html>
[69] Clarkson, above n 31.
[70] Objectionable Publications and Indecency Legislation Bill 2014 (124-1), cl 13. See Appendix A.

This provision provides that:

> 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.[71]

It is a defence to this charge if it is proved that prior to sending the indecent communication to the young person, the person charged had taken reasonable steps to determine if the young person was of or over the age of 16 years and they believed on reasonable grounds that the young person was of or over the age of 16 years. It is also a defence if the person did not know that the material sent was indecent provided they had no reasonable opportunity of knowing this and the circumstances dictated that this was excusable.

As outlined in the Bill's explanatory note, this provision would recognise that indecent communication is injurious to the young person themselves and the public good. Whilst this proposed provision endeavours to fill a void in the current legislative framework, various inadequacies can be identified and these will now be discussed.

[71] Ibid.

Chapter II: Analysis of s 124A – the implications and shortcomings

A The provision's potential to net young people

(i) The context

Sexting has been recently touted as "today's courtship" with respect to young people,[72] or likewise cell phones as the new bike shed.[73] A recent survey of high school students conducted across Australia was indicative of the increasing trend of young people sexting.[74] Of those 2,000 students surveyed, over half reported having received a sexually explicit text message and over a quarter reported sending a sexually explicit photo of themselves. Of those students who were already sexually active, most reported having received and/or sent sexually explicit text messages. Over half reported sending a sexually explicit nude or nearly nude photo or video of themselves, while most reported receiving such a photo or video.[75] Whilst this study was limited to Australian high school students, it can be deduced at least some of New Zealand high school students would also be engaging in this kind of behaviour.

A myriad of factors have lead to the prolificacy of sexting amongst young people, inter alia: an increasingly sexualised world, transformations in the way young people can communicate and socialise, the coalescing of technology and sexuality, media attention surrounding celebrity sexting and the creation of new means to explore one's sexuality.[76] The chief technology officer of NetSafe expressed the sentiment that spurred on by celebrity behaviour, some young people considered taking suggestive selfies as a normal part of a relationships or other romantic interactions.[77] As aforementioned, in the Objectionable Publications and Indecency Legislation Bill's explanatory note, the proposed provision would recognise that indecent communication is injurious to the young person themselves and the public good.

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[72] Matt Stewart "Sexting is today's courtship" (6 May 2014) Stuff Life&Style <http://www.stuff.co.nz/life-style/love-sex/10011725/Sexting-is-todays-courtship>

[73] Emma Bond "The mobile phone = bike shed? Children, sex and mobile phones" (2010) 13(4) New Media & Society 587.

[74] Mitchell and others *5th National Survey of Australian Secondary Students and Sexual Health 2013* (Australian Research Centre in Sex, Health and Society, Monograph Series No. 97).

[75] Ibid, at 7.

[76] Shelley Walker, Lena Sanci and Meredith Temple-Smith "Sexting and young people: Experts' views" (2011) 30(4) Youth Studies Australia 8.

[77] Matthew Theunissen "Kids copy celebs' naked selfie posts" *The New Zealand Herald* (online ed, Auckland, 28 September 2014).

However, it would be difficult to see how a teenager who engages in this type of behaviour with a consensual recipient injures the fellow young person or the public good.[78] Further, a teenager when sending a communication of a sexual nature in a mutually consensual setting does not do so with the thought of causing harm in mind but to communicate in a flirtatious and exciting way.[79]

Given that young people are sexting, then this means their actions may have the potential to fall within the ambit of the provision, as it is applicable to those persons of or over the age of 16-years-old.[80] Whilst those young people who are aged 15 years or younger will not invoke criminal liability for their actions under this provision, the provision does not account for instances whereby the sender is aged 16 years or older and the recipient is under 16-years-old and a communication is sent not for malicious purposes or those reasons likely intended for the offence to encapsulate. Consider the two following scenarios.

> Scenario one: a 16-year-old female consensually sends a naked photo of herself to her 15-year-old boyfriend during a text message conversation, after he has encouraged her to.[81]
>
> Scenario two: a 50-year-old male sends a photo of his naked self to an eight-year-old child.

These are axiomatically two very different scenarios. In the first scenario, there is an age difference between sender and recipient of only one year and thus there appears to be no imbalance of power. Moreover, mutual consent appears to be present (this rests on the presumption that a fifteen year old is capable of consenting to this type of behaviour), and there does not appear to be great cause for concern that the fifteen year old is going be harmed and victimised.[82] In scenario two, the age disparity is great suggestive of a power imbalance. There is great potential for harm and victimisation to occur and even if the eight-year-old had requested the photo, it would seem repugnant to suggest that a child of this age

[78] Joanna Lampe "A Victimless Crime: The Case for Decriminalizing Consensual Teen Sexting" (2012-2013) 46 U.Mich.J.L.Refom 703 at 722.
[79] Ibid.
[80] Objectionable Publications and Indecency Legislation Bill 2014 (124-1), cl 13. See Appendix A.
[81] This would still need to be considered 'indecent' to engage the provision. See discussion on the meaning of 'indecent' on page 36.
[82] There is potential for victimisation should the material be disseminated to third parties. See note regarding dissemination to third parties on page 29.

is capable of consenting to something of this sexual nature. Thus by drawing these distinctions, it would seem unlikely that the teenager in scenario one is the target of this provision and a reasonable person would be unlikely to think that the actions of the teenager should attract a criminal sanction.

Furthermore, it has been well established that people during their teenage years undergo significant structural changes in certain areas of the brain associated with a variety of functions, inter alia: decision-making, the ability to make judgements, assimilation of emotions and thought and impulse control.[83] As a result, sexting for teenagers may be reflective of impulsive and emotional behaviour whereby they are unable to foresee or have any appreciation of the consequences that may ensue.[84] It follows then as to whether it is appropriate to criminalise teenagers for this behaviour given that their brains may not be equipped to respond appropriately to these situations.

The question then arises of how the provision could account for situations similar to those depicted in scenario one (hereafter referred to as 'teen sexters'/'teen sexting').[85] This is of particular importance given that a conviction of this nature may have far reaching consequences for the young person concerned due to the societal stigma associated with what is deemed sexual offending.[86] Moreover, this would mean inclusion on the proposed sex offender register[87] and subsequent implications (notwithstanding that the young person would

[83] Abigail Judge "'Sexting' Among U.S. Adolescents: Psychological and Legal Perspectives" (2012) 20(2) Harvard review of psychiatry 86 at 90; Maryam Mujahid "Romeo and Juliet - A Tragedy of Love by Text: Why Targeted Penalties that Offer Front-end Severity and Backend Leniency are Necessary to Remedy the Teenage Mass-Sexting Dilemma" (2011) 55(1) How.L.J. 173 at 198.
[84] Judge, above n 83.
[85] It is without prejudice that the terms 'teen sexters' and 'teen sexting' is used, noting that there are other forms of communication/means to communicate that are not explicitly texting related but for simplicity, these terms are used. Further, as the term 'sexting' has only recently been incorporated into the everyday lexicon, it's meaning is not static and continues to evolve, encompassing other types of practices.
[86] See Anne-Marie McAlinden "The use of 'Shame' with Sexual Offenders" (2005) 45 Brit.J.Criminol. 373.
[87] Police and Corrections Minister Anne Tolley announced in August 2014 that the Child Protection Offender Register is going to be created. This is a sex offender register that will be made available to Police and Corrections staff along with other relevant agencies such as Child, Youth and Family and Housing New Zealand with the potential for information to be released to a third party. The register will be available in 2016 once relevant legislation is passed. Inclusion on the register imports onerous obligations on the offender including providing a range of information to Police and requiring offenders to notify Police if they intend to take a trip away from their home for longer than 48 hours as well as provide details such as whether children will be residing where they are staying. Anne Tolley "Minister announces Child Protection Offender Register" (press release, 14 August 2014).

also have a criminal conviction which has far-reaching and deleterious consequences in and of itself on top of any penalty imposed for this offending).[88] Further, it would seem counterintuitive to punish a teenager for what would likely be deemed lawful behaviour if the sender was to expose themselves to the recipient not over any technological means but in their physical presence.[89]

(ii) Avenues for 'teen sexters' who are 16-years-old to avoid falling foul of the provision

Importantly, those teenagers who are aged 16-years-old will be dealt with by youth justice processes as established under the Children, Young Persons and Their Families Act 1989. One of the guiding principles as outlined in s 208(a) of the Act is that criminal proceedings should not be employed against a child or young person if there is an alternative means of dealing with them (unless the public interest requires). If a young person offends, enforcement officers have a range of options to deal with the offender. For example, when considering whether to prosecute, the enforcement officer must consider whether it would be sufficient to give the offender a warning instead.[90] Other alternative means include a diversion process, administered by Police Youth Aid.[91] This commences after consultation with the young person and their family as well as the victim. The terms of diversion are very flexible and allow for any action targeted at reducing reoffending. Provided the young person complies with the conditions of diversion, they will be dealt with outside of court and the Family Group Conference process. Should these options not be considered, then the matter proceeds to the Youth Court. If the young person does not deny the offending, a Family Group Conference is convened. At this stage, proceedings can be discontinued or a plan can

[88] See Robert Johnson "Collateral Consequences" (2001) 16 JCJ32.; Eric Rasmusen "Stigma and Self-fulfilling Expectations of Criminality" (1996) 39 Journal of Law and Economics 519.

[89] Attention is directed to the recent Supreme Court decision, *Y v R* "Mere presence will not in itself be sufficient. Conduct of the kind usually referred to as "flashing" will not result in conviction under ss 132 and 134 just because a child happened to be present. This is obviously so where the child's presence was merely accidental or incidental. And we consider that this is also the case even where the conduct (that is "flashing") was directed at the child unless that child was to some extent under the control or influence of the defendant. On the other hand, if the defendant was able to conscript the child as a participant, whether active or passive, in what happened, then the "with or on" test will be satisfied." *Y v R* [2014] NZSC 34 at [21].

[90] Children, Young Persons, and Their Families Act 1989, s 209.

[91] Ministry of Justice "Child offending and youth justice processes" (20 September 2013) Policy development <http://www.justice.govt.nz/policy/crime-prevention/youth-justice/child-offending-and-youth-justice-processes>

be made for the young person to comply with.[92] The plan can make recommendations for the young person such as appropriate penalties and reparation to any victim.[93] If the Youth Court Judge approves the plan and the young person completes it, the case is discharged,[94] as if the charge had never been laid.[95] If the young person denies the offending, a defended hearing in the Youth Court takes place,[96] and should the charges be proved, a Family Group Conference is held whereby a plan is made as discussed above and again if complied with, the case is discharged.

Thus should a 16-year-old engage in sexting, the youth justice process operates to provide a range of opportunities for the young person to avoid the consequences of having a criminal conviction. This would help to ensure that those young people who are not engaging in indecent communication and victimising a child or young person do not fall foul to the consequences of the provision. At the same time, should a 16-year-old commit the offence and victimise a child or young person, then a system is in place to ensure they receive the appropriate consequences stemming from their offending. It would appear then that youth justice processes would act as a safeguard for the operation of the proposed provision and its potential to net young people.

Nevertheless, the provision would still criminalise the actions of young people and see them enter the justice system. Further, youth justice processes are only applicable to those young people who are 16-years-old or younger meaning convictions may still result for those older than 16-years-old.

(iii) Avenues for 'teen sexters' who are 17-years-old and older to avoid falling foul of the provision

There may be possibilities for teen sexters who are 17-years-old or older to avoid liability via the discretionary opportunities the adult criminal justice system affords.

[92] Children, Young Persons, and Their Families Act 1989, s 260.
[93] Ibid.
[94] Children, Young Persons and Their Families Act 1989, s 282(1).
[95] Children, Young Persons and Their Families Act 1989, s 282(2).
[96] Children, Young Persons and Their Families Act 1989, s 246.

In order for a prosecution to be initiated or continued, the prosecutor should be satisfied that the Test for Prosecution is met, pursuant to the Prosecution Guidelines.[97] This may be an avenue for a teen sexter to avoid prosecution under the relevant provision. The Test for Prosecution comprises two parts.[98] Firstly, that there is sufficient evidence to provide a reasonable prospect of conviction (the Evidential Test)[99] and secondly that prosecution is required in the public interest (the Public Interest Test).[100] It is the latter test that would be relevant in instances of teen sexting. There is no rule that prescribes that all offences must be prosecuted but typically a prosecution proceeds on the premise that there has been a contravention of criminal law.[101] However, there will be instances where the offence is not considered serious and thus prosecution would not be in the public interest. Prosecutors "should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth)."[102]

Notwithstanding this, the adult diversion scheme is also unlikely to be a suitable 'out of court' solution to instances of teen sexting. This is because certain types of offending are considered too serious in nature that diversion would not be appropriate. Such types of offending includes sexual offences or offences with sexual overtones. Indecent communication with a young person may be categorised as a sexual offence or one with a sexual overtone thus making diversion not an appropriate option.[103]

Given that instances of teen sexting may make it to Court, judicial discretion becomes relevant. In New Zealand judges are conferred considerable yet fettered discretion in terms of the type of sentence available and the length of any sentence.[104] As listed in s 10A of the Sentencing Act 2002, there is a hierarchy of sentencing options available to a judge.[105] This discretion is constrained by inter alia the principles of sentencing or otherwise dealing with

[97] The Guidelines are not the law per se but reflect the aspirations and practices of prosecutors who adhere to the United Nations Guidelines on the Role of the Prosecutor (adopted 1990) and the International Association of Prosecutors Standards (1999).
[98] *Prosecution Guidelines* (Crown Law, January 2010) at 7.
[99] Ibid.
[100] *Prosecution Guidelines* (Crown Law, January 2010) at 9.
[101] Ibid.
[102] Ibid.
[103] "About the Adult Diversion Scheme" New Zealand Police: About the Adult Diversion Scheme <http://www.police.govt.nz/about-us/programmes-initiatives/adult-diversion-scheme/about>
[104] Geoff Hall *Hall's Sentencing* (online looseleaf ed, LexisNexis) at I.
[105] Sentencing Act 2002, s 10A.

offenders as listed in s 8,[106] and the aggravating and mitigating factors per s 9.[107] In terms of young people specifically, s 18 limits the imprisonment of persons under 17 years of age to certain offences.[108]

Several of the principles outlined in s 8 may be particularly pertinent in instances of teen sexting. For example, s 8(f): the court must take into account any information provided to the court concerning the effect of the offending on the victim.[109] In teen sexting, the effect on the victim is unlikely to be negative if mutual consent was present. Secondly, s 8(h): the court must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe.[110] Such circumstances may include that the offender is young and there would be far-reaching consequences stemming from a penalty (especially if the proposed sex offender register is implemented) and this may be disproportionately severe given that the offender was engaging in a form of sexual activity in a consensual setting, there is little age difference between the offender and victim and there is no imbalance of power or breach of trust.[111] Finally s 8(g): the imposition of the least restrictive outcome that is appropriate in the circumstances in accordance with the hierarchy of sentences.[112] Those circumstances aforementioned in relation to s 8(h) would also likely be relevant for s 8(g) and may suggest that a sentence of the least severity be imposed.

Pursuant to s 106, one of the sentencing options a judge has available to them is discharging the person without conviction.[113] However, they must be satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence per s 107.[114] Thus provided they are satisfied in accordance with s 107, the sentencing judge would have the capacity to prevent teenagers from falling foul to the consequences of the provision. However, as this is within a judge's discretionary arsenal, there is no assurance that a judge

[106] Sentencing Act 2002, s 8.
[107] Sentencing Act 2002, s 9.
[108] These offences are those that are a category 4 offence, or a category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years. Sentencing Act 2002, s 18.
[109] Sentencing Act 2002, s 8(f).
[110] Sentencing Act 2002, s 8(h).
[111] See discussion on page 18.
[112] Sentencing Act, 2002, s 8(g).
[113] Sentencing Act 2002, s 106.
[114] Sentencing Act 2002, s 107.

would choose to deal with a teenager offender in this way. Further given that teenage sexting according to some studies appears to be ubiquitous,[115] judicial discretion may not be a fitting solution to this problem.

(iv) Avoiding liability through statutory wording

Another potential solution to instances of teen sexting could be to re-word the provision to exclude teenagers in these instances or to make a suitable defence available to them.

This kind of exclusionary legislative wording is observable within the Commonwealth Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010, specifically s 474.27A: Using a carriage service to transmit indecent communication to person under 16 years of age.[116] Under this provision, a person (the sender) commits an offence if he/she is at least 18 years of age and transmits an indecent communication to a recipient who is under 16 years of age. This provides a two-year leeway whereby 16 and 17 year-olds are excluded from liability, encompassing those types of situations aforementioned. However, this simultaneously means those aged 16 or 17 years-old can also escape liability in situations whereby they exploit children and young people in instances the legislation aims to protect children and young people from. For example, a 17-year-old who sends an indecent communication to a seven-year-old or a 17-year-old who sends an unsolicited and potentially harmful indecent communication will not attract liability under the provision. Therefore, there needs to be a way to protect young people from liability in situations of consensual sexting amongst teenagers and where no harm results whilst concurrently protecting potential victims.

Various other jurisdictions have also canvassed this problem of teen sexting attracting criminal liability. Specifically, this it not in relation to indecent communication laws per se but rather in response to teenagers and young people becoming liable under various child pornography provisions. For example, in the American state of Florida, a young person could be found guilty of "promoting a sexual performance by a child when, knowing the character

[115] See Bryn Ostrager "SMS. OMG! LOL! TTYL: Translating the Law to Accommodate Today's Teens and the Evolution from Texting to Sexting" (2010) 48(4) Family Court Review 712.
[116] Australian Commonwealth Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth), s 474.27A.

and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age"[117] and further for any person (including young people) "to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child".[118] Under these provisions, in the case of *A.H. v. State of Florida*,[119] a then 16-year-old woman (A.H) and her then 17-year-old boyfriend took photos of themselves engaging in sexual acts and proceeded to email them from her email account to his. Both were charged with producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child whilst the male was also charged possession of child pornography. Their convictions were upheld on appeal on the grounds that prosecution furthered the State's interest in preventing the sexual exploitation of children and there was no reasonable expectation of privacy under these circumstances. Recognising the potential for criminal liability for young people, a new offence was enacted to specifically target sexting. Under this new offence a minor (any person under the age of 18 years) commits the offence of sexting if (a) he or she knowingly uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity[120] and is harmful to minors or (b) possesses a photograph or video of any person that was transmitted or distributed by another minor which depicts nudity and is harmful to minors.[121,122]

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[117] Florida Statute, title 46 § 827.071(3).
[118] Florida Statute, title 46 § 827.071(5)(a).
[119] *A.H. v. State, 949* So. 2d 234, 234 (Fla. 1st DCA 2007).
[120] "'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding." Florida Statute, title 46 § 847.001(9).
[121] Florida Statute, title 46 § 847.0141(1).
[122] Harmful to minors is defined as "any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
(a) Predominantly appeals to a prurient, shameful, or morbid interest;
(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
(c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors." Florida Statute, title 46 § 847.001(6).

A defence applies to (b) whereby a minor does not violate this paragraph if all of the following apply:

1. The minor did not solicit the photograph or video.
2. The minor took reasonable steps to report the photograph or video to the minor's legal guardian or to a school or law enforcement official.
3. The minor did not transmit or distribute the photograph or video to a third party.[123]

The penalties for minors who are convicted of such offences are staggered according to how many times they have committed the offence. For a first offence, the minor commits a noncriminal violation punishable by eight hours of community service or, if ordered by the court in lieu of community service, a $60 fine.[124] The court may also order the minor to participate in suitable training or instruction in lieu of, or in addition to, community service or a fine.[125] If the minor has already committed the noncriminal violation previously, the minor commits a misdemeanor of the first degree punishable by the imposition of a fine and potentially imprisonment.[126] Finally, if the minor offends again after being found to have committed a misdemeanor of the first degree for sexting, then they will have committed a felony and will be subject to potentially the imposition of a fine and mandatory imprisonment.[127]

This provision specifically relates to sexting whilst simultaneously leaving open the option of charging a young person with child pornography offences should the severity of a young person's offending command that he/she be charged with a more serious offence (such as when the person's intent is to gratify his/her desire to sexually exploit children and young people). However, this offence of sexting is only applicable to minors and still has the potential to criminalise actions that arguably do not warrant the sanction of the criminal law, specifically in cases whereby the sending and receiving of such communications is a factor of a developmentally appropriate adolescent interaction.

[123] Florida Statute, title 46 § 847.0141(1)(b).
[124] Florida Statute, title 46 § 847.0141(3)(a).
[125] Ibid.
[126] Florida Statute, title 46 § 847.0141(3)(b), as provided for in § 775.082 or § 775.083.
[127] Florida Statute, title 46 § 847.0141(3)(b), as provided for in § 775.082, § 775.083 or § 775.084.

(v) Suggested changes to the legislative wording

Thus it is posed that the following defence be included within s 124A Indecent communication with young person under 16. This defence would circumvent the criminalisation of young people who choose to send and receive communications of a sexual nature whilst ensuring that young people who do engage in genuinely predatory and paedophilic behaviour do not flout and escape the law.

- It is a defence to a charge under **subsection (1)** and **subsection (2)** if the person charged proves that,
    (a) at the time the communication was made, the person charged was no more than two years older than the recipient and;
    (b) the person charged believed on reasonable grounds that the recipient consented to receiving the communication and;
    (c) the communication implicates either the person charged and/or recipient of the communication only.

Allowing only a two-year age gap between sender and recipient would prevent instances of genuine child exploitation, for example as aforementioned whereby a 17-year-old sends an indecent communication to a seven-year-old whilst at the same time recognising that if the age disparity between sender and recipient is slight, there is less imbalance of power. However, this subsection alone would not prevent instances whereby a 17 or 18-year-old sends an unsolicited indecent communication to a victim where the age difference is slight yet there is still the potential for harm to occur. Thus there requires a consensual component to the defence. Curiously, this resides on the premise that a young person is capable of consenting to this type of communication. This would essentially create a discord between the implied age of consent in other areas of law that govern sexuality such as the age of consent for sexual intercourse in pursuance to s 134 of the Crimes Act 1961 which is 16-years-old.[128]

Whilst acknowledging that young people under 16 may lack the emotional and psychological maturity that would allow them to make informed decisions on whether to engage in sexual

[128] Crimes Act 1961, s 134.

intercourse, sending a sext and engaging in sexual intercourse are axiomatically two different activities. Further, whilst New Zealand does not explicitly have a similar age defence or a 'Romeo and Juliet' law,[129] teenagers who engage in consensual underage sex where there is little age difference between the couple are rarely prosecuted.[130, 131] Additionally, as aforementioned, the young person is unlikely to be liable for exposing themselves in the physical presence of the person,[132] or communicating a sexual message via physical conversation and so it would seem absurd to make such behaviour an offence by virtue of the fact it occurred over electronic communication.[133] If they can in effect legally say or show /hear or see the communication physically, then this can be extrapolated to assume they are capable of consenting to such and thus have the capacity to consent to this via electronic means.

The requirement that the young person believe that the recipient had consented will protect victims who are of similar age to the offender but whom the offender nevertheless endeavours to exploit. This will circumvent offenders from escaping liability by virtue of the fact they are close in age to the victim. Explicit consent would not be required because in some instances consent may be generated contextually over the duration of a conversation for example or may be inferred from flirtatious suggestion. The requirement that the consent be on reasonable grounds will act as a safeguard to maintain the integrity of the defence by ensuring that consent was not deliberately misconstrued for the gratification of the sender.

The further requirement that the communication only implicates either the sender and/or recipient of the communication will protect unwilling participants from being the subject of

[129] Romeo and Juliet laws provide a defence to people charged with rape or sexual violation where the sexual activity is consensual but the law deems one of the participants too young to consent to such activity resulting in a charge against the older participant. See Steve James "Romeo and Juliet were sex offenders: an analysis of the age of consent and a call for reform" (2010) 78 UMKC L.Rev. 241. For example, the Texas Penal Code provides a defence to a charge of sexual assault if the person charged was not more than three years older than the victim, the victim was older than 14 years of age, the person charged was not registered or required to register as a sex offender and incest or bigamy was not being committed: Texas Penal Code § 22.011. Similarly, in Indiana a defence to sexual misconduct applies if the person charged is under 21 years of age and not more than four years older than the victim, and the person charged and the victim were in an ongoing personal relationship: Indiana Code Ann § 35-42-4-9.

[130] Ruth Berry "Teens face tough new underage sex penalty" *The New Zealand Herald* (online ed, Auckland, 26 May 2004).

[131] Phil Goff "No change in age of consent" (press release, 23 May 2004).

[132] Provided this was not in a public place pursuant to the offence of indecent exposure, Summary Offences Act 1981, s 27.

[133] See comment above n 89.

the communication. For example, a young person may send or make available a photo of another young person or child such as in the 'Roast Busters' saga.[134] Albeit, this kind of behaviour may potentially engage offences within the Films, Videos, and Publications Classification Act 1993 provided the communication is deemed a publication and meets the threshold of objectionable as provided within s 3 of the Act.[135]

Finally, unlike in Colorado, the defence will not require that the communication not be transmitted or distributed to a third party. This is not because the dissemination of such private communications is deemed appropriate but because it is this author's opinion that the dissemination of private communications be an offence in and of itself in order to prevent victimisation of people through the likes of 'revenge porn'. It is noted that this is problematic and worthy of consideration however it is beyond the scope of this paper.

As in Florida's case, New Zealand's child pornography laws (specifically offences included within the Films, Videos, and Publications Classification Act 1993)[136] may still apply and serve as a back up should a young person be engaging in concerning behaviour that transcends teen sexting into the realm of child pornography.

B Incitement of a child or young person to send 'child erotica'

A gap in the proposed provision is that it does not account for instances whereby an adult incites a child or young person to send a communication such as an image of themselves which is acquired by the adult for an indecent purpose (i.e. sexual gratification) resulting in violation of the victim.[137] Images such as this are known as child erotica.[138] Instead it focuses on when an adult sends the indecent communication. On the current wording, those adults who send for example, a naked photo of themselves to a child, will be liable under the provision. However, an adult who requests child erotica from a child or young person will not be liable unless that request is in and of itself an indecent communication. Whilst at times the

[134] "Roast Busters petition delivered to Parliament" *The New Zealand Herald* (online ed, 21 November 2013).
[135] See discussion on page 10.
[136] See discussion on page 10.
[137] See discussion on the sexual use of an image of a child (whether prima facie innocuous or explicit) and consequent victimisation in Max Taylor, Gemma Holland and Ethel Quayle "Typology of Paedophile Picture Collections" (2001) 74 The Police Journal 97.
[138] Ibid, at 97.

request may be considered indecent by nature, assumedly there will be instances where prima facie the request will not be indecent as illustrated by the following hypothetical scenario.

> Young person: "I'm sunbathing at the beach with my friends"
> Adult: "send me a photo haha"

Anecdotal evidence would also suggest that victimisation occurs and harm can result from a recipient using an image sent by a young person or child for their gratification (or the gratification of others), even if the photo is not inherently indecent. For example, a 14-year-old girl sent a selfie via Snapchat to a stranger that depicted her in a tankini swimsuit, taken when she was on holiday.[139] Nothing would suggest that such a photo is inherently indecent and it would likely follow that the request for the photo by association also not be deemed indecent. The stranger in this situation went on to share the image on an online forum designed as a platform to share explicit photographs. The victim's mother described her as being "traumatised and humiliated".[140]

Importantly, should the child or young person send an indecent image at the request of the offending adult, this may fall within the ambit of s 131(1) of the Films, Videos, and Publications Classification Act 1993: Offence to possess objectionable publication. Under this section, every person commits an offence against the Films, Videos, and Publications Classification Act 1993 who, without lawful authority or excuse, has in that person's possession an objectionable publication. Alternatively, if the child or young person did not send the adult the requested photograph for example but the request was simply made, then the offender may not be liable for the full offence but may be liable for attempt to commit the offence in pursuance to section 72 of the Crimes Act 1961. The recent case of *R v Harpur*[141] acknowledges that Parliament did not provide detailed criteria to help determine whether conduct amounts to an attempt. The legislative wording in s 72 allows attempt to be decided on a case by case as justice demands.[142] *R v Harpur* clarified the ambiguous position in *R v Wilcox* and affirmed that the offender's conduct is to be considered cumulatively up until the

[139] Gemma Aldridge "Snapchat 'porn to order' craze creates virtual playground for paedophiles" (16 August 2014) Mirror UK News < http://www.mirror.co.uk/news/uk-news/snapchat-porn-order-craze-creates-4063055>
[140] Ibid.
[141] *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909 at [16]. The guidance in *R v Harpur* was applied recently in *Johnston v R* [2012] NZCA 559.
[142] *R v Harpur*, above n 141.

conduct in question ceases as opposed to focussing on discrete acts.[143,144] The facts of *R v Harpur* concerned the defendant having been charged with attempt to sexually violate a young girl by unlawful sexual connection. Whilst not immediately relevant to the proposed offence of indecent communication with a young person, the facts did involve text conversations and the court did make the comment that it did not matter that the completion of the crime was dependant on the co-operation of the text message recipient.[145] Thus by analogy, it may be construed that the attempt to possess an objectionable publication can be committed without the co-operation of the child or young person. Further, given that the offender's conduct is to be considered cumulatively, a full text conversation between the adult and child or young person for example may be looked at in its entirety.

However, in these types of instances, one hurdle that would still need to be overcome in order for an offender to be liable under this provision would be that the communication requested and/or received could be classified as objectionable. Objectionable is given a legal definition within the Act and is defined within s 3 as discussed above.[146]

It is arguable that not all communications requested and/or received such as those within the realm of child erotica are going to meet this threshold of objectionable. Within the aforementioned hypothetical example, it is doubtful that a photograph of a young person in their swimming togs would be injurious to the public good and hence meet the threshold of objectionable. Notwithstanding this, an offender may still abuse the photograph for their own purposes and victimise the young person or child.[147]

Moreover, whilst this offence of possessing an objectionable publication would be largely applicable to photographs, it may be problematic when applying it to other forms of communication, such as the content of a text message, non-recorded video streaming, or an instant message. In the previously discussed *Walker* case, the accused had sent sexually explicit text messages to young girls and those text messages were not held to be objectionable. Whilst this factual scenario deals with the communications sent to the children

[143] Ibid, at [193].
[144] *R v Wilcox* [1982] 1 NZLR 191 (CA).
[145] *R v Harpur*, above n 141, at [40].
[146] See page 10.
[147] Furthermore, classifying such a photo as objectionable may open the door for liability for situations that were unintended by the legislator. For example, a parent may have photographs of his/her children on their phone for purely innocuous purposes.

and young persons themselves, thus leaving open the possibility of whether this could be extrapolated to any of the replies being classified as objectionable (hence making the offender liable for possession of an objectionable publication), it nonetheless raises questions about whether the nature of modern communications means they can be covered by this legislation. A type of scenario where this could be envisioned can be seen in the following hypothetical example:

> Young person: "just out clothes shopping with my friend"
> Adult: "Describe to me what you are wearing haha"

Here an adult is inciting a communication from a child that may be used for indecent purposes such as the adult's gratification thus victimising the young person and yet when context is removed as done so by the New Zealand Film and Literature Board of Review (that an adult is sending this request to a young person), it would be difficult to conceive how this style of text message could meet the threshold of objectionable.

As aforementioned, a further element of modern communications that may restrict the ability of this provision to apply would be the meaning of 'publication'.[148]

Further, if an offender simply views an indecent communication and does not make a record of it, it is ambiguous as to whether this would meet the definition of 'possession' for the purposes of the provision.

Notably, the Objectionable Publications and Indecency Legislation Bill endeavours to amend the Films, Videos, and Publications Classification Act 1993 to encapsulate the type of scenarios whereby an offender views an objectionable publication but does not save it thereby making a recording.[149] Clause 5 of the Bill proposes to insert after s 131(2),[150]

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[148] See discussion on page 11.
[149] Objectionable Publications and Indecency Legislation Bill 2014 (124-1), cl 5.
[150] Offence to possess objectionable publication: (1) Subject to subsections (4) and (5), 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) is liable on conviction to a fine not exceeding,—
(a) in the case of an individual, $2,000:
(b) in the case of a body corporate, $5,000.

s 131(2A):

> A person can have an electronic publication in that person's possession for the purposes of subsection (1) even though that person's actual or potential physical custody or control of the publication is not, or does not include, that person intentionally or knowingly using a computer or other electronic device to save the publication (or a copy of it).[151]

Thus a strained interpretation of the law in its current state (sans further amendment by the Objectionable Publications and Indecency Legislation Bill) may be required were the law to make people liable for requesting indecent communications from a child or young person.

Other jurisdictions have attempted to criminalise the inciting of a child to engage in pornography. The United Kingdom have a provision within the Sexual Offences Act 2003, namely s 48,[152] which may be used to prevent the incitation of children into pornography. Under this provision, a person commits an offence if—

> (a) he intentionally causes or incites another person (B) to become a prostitute, or to be involved in pornography, in any part of the world, and
> (b) either—
> (i) B is under 18, and A does not reasonably believe that B is 18 or over, or
> (ii) B is under 13.

For the purposes of this section, a person is involved in pornography if an indecent image of that person is recorded and "pornography" is interpreted accordingly.[153] Thus this provision would only be engaged if the image of the child or young person were to be recorded. With advances in modern technology as aforementioned, not all images are going to be in fact recorded. This factor coupled with the ambiguity of whether a prima facie innocuous image of a child or young person can be considered indecent may suggest that a provision such as this would not be applicable to these types of situations.

Films, Videos, and Publications Classification Act 1993, s 131.
[151] Objectionable Publications and Indecency Legislation Bill 2014 (124-1), cl 5.
[152] Sexual Offences Act 2003 (UK), s 48.
[153] Sexual Offences Act 2003 (UK), s 51.

The American state of Colorado has a more technology specific provision, specifically the offence of Internet sexual exploitation of a child. A person commits this offence if he/she knowingly importunes, invites, or entices through communication via a computer network or system, telephone network, or data network or by a text message or instant message, a person whom the actor knows or believes to be under fifteen years of age and at least four years younger than the actor, to:

> (a) Expose or touch the person's own or another person's intimate parts while communicating with the actor via a computer network or system, telephone network, or data network or by a text message or instant message; or
> (b) Observe the actor's intimate parts via a computer network or system, telephone network, or data network or by a text message or instant message. [154]

This provision accordingly targets those instances when an adult entices a child or young person to engage in sexual activity over technological means. Whilst this provision encompasses a range of technologies and situations where a child or young person is being enticed by an adult, it does not cover instances whereby an adult incites a child via technological means to send what is prima facie an innocuous communication. Instead, the offending that this provision incorporates would likely already be encompassed by the proposed provision if the request for the child or young person to expose or touch him or herself were indecent in nature as aforementioned.[155] Alternatively it would cover offending where a communication depicting the offender's intimate parts is deemed an indecent communication – the crux and objective of the proposed provision in its current form.

[154] Florida Statute, title 46 § 18-3-405.4.
[155] Alternatively the offender may be liable under the Films, Videos, and Publications Classification Act 1993, s 131(1): Offence to possess objectionable publication (for either the full offence or attempt).

(i) How the legislation could be changed to criminalise this type of offending

A solution to this issue could be to amend the provision so it encompasses instances of when a child or young person is incited to send a communication for indecent purposes. By making the purposes indecent as opposed to the communication itself, this would still criminalise those instances when a young person or child is asked to send child erotica which by its nature is not inherently indecent. The Scottish jurisdiction has enacted a provision of Communicating indecently with a young child etc, included within The Sexual Offences (Scotland) Act 2009, specifically s 24 of the Act.[156] This section does not extend to inciting a communication from a child or young person but does make reference to the offender's purpose for communicating indecently with a young child. Specifically, a person commits an offence if he/she sends a sexual communication to a child for certain purposes. These purposes are (a) obtaining sexual gratification, (b) humiliating, distressing or alarming the child.

Section 49(1) of the Sexual Offences (Scotland) Act 2009 further clarifies the purposes outlined in s 24 by stating that the offender's purpose was obtaining sexual gratification or humiliating, distressing or alarming the child if in all the circumstances of the case it may reasonably be inferred the offender was doing the thing for the purpose in question.[157] This would likely lesson the burden for the prosecution, as it would allow intent to be construed contextually.

I would pose the following amendment to the legislation:

- Without limiting section 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 incites, counsels or procures a child or young person to send a communication and that person does so with the intent to use that communication for an indecent purpose.
- For purpose of this subsection, the person's purpose was indecent if in all the circumstances of the case it may reasonably be inferred the offender was inciting, counselling or procuring the communication for an indecent purpose.

[156] The Sexual Offences (Scotland) Act 2009, s 24.
[157] The Sexual Offences (Scotland) Act 2009, s 49(1).

(ii) Discord between behaviour committed over technology vs. a physical setting

The issue does arise as to whether criminalising this type of behaviour would be to impose criminal liability for something done by technological means that would not be criminal if done in a physical setting. For instance, it would not be criminal for an adult to request an innocuous photograph of a child and then go on to use this for his/her sexual gratification nor would it be criminal for an adult to for example masturbate to a photo of a child in a clothing catalogue. However, requesting a communication from a child over technological means is more analogous to grooming whereby the adult takes a more active yet insidious role in order to gain the young person or child's trust so they may be exploited. Unlike the second example, the adult would have taken the extra step of communicating directly with the child in order to obtain the communication. These two instances aforementioned would also be difficult to police as unlike when a technological means is employed, there would unlikely be any trace of the offending. Furthermore, whilst this behaviour is yet to be criminalised, it does not equate to implying that it should not be criminalised nor will not be criminalised in future.

C The meaning of 'indecent'

The above discussion brings to the forefront the issue of what is meant by the word 'indecent'. A definition of 'indecent material' has not been provided within the proposed provision. As noted within the Regulatory Impact Statement, case law will be able to provide guidance on what is deemed to be indecent.[158] Further, in some cases it might be imagined that this would be manifestly apparent such as an adult male sends a photograph of his genitalia to a child or young person but in other situations, this may not be so obvious. The Court of Appeal considered the meaning of indecent in *R v Annas*[159] in relation to an indecent act with intent to insult or offend.[160] Whether something is to be considered 'indecent' was held to be an "objective question, to be answered by what the jury assesses to be the standards of right-thinking members of the community".[161] This is similar to the Australian Commonwealth Crimes Legislation Amendment (Sexual Offences Against

[158] Ministry of Justice *Regulatory Impact Statement: Addressing Child Pornography and Related Offending* (2 August 2012) at [58].
[159] *R v Annas* [2008] NZCA 534.
[160] Crimes Act 1961, s 126.
[161] *R v Annas*, above n 159, at [56].

Children) Act 2010, s 474.27A. For this section whilst indecent is defined, it is not defined explicitly but comparably to the description in *R v Annas*,[162] 'indecent' is defined as "indecent according to the standards of ordinary people" and whether it is deemed indecent is to be decided by the fact-finder.[163]

The aforementioned Scottish provision of Communicating indecently with a young child etc,[164] does not define indecent. Instead this provision is more perspicuous, making references to communication of a sexual nature through the phrases "sexual verbal communication" and "sexual written communication". The Act provides further clarity by specifying that "verbal communication" comprises sounds of sexual activity (whether actual or simulated). Hence this Act is more specific by delineating that the communication be of a sexual nature. Whilst this wording instils a sense of clarity and as such one of the bedrock aspirations of law generally, one may hypothesise that this be at the expense of not criminalising other types of indecent communications that may be injurious to the child or young person and society generally. For example, parliament clearly intends the public to be protected from other forms of communications such as those depicting "horror, crime, cruelty, or violence" as referenced in the meaning of objectionable in the Films, Videos, and Publications Classification Act 1993.[165]

Thus employing more equivocal wording such as 'indecent communication' as opposed to 'sexual communication' appreciates the often-conflicting bedrock aspiration for law that is flexibility. It also fosters flexibility by allowing the provision to adapt to society's changing values. For example, in the past, references to homosexuality may have been considered indecent by the wider community but given that homosexuality has gained societal acceptance,[166] this is now unlikely to be so.

[162] Ibid.
[163] Using a carriage service to transmit indecent communication to person under 16 years of age: Australian Commonwealth Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth), s 474.27A.
[164] The Sexual Offences (Scotland) Act 2009, s 24.
[165] Films, Videos, and Publications Classification Act 1993, s 3.
[166] As evidenced by the Marriage (Definition of Marriage) Amendment Act 2013.

(i) The adequacy of the term 'indecent'

Previous case law deals with 'indecent' in terms of an indecent act[167] and so has a quality of action or physicality about it. Hence it may be assumed that the guiding test provided by case law be of limited value in circumstances of sending an indecent communication where there is no physical act. However, as aforementioned it was held in *Y v R*[168] that physical contact is not necessary for liability to be established for the purposes of doing an indecent act.[169] Therefore it may be deduced that the test of determining whether something is indecent be applicable in an indecent communication scenario whereby there is the absence of physical contact.

However, what this test lacks is any mention of whether surrounding circumstances or context can be looked to when determining whether a communication is indecent and whether a communication can be looked at in its entirety on making a determination of indecency. The nature of modern communications would suggest that clarity is needed on this matter. For example, would each text message be looked at in isolation and viewed as a separate communication? Or could indecency be construed from a text conversation or multiple text conversations? If context cannot be considered, then it is possible that some communications (particularly those that are not images[170]) will not attract liability under the provision as in *Walker*, albeit this concerned whether the images were objectionable. This could be circumvented were a guiding definition of indecent be explicitly provided within the provision. Such a definition would also allow the law to be applied more consistently and provide clarity for juries and judges alike given that the penalty for the offence is a maximum of three years imprisonment and so jury trial may be elected.[171]

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[167] Crimes Act 1961, s 132(3); Crimes Act 1961, s 134(3).
[168] See page 8. In this case the appellant had induced and permitted three boys aged between 11 and 12 to masturbate in his presence. No physical contact occurred between him and the children, nor did he engage in any contemporaneous sexual activity. *Y v R* [2014] NZSC 34.
[169] Crimes Act 1961, s 132(3); Crimes Act 1961, s 134(3).
[170] Whilst an image may more easily be labelled as indecent as evident on the face of it, a text message or instant message in isolation from surrounding context such as a conversation in its entirety may not be considered indecent. Given context however, indecency may be construed.
[171] New Zealand Bill of Rights Act 1990, s 24(3).

(ii) A guiding definition of 'indecent'

In line with those inadequacies identified above, a guiding definition of 'indecent' could read as follows:

- Whether a communication is considered indecent is to be determined by what would be considered as indecent by right-thinking members of the community.
    (d) Indecency includes but is not limited to communications of a sexual nature, or those that depict cruelty, or violence.
    (e) The communication is to be determined as indecent if in all the circumstances of the case it may reasonably be inferred the communication was indecent.

D The penalty

A person who commits an offence under the proposed provision is liable to imprisonment for a term not exceeding three years. This contrasts starkly to the analogous aforementioned provisions in the Australian Commonwealth Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 and The Sexual Offences (Scotland) Act 2009. These provisions list penalties of seven years and ten years imprisonment respectively.[172] Further, the grooming offence of exposing a child to indecent matter in Western Australia as outlined in the Criminal Code Act Complication Act 1913, prescribes a maximum penalty of ten years imprisonment.[173] The maximum penalty of three years imprisonment also contrasts starkly to the penalty for an offence committed under s 124 of the Films, Videos, and Publications Classification Act 1993. A person convicted under this section is liable to a term of imprisonment of up to ten years.[174]

Parliament has recognised a recent focus on addressing child pornography/child exploitation material as identified in the Objectionable Publications and Indecency Legislation Bill.[175] It has been proposed in this Bill that the maximum term of imprisonment should increase from 10 years to 14 years for offences committed under s 124 of the Films, Videos, and

[172] The Sexual Offences (Scotland) Act 2009, schedule 2.
[173] Criminal Code Act Complication Act 1913 (WA), s 204B(3)(b)(ii).
[174] Films, Videos, and Publications Classification Act 1993, s 124.
[175] Objectionable Publications and Indecency Legislation Bill 2014 (124-1).

Publications Classification Act 1993 along with an increase in the maximum penalty for possession of an objectionable publication under s 131 from five years to 10 years imprisonment. As noted in the Regulatory Impact Statement for the Bill, judges have yet to sentence an offender for an offence under s 124 to more than five years imprisonment.[176] Hence it may be queried as to whether the penalty for indecent communication with a young person being set at a maximum of three years imprisonment is in line with Parliament's focus on addressing child exploitation material. Further, this penalty is unlikely to acknowledge the harm done to a child or young person by exploiting him/her in this way or provide an adequate deterrent, especially if judges are reluctant to impose a penalty near the maximum permitted as in offences committed under s 124.

To bring New Zealand more in line with overseas jurisdictions and to adequately acknowledge the harm caused as well as serve as a deterrent, it is suggested that the maximum penalty for an offence committed under the proposed provision be at least ten years imprisonment as is the current penalty for a breach of s 124 of the Films, Videos, and Publications Classifications Act 1993.

[176] Ministry of Justice, above n 159, at [18].

Chapter III: Conclusion and revised provision

New technologies have revolutionised the way we communicate and express ourselves as well as forging a virtual space for us to do so. We now have instant access to others; no longer bound by the limits and constraints of our physical environment. Some choose to use this space and means of communicating to engage in a new kind of virtual sexual activity. For consenting adults, this can mean a fun and flirtatious way to communicate with one another. However, a more insidious side to the use of new communications has emerged whereby adults can now abuse these technological advancements to exploit children and young people in ways the law simply has not been able to anticipate.

Essentially the law at present fails to criminalise this emerging and likely increasing form of child exploitation and consequently it goes unpunished. Parliament has responded by proposing an offence designed to directly target adults who abuse and exploit children and young people over technological means. Whilst this provision holds promise that we may be better able to protect children and young people from this pernicious offending and can hold accountable those who offend in this way, the provision falls short in its ability and potential to protect children and young people from harm of this type.

In examining the provision, this paper established that it has the potential to bring young people into the ambit of the criminal justice system despite the fact that it is young people that the provision sets out to protect. Unlike the situation where an adult exploits a child or young person, consensual sexual communication between young people does not result in victimisation nor is it likely that it would be injurious to the public good. Instead, young people too use new technologies as a fun and flirtatious way to communicate. It would seem counterintuitive to punish teenagers for behaviour that by virtue of their age is criminal but would be otherwise be lawful as in the case of the aforementioned consenting adults. Furthermore, this provision creates an anomaly in the law whereby sexual flirtation by teenagers over technological means is criminalised whilst in the physical environment it is not. Whilst the leaky funnel that is the criminal justice system may provide a means for young people to escape criminal sanction, this is not guaranteed and furthermore should not need to be relied upon given the inherent differences between child exploitation and teenagers expressing their sexuality.

Notwithstanding this, when consent is absent, there is an age difference between sender and recipient indicative of a power imbalance, or the communication depicts unwilling others, exploitation and victimisation can still occur. Thus it is essential that whilst young people are protected from facing criminal sanction when communication occurs in an appropriate way, a balance needs to be struck whereby the law is still able to respond when it requires.

This paper establishes that the provision fails to anticipate another form of indecent communication with a young person, specifically when an adult incites a child or young person to send them child erotica. These requests essentially solicit an innocuous communication intended for indecent purposes such as the sexual gratification of the adult requesting it. It is the use of this communication for an indecent purpose that can result in victimisation and harm to both the victim and wider community and so it follows then that in keeping with the objectives of the provision, such requests are criminalised. The provision in its current state has missed an opportunity to both condemn and criminalise such behaviour and perhaps even provides a technicality that may enable some perpetrators who exploit children and young people in this way to escape liability. Thus the provision needs to be widened in scope to account for this kind of behaviour.

The provision employs the expression ‘indecent’ to describe those communications that the offence will encompass. This expression is wide enough to encompass not only communications of a sexual nature but also those that may be harmful because of other reasons such as communications depicting gross violence. However, in order to avoid the pitfalls observed when trying to fit communications within the term objectionable (and that context cannot be considered), some legislative guidance is needed. This guidance can specify that communications be considered contextually in addition to being considered in their entirety (such as an adult sending a series of text messages to a young child alluding subtly to sexual content). This recognises that not all communications are going to be prima facie indecent but when considered as part of a whole, they may be recognised as such.

The penalty for a breach of s 124A is a maximum of three years imprisonment. This differs from the much larger penalties imposed in other jurisdictions for offending of this type. The penalty also differs when compared to that of offences that are similar in kind such as those included within the Films, Videos, and Publications Classification Act 1993. Parliament has acknowledged its commitment to addressing child exploitation and yet this maximum penalty

of three years appears incongruous with this commitment. Should the penalty for possessing child pornography become 10 years and the penalty for sending a child pornography be set at only three years, then offending of this latter type may be marginalised. The penalty needs to be at a level that denounces this offending, provides retribution for victims as well as acting as a suitable deterrent.

In light of the examination undertaken in this paper and recommendations made throughout, the following re-drafted provision is provided.

Section 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 10 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) Without limiting section 1, a person of or over the age of 16 years is liable to imprisonment for a term not exceeding 10 years if he or she incites, counsels or procures a child or young person to send a communication and that person does so with the intent to use that communication for an indecent purpose.

(3) A reference in **subsection (1)** or **subsection (2)** 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)** or **subsection (2)**, when communicating with the fictitious young person and exposing the fictitious young person to indecent material or requesting material from the fictitious young person for indecent purposes, believed that the fictitious young person was a person under the age of 16 years.

(4) Whether a communication is considered indecent is to be determined by what would be considered as indecent by right-thinking members of the community.

   (a) Indecency includes but is not limited to communications of a sexual nature, or those that depict cruelty, or violence.

   (b) The communication is to be determined as indecent if in all the circumstances of the case it may reasonably be inferred the communication was indecent.

(5) For purpose of **subsection (2)** the person's purpose was indecent if in all the circumstances of the case it may reasonably be inferred the offender was inciting, counselling or procuring the communication for an indecent purpose.

(6) It is a defence to a charge under **subsection (1)** and **subsection (2)** if the person charged proves that,

(a) before communicating with the young person and exposing the young person to the indecent material or requesting material from the young person for indecent purposes, 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 or requesting material from the young person for indecent purposes, the person charged believed on reasonable grounds that the young person was of or over the age of 16 years.

(7) It is a defence to a charge under **subsection (1)** and **subsection (2)** if the person charged proves that,

(a) at the time the communication was made, the person charged was no more than two years older than the recipient and;

(b) the person charged believed on reasonable grounds that the recipient consented to receiving the communication and;

(c) the communication implicates either the person charged and/or recipient of the communication only.

(8) 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

that in the circumstances the ignorance of the person charged was excusable.

(9) No private prosecution (as defined in section 5 of the Criminal Procedure Act 2011) for an offence against this section can be commenced without the Attorney-General's consent.

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Appendix A

Section 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

that in the circumstances the ignorance of the person charged was excusable.

(5) No private prosecution (as defined in section 5 of the Criminal Procedure Act 2011) for an offence against this section can be commenced without the Attorney-General's consent.