
Crimes (Child Exploitation Offences) Amendment Bill

09/12/2021

Submission on the Crimes (Child Exploitation Offences) Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (the **Law Society**) welcomes the opportunity to comment on the Crimes (Child Exploitation Offences) Amendment Bill (the **Bill**).
- 1.2 The Bill seeks to help protect children from harm online by creating two new criminal offences:
- (i) a person over 18 years communicating, by means of digital communication, with a person under 16 years with the intent to mislead as to their age or identity; and subsequently meets or arranges to meet them (carrying a maximum penalty of 5 years' imprisonment).
 - (ii) a person over 18 years communicating, by means of digital communication, with a person under 16 years intending to cause harm or being reckless as to whether they are harmed (maximum penalty 7 years' imprisonment).
- 1.3 The Bill provides a defence to the first offence if the person proves that:
- (a) before the time he or she took the action concerned, he or she 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 he or she took the action concerned, he or she believed on reasonable grounds that the young person was over the age of 16 years.
- 1.4 The Law Society supports the Bill in principle and makes recommendations as to how it could be improved for it to achieve its purpose.
- 1.5 The Law Society does not wish to be heard in relation to this submission but is happy to engage further with the select committee or officials if that would be of assistance

2 Summary and recommendations

- 2.1 In summary, the Law Society makes the following recommendations:
- (i) A definition of 'harm' (clause 4) should be provided.
 - (ii) Consideration be given to framing section 126B as a strict liability offence.
 - (iii) Amend section 126A(1)(b) to include meetings which were not agreed to by the young person, and to include an intention to meet so as to prevent accidental meetings from being captured.
 - (iv) Amend section 126A(3)(a) to clarify the relevant time when the 'reasonable steps' were taken.

3 Definition of harm

- 3.1 Clause 4 provides for the amendment of the Crimes Act 1961 by inserting the two new offences as sections 126A and 126B. The offence created by new section 126B requires that

the person over the age of 18 years old intended to cause harm or was reckless as to whether harm was caused.

- 3.2 However, the Crimes Act 1961 does not provide a definition of harm and neither does the Bill.
- 3.3 Harm is defined in the Harmful Digital Communications Act 2015, as ‘serious emotional distress’. Consideration should be given to whether this is the standard intended by the Bill, or whether there are other ‘harm’ standards that may be appropriate.
- 3.4 In considering what type of harm ought to be captured, it is important to consider the underlying policy rationale of section 126B: to protect vulnerable minors from increasingly prevalent digital communications of a sexual nature.¹ While the proposed offence does not require subsequent physical contact occurring, the relevant harm that might be caused by such communications could range from emotional to physical, depending on the nature of the communication.
- 3.5 For that reason, the Law Society recommends the definition of ‘harm’ be more broadly framed than the definition of harm in the Harmful Digital Communications Act 2015. For instance, it may be appropriate to provide a definition such as that in the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018, where ‘harm’ means “any kind of detriment and includes physical, psychological, emotional, or sexual harm.”
- 3.6 It is the Law Society’s view that a broad framing of the definition of harm is particularly important as section 126B incorporates a mens rea element of intention or recklessness, requiring the person communicating with the young person to either intend or at least contemplate that ‘harm’. This requires proof of the defendant’s subjective evaluation of how the young person will likely receive the communication, namely that they either intended harm to the young person or were reckless as to whether harm would result. In order to be reckless, the defendant will need to have recognised the real possibility that the young person could be harmed by the communication yet sent it anyway, that being objectively unreasonable.²
- 3.7 If ‘harm’ is defined too narrowly, there is a risk it could frustrate the protective purpose of the proposed offence provision. Under a narrow definition, where a young person is a willing participant in communications of a sexual nature with the defendant, short of the communication being of a particularly egregious or sexually violent nature, it will be difficult to establish that the defendant appreciated that the communication was harmful to the young person.

¹ Crimes (Child Exploitation Offences) Amendment Bill (59-1) (explanatory note) at 1. See also Hansard, (20 October 2021) 755 NZPD (Crimes (Child Exploitation Offences) Amendment Bill — First Reading, Ginny Anderson) where Ms Anderson refers to “online predators”, children and teenagers unwittingly sharing nude images, grooming and sexual exploitation.

² *Cameron v R* [2017] NZSC 89; [2018] 1 NZLR 161, (2017) 28 CRNZ 166 at [73].

4 **Section 126B framed as a strict liability offence**

4.1 The section 126B provision could be made simpler and more adequately meet its protective objectives if it were framed as a strict liability offence for digital communications with a young person that are of a *sexual nature*. That is because a person over the age of 18 engaging in such a conversation with a young person will always be 'harmful'. The mens rea requirement is an arbitrary hurdle.

4.2 This would be consistent with other offence provisions with a similar protective focus, such as sections 134 and 134A of the Crimes Act 1961 (sexual conduct with a young person under 16), section 98AA of the Crimes Act (dealing in persons under 18 for sexual exploitation), and sections 20 - 22 and of the Prosecution Reform Act 2003 (relating to contracting with or receiving commercial sexual services from a person under 18 years of age).

5 **Section 126A(1)(b): Meets or arranges to meet**

5.1 The current drafting of section 126A(1)(b) requires the person to 'arrange to meet' the young person. This could be interpreted to mean the person and the young person have mutually considered or discussed a meeting. "Arrange" means plan or organise; it is arguable that restricting this section to 'arranging' may mean it would not cover behaviour where the person unilaterally takes steps to meet the young person. For example, a person who goes to a young person's address without having told the young person that they were coming, has not 'arranged to meet' them.

5.2 This can be compared to the more specific drafting of s 131B (grooming):

- a) having met or communicated with a person under the age of 16 years (the young person) on an earlier occasion, he or she takes one of the following actions:
 - (i) intentionally meets the young person:
 - (ii) travels with the intention of meeting the young person:
 - (iii) arranges for or persuades the young person to travel with the intention of meeting him or her; and

....

5.3 It is noted that the s 131B(a)(iii) definition is also problematic as it does not cover arranging to meet a young person at the place where the young person is when the arrangement is made.³ However, it does require the person to *intentionally* meet the young person.⁴ That

³ See *R v Dyason* DC Wellington CRI-2009-032-929, 5 February 2010, where arranging to meet a young person at the address where she was staying (and not actually meeting her) was held not to be covered by s 131B(a)(iii). Judge Harrop described this as "a lacuna in the law", noting that if the defendant had arranged to meet the complainant in the park next to her address, he would have committed an offence (at [26]—[29]).

⁴ An *intentional* meeting for the purposes of s 131B only requires the meeting to have been purposefully arranged, even if the forming of that intention and its implementation were not the subject of extensive premeditation, planning and reflection (*R v S* [2009] NZCA 64 at [18]).

would be an appropriate added qualification to s 126A, as presumably the harmful behaviour intended to be covered by the Bill does not include accidental meetings.

5.4 The Law Society recommends consideration is given to drafting this offence provision in similar terms to section 131B(a) to include:

- (i) intentionally meeting the young person.
- (ii) traveling with the intention of meeting the young person.
- (iii) arranging to meet with the young person.

6 Amend section 126A(3)(a): before the time he or she took the action concerned

6.1 It is not clear in the defence provided for under section 126A(3)(a) whether the relevant time (before the 'action concerned') is before the communication was made to mislead the young person as to the defendant's age in s 126A(1)(a), or before the defendant met/arranged to meet the young person.

6.2 We presume the relevant action is the former and recommend this is clarified.



Frazer Barton
Vice President