



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Objectionable Publications and Indecency Legislation Bill

12/02/2014

SUBMISSION ON THE OBJECTIONABLE PUBLICATIONS AND INDECENCY LEGISLATION BILL

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Objectionable Publications and Indecency Legislation Bill (Bill).
2. The Law Society recommends that further consideration be given to two aspects of the Bill:
 - (a) whether the increase in penalties in proposed new section 131A ought to apply only to offences involving child sexual exploitation and not (as presently drafted) to all objectionable publications; and
 - (b) whether the proposed presumption in new section 132B (in favour of imprisonment for repeat offences relating to images of child sexual exploitation) is required. The Sentencing Act 2002 already provides that previous convictions are an aggravating factor when determining sentences and it is doubtful the new proposal would have much impact in practice.

Grammatical problem: Clause 5 – Section 131 amended (Offence to possess objectionable publication)

3. First, we point to a minor problem of grammar. New section 131(2A) is designed to ensure that the offences relating to possession of objectionable publications can be committed even where an individual does not save or download the publication.
4. But the words “is not” in the new section do not have any referent. The Law Society recommends that section 131(2A) be redrafted to make it clear.

Clauses 4 and 6: New penalties for offences relating to possession of objectionable publications involving knowledge

5. Clause 4 amends section 124, increasing from 10 to 14 years the maximum sentence for knowingly making or supplying objectionable publications; and clause 6 amends section 131A, increasing from 5 to 10 years the maximum sentence for possession of objectionable publications involving knowledge.
6. The principal aim of this Bill is said to be to increase penalties applying to images of child sexual exploitation. But the range of objectionable publications is much broader, and can include material that is not about sex or child sexual exploitation at all. Elsewhere in the Bill cases involving images of child sexual exploitation are singled out for special treatment – in proposed new section 132B. The Law Society invites the Committee to consider whether the increases in maximum sentence should similarly be restricted to cases of that type. As noted, images of child sexual exploitation appear to

be the principal concern behind the Bill and the principal topic of the Regulatory Impact Statement (RIS).

Clause 7: New section 132B inserted (Presumption of imprisonment for repeat offenders)

7. Clause 7, inserting new section 132B, is intended to remove some of the discretion courts ordinarily have in imposing sentences. The presumption is in almost identical language to that provided for by section 128B of the Crimes Act 1961, which provides that an offender must be sentenced to a sentence of imprisonment if convicted of rape. But in this case the presumption is to be triggered by the fact of a previous conviction.
8. The Law Society queries whether there will be any meaningful difference between what clause 7 would require, if enacted, and what section 9(1)(j) of the Sentencing Act 2002 already requires of sentencing judges who deal with repeat offenders. Section 9(1)(j) reads:

9. Aggravating and mitigating factors

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

...

(j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time:

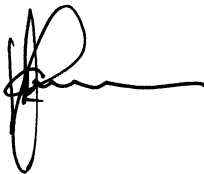
9. The Law Society submits there is likely to be no difference under the new regime, if enacted. As things currently stand, it is for prosecutors to bring the existence of previous convictions to the attention of a sentencing judge. They are mandatory considerations. If the facts of a crime, in light of a previous conviction, justify imprisonment then it is the judge's duty to impose that sentence.
10. Clause 7 if enacted would produce the same outcome. The fact of a previous conviction means, of course, that a sentencing judge would begin with a presumption of imprisonment. Even so, the judge may be required to depart from this after having regard to the particular circumstances of the offence or the offender.
11. Since the circumstances of offence and offender must always be considered, it is difficult to see that there would be any difference in outcome in actual cases.

12. Given that, the Law Society queries whether the proposed change is truly necessary. If it has been prompted by a concern that repeat offenders are not being sentenced to imprisonment for repeat offences *when imprisonment is appropriate having regard to the circumstances* then this is something that can be addressed through the appellate process in specific cases. But nothing in the Explanatory Note to the Bill or RIS suggests that there is such a concern. The RIS contains this relevant paragraph:

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

[Emphasis added]

13. The Law Society therefore queries whether it is truly necessary to introduce a new sentencing regime for repeat offenders for the offences named in this clause. If enacted it will be an overlay to the general principles of sentencing already contained in the Sentencing Act 2002. Those general principles already contain a requirement to consider previous convictions. The Law Society suggests it is preferable for the Sentencing Act 2002 to remain a complete code for sentencing principles.
14. The Law Society wishes to be heard.



Chris Moore
President
12 February 2014