

Films, Videos, and Publications Classification Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill amends the Films, Videos, and Publications Classification Act 1993 to address changes that have occurred in the nature and scale of offending, largely as a result of the worldwide proliferation of child pornography via the Internet. It also—

- clarifies aspects of the existing classification criteria; and
- makes changes designed to improve the practical operation of the Act.

Background

The Films, Videos, and Publications Classification Act 1993 (the **Act**) has been in operation for 9 years. It introduced a unified regime for the censorship and classification of printed material, films, and other publications.

The availability and use of the Internet has had a major impact on offending patterns and the focus of law enforcement activity. In particular, the Internet has become the prime vehicle for the worldwide proliferation of child pornography. This has prompted the development of international legal measures to address the exploitation of children. Those measures include the Optional Protocol to the United Nations Convention on the Rights of the Child (UNCROC) on the Sale of Children, Child Prostitution and Child Pornography (the **Optional Protocol**). New Zealand, as a party to the Optional Protocol, must ensure that domestic laws accord with its terms. The Ministry of Justice undertook a review in 2003 of the current offence provisions and enforcement powers contained in the

Act. The review concluded that existing penalties do not reflect the seriousness of some offending, particularly that involving child pornography, and that other changes were required to adequately address the nature and scale of offending.

Recently, the Court of Appeal made important rulings on the meaning of “objectionable”, which is the standard for prohibiting publications under the Act. Most significantly, the Court in *Living Word Distributors Limited v Human Rights Action Group* [2000] 3 NZLR 570 said that for material to be “objectionable” under the Act, it must fall within the scope of the section 3(1) subject matter “gateway”, and that the subject matter limitation was designed to limit the reach of the censorship laws. The Court stated that publications could only be banned under the Act if they deal with sex, horror, crime, cruelty, or violence, or other similar matters.

In 2003, the Government Administration Committee also completed a wide-ranging inquiry into the operation of the Act. While the Committee’s report focussed on the impact of the recent Court of Appeal decisions on the meaning of “objectionable”, it also made recommendations aimed at improving the operation of the Act. The Bill draws on recommendations made by the Government Administration Committee as well as the findings of the Ministry of Justice review of offence provisions and penalties.

Main reforms

The Bill—

- extends the scope of the “trading or commercial” offences in the Act by expanding them to include the distribution or giving of an objectionable publication to another person, without a requirement for financial gain;
- further extends the “trading or commercial” offences in the Act to include importing and exporting objectionable material for the purposes of supply or distribution, and ensures that relevant provisions of the Customs and Excise Act 1996 relating to importation and exportation of objectionable publications are aligned with the Act;
- increases the maximum penalties for making, trading, and distributing objectionable material (including child pornography) to 10 years’ imprisonment;

- creates a new offence, punishable by up to 2 years' imprisonment, of possession of an objectionable publication, knowing or having reasonable cause to believe that it is objectionable:
- requires a court, when sentencing for an offence involving an objectionable publication, to take into account, as an aggravating factor, the extent to which the publication is objectionable because it contains child pornography:
- gives District Court Judges power to issue search warrants in connection with the suspected commission of the new possession "with knowledge" offence:
- removes any doubt that nude or partially nude images of children that can reasonably be considered sexual in nature are publications that deal with "a matter such as sex", as required by section 3(1) of the Act, and can therefore be examined and classified as "objectionable" by the censors:
- introduces a specific provision to permit a publication, which would otherwise be classified as unrestricted, to be classified as restricted to persons of a specified age, if the publication contains offensive language and exposure to the publication would be harmful to persons under that age:
- amends existing classification criteria so that the use of urine or excrement in association with degrading or dehumanising or sexual conduct will not result in a publication being deemed "objectionable", but will instead be a factor that must be given particular weight in reaching a classification decision:
- includes provisions dealing with extraterritorial jurisdiction in respect of New Zealand citizens, extradition, and mutual assistance in criminal matters, to ensure compliance with the Optional Protocol.

Expanding the concepts of supply and distribution

It is an offence under the Act to supply an objectionable publication, possess an objectionable publication for supply, or distribute or advertise an objectionable publication for supply. The definition of "supply" in the Act is "to sell, or deliver by way of hire, or offer for sale or hire". However, the commercial element is not always central to serious offending, especially on the Internet. Those who are committed to doing so can exchange or access large volumes of

objectionable material, including child pornography, electronically without the transactions involving financial gain or reward. With child pornography in particular, there appears to be much more personal trading between individuals. The Bill amends the Act to ensure that the absence of a commercial incentive does not result in such offending being relegated to a much less serious category. The expanded distribution offences also capture “providing access to” publications to ensure the coverage of arrangements such as file sharing via the Internet.

Increased maximum penalties

The current maximum penalty for making, supplying, or trading objectionable material (including child pornography) is 1 year’s imprisonment. For possession of objectionable material, the maximum penalty is a fine of \$2,000 for an individual. The Bill increases maximum penalties for the most serious offences to 10 years’ imprisonment, which brings them into line with those of the United Kingdom and Canada, which both have maximum sentences of 10 years’ imprisonment for producing or trading in child pornography. A maximum penalty of 2 years’ imprisonment for possession of objectionable material is proposed. These offences are to be punishable on conviction on indictment. The Bill also makes child pornography an aggravating factor for sentencing purposes, and makes corresponding adjustments to penalty levels for other offences under the Act. A table, included below in the clause by clause analysis, sets out the increases in maximum penalties introduced by the Bill.

New offence: possession “with knowledge”

Currently, possession of an objectionable publication is a “strict liability” (without knowledge) offence punishable, as noted above, by a relatively modest maximum fine. There has been a significant increase in suspected offences of possession of objectionable material obtained electronically from overseas sources. Child pornography is the material of most concern to both domestic and foreign law enforcement authorities. Recognition of the seriousness of such offending is proposed by the creation of a new offence, punishable by up to 2 years’ imprisonment, to deal with the more serious cases of possession. This offence will be committed where the person charged knows, or has reasonable grounds to believe, that

the publication is objectionable. To facilitate investigation and prosecution of such offences, the search warrant powers are extended, subject to safeguards.

Importing and exporting

The Customs and Excise Act 1996 currently makes the importing of objectionable material an offence which carries a maximum penalty of 6 months' imprisonment. There is no corresponding offence for exporting objectionable material. New Zealand is required to enact a criminal offence of exportation to comply with its obligations under the Optional Protocol. The Optional Protocol also requires higher maximum penalties. The Bill addresses these matters in 2 ways. First, the trading or distribution offences in the Act are extended to include offences of importing and exporting objectionable material for the purposes of supply or distribution. Second, the Bill amends the Customs and Excise Act 1996 to align the penalties for "simple" importing and exporting offences with the penalties for the domestic possession offences.

Meaning of "objectionable" and offensive language

The law, as stated by the Court of Appeal in the *Living Word* decision, is that a publication must deal with "matters such as sex, horror, crime, cruelty, or violence" to be classified as "objectionable" under the Act. No change is proposed to this subject matter description, which defines the overall scope of the censorship laws. However, 2 discrete amendments are proposed to deal with areas of potential uncertainty arising from the *Living Word* decision.

The first amendment clarifies, for the avoidance of doubt, that sexualised images of nude or partially nude children are a "matter of sex" and can therefore be classified as "objectionable" under the Act. The second amendment provides that the censors can impose age restrictions on publications that use offensive language in a manner that may be harmful to people under a particular age. While offensive language has long been a feature of classification decisions, there is some doubt, under *Living Word*, whether an age restriction based on offensive language can be imposed if the publication would otherwise be classified as unrestricted.

Amending classification criteria

Section 3(2) of the Act provides that publications that “promote or support or tend to promote or support” certain behaviours are automatically deemed to be objectionable. Unlike all the other matters listed in section 3(2) (such as extreme violence and sexual abuse of children), the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct (section 3(2)(d)) is not a criminal offence. In the light of the fact that this Bill proposes to increase maximum penalties for supply of such objectionable material (to 10 years’ imprisonment), retaining section 3(2)(d) is anomalous and potentially unjust. The Bill repeals section 3(2)(d), and inserts a similar *new section 3(3)(a)(iia)*, which will make the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct a special factor that must be given particular weight in reaching a classification decision.

Other reforms

Other changes are also proposed to improve the operation of the Act. The Bill—

- confirms that a disc and an electronic or computer file are publications under the Act;
- permits the Commissioner of Police to submit a publication to the Classification Office for classification without first obtaining the leave of the Chief Censor;
- allows the Chief Censor to arrange for the Classification Office to meet some or all of the public notification requirements arising from submission of a publication for classification if satisfied that meeting those requirements would place an undue burden on the submitter;
- provides that official labels like those currently used for films must also be used whenever there is a requirement to publicly display the classification given to a restricted publication other than a film (such as a magazine);
- clarifies the timeframe for making an application for review of a Classification Office decision;
- reduces the number of members of the Film and Literature Board of Review from 9 to 6 and makes appropriate transitional arrangements.

Clause by clause analysis

Clause 1 is the Title clause. The Bill amends the Films, Videos, and Publications Classification Act 1993 (“the principal Act”). Unless stated to be references to sections of other Acts, references in this analysis to sections are references to sections of that Act.

Clause 2 relates to commencement. To enable necessary parallel amendment regulations to be made, specified clauses (relating to the issue under the principal Act of labels for restricted publications (other than films)) come into force 3 months after assent. The rest of the Bill comes into force on the day after assent.

Part 1

Amendments to principal Act

Clause 3(1) amends the definition of **label** in section 2 to make it clear that the term may relate to publications other than films. The amendment is consequential on the one made by *clause 9(1)*.

Clause 3(2) amends the definition of **publication** in section 2 to make it clear that the term includes a disc and an electronic or computer file.

Clause 4(1) inserts in section 3 *new subsections (1A) and (1B)*. *New subsection (1A)* makes it clear that publications deal with a matter such as sex, as required by section 3(1), if—

- the publications are or contain visual images of children or young persons who are nude or partially nude; and
- those visual images are reasonably capable of being regarded as sexual in nature.

New subsection (1B) makes it clear that *new subsection (1A)* is for the avoidance of doubt.

Considered together, the changes made by *clause 4(2) and (3)* alter the approach taken to the classification of publications that promote or support, tend to promote or support, or otherwise deal with one particular kind of coprophilic behaviour (namely the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct).

Clause 4(2) repeals section 3(2)(d). The effect of the repeal is that a publication is not deemed objectionable for the purposes of the principal Act solely because it promotes or supports, or tends to

promote or support, the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct.

Clause 4(3) inserts in section 3(3)(a) a *new subparagraph (ia)*. The effect of the amendment is to require particular regard to be given, in classifying a publication under the principal Act, to the extent and degree to which, and the manner in which, the publication deals with the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct.

Clause 5 is a transitional provision relating to classification decisions made before the time the changes made by *clause 4* come into force. Those existing decisions are conclusive evidence in proceedings after that time unless challenged successfully—

- under *clause 5* (which gives a new, additional right of challenge to ensure a person charged with an offence has the right (because the changes made by *clause 4* could in some cases lead to a change in the classification given to a publication) to the benefit of any new, and potentially less restrictive, classification given to the publication); or
- under any of the sections of the principal Act that currently provide rights of reconsideration, review, or appeal.

All challenges to existing classification decisions will be determined under the principal Act as changed by *clause 4*.

Clause 6 inserts in section 13(1) a *new paragraph (ab)*. The amendment permits the Commissioner of Police, without the leave of the Chief Censor under section 15, to submit a publication to the Classification Office for a decision under the principal Act on that publication's classification.

Clause 7(1) substitutes a *new section 19* (which relates to notification of the submission of a publication). There are 2 main changes. One is that, under *new section 19(2) and (3)*, the Chief Censor determines what notice is to be given and whether the fact of the submission of the publication is to be publicised. The other is *new section 19(4) and (5)*. Under those new subsections, the Chief Censor must, after determining that notice is to be given or that a fact is to be publicised, usually direct the submitter to give that notice or to publicise that fact. The exception (which is new) is that the Chief Censor must arrange for the Classification Office to give that notice

or to publicise that fact if satisfied that giving that notice or publicising that fact would place an undue burden on the submitter (*new section 19(5)*).

Clause 7(2) makes a consequential amendment, and *clause 7(3)* is a transitional provision about directions under section 19(a) or (b).

Clause 8 amends section 23 (which relates to examination and classification of publications).

Clause 8(1) amends section 23(2)(c)(i). Under that subparagraph the Classification Office may classify a publication as objectionable except if the availability of the publication is restricted to persons who have attained a specified age. The amendment makes it clear that the specified age may be any age that does not exceed 18 years.

Clause 8(3) adds to section 23 *new subsections (4) and (5)*.

New subsection (4) deals with a publication that would otherwise be classified as unrestricted. *New subsection (4)* permits the publication to be classified as a kind of restricted publication (namely as a publication that is objectionable except if the availability of the publication is restricted to persons who have attained a specified age not exceeding 18 years). However, to be able to be so classified, the publication must contain offensive language to such an extent or degree that the availability of the publication would be likely, if not restricted to persons who have attained the specified age, to be harmful to persons under that age.

New subsection (5) requires the Classification Office, in determining whether to classify a publication as a restricted publication under *new subsection (4)*, to consider the matters (considered in determining that the publication would otherwise be classified as unrestricted) specified in section 3(4)(a) to (f).

Clause 8(2) makes a consequential amendment.

Clause 9(1) substitutes a *new section 27(4)(a)*. The amendment relates to conditions (imposed by the Classification Office) requiring that the classification given to a restricted publication (other than a film) be shown, when it is on public display, on the publication or a package in which it is kept. Under *new section 27(4)(a)*,—

- conditions can require the classification to be shown not merely on the publication or a package in which it is kept, but on both; and
- the classification must be shown—

- not (as currently) in the manner (if any) specified by the Classification Office; but instead
- by official labels (the form and content of which is prescribed by regulations under the principal Act) issued by the labelling body at the direction of, and affixed in the manner specified by, that office.

Clause 9(2) and (3) is a transitional provision relating to conditions imposed before the commencement of *clause 9(1)*.

Clause 10 inserts in the principal Act a *new section 36A*. *New section 36A* relates to the Classification Office directing the labelling body to issue a label in respect of a publication (other than a film) if the Classification Office has—

- examined the publication and classified it as a restricted publication; and
- imposed pursuant to *new section 27(4)(a)* (substituted by *clause 9(1)*) a condition requiring the classification given to the publication to be shown when it is on public display.

Clause 11 amends section 38(2) (which relates to written notice of classification decisions). The amendment is consequential on the amendments (about conditions imposed pursuant to *new section 27(4)(a)*) made by *clauses 9(1) and 10*.

Clauses 12 and 13 are analysed with *clause 14*.

Clause 14 substitutes a *new section 48(1)(b)*. The amendment relates to the 30-working-day period for making applications under the principal Act for review of a Classification Office decision with respect to the classification of a publication. The amendment ensures that the period starts after the decision is made open to inspection by the public in a list of decisions produced by the Classification Office. *Clauses 12 and 13 and 34 to 36* adjust, in a similar way, time frames stated in sections 41(2), 42(1) and (2), 152(4), 161(5), and 168(5) respectively.

Clause 15 inserts a *new section 55(1)(da)*, which relates to cases where the Board, in reviewing a publication submitted to it for review, imposes a condition pursuant to *new section 27(4)(a)* (substituted by *clause 9(1)*). In those cases, *new section 55(1)(da)* requires the Board to order the Classification Office to direct the labelling body, in accordance with *new section 36A(2)* (inserted by *clause 10*), to issue a label in respect of the publication.

Clause 16 inserts a *new section 71(ba)*, which states functions of the labelling body in relation to the issue of labels in respect of specified publications, including publications (other than films) that are the subject of a condition imposed pursuant to *new section 27(4)(a)* (substituted by *clause 9(1)*).

Clause 17(1) amends section 93(1) to reduce the number of members of the Film and Literature Board of Review from 9 to 6. *Clause 17(2) and (3)* is a transitional provision. It ensures that, despite the reduced size of the Board, every member whose term of office has, on the commencement of *clause 17*, not expired,—

- continues as a member until the expiry of his or her term of office, unless he or she sooner dies or vacates office; and
- continues as a member after the expiry of his or her term of office, in the ordinary manner, until reappointment, or appointment of a successor, or notice of non-reappointment, unless he or she sooner dies or vacates office.

Clause 18 amends section 95(b) to correct a minor drafting error.

Clause 19 substitutes a *new section 100(2)*. In the light of the fact that *clause 17* reduces the number of members of the Board of Review from 9 to 6, *new section 100(2)* reduces the quorum of members required for a review from 5 to 4 (without affecting the requirement that 1 of those members must be the President).

Clause 20(1) repeals section 101, which enables the Board of Review to sit in divisions. In practice the President has never considered it appropriate for the Board to sit in divisions. Further, the fact that *clause 17* reduces the number of members of the Board of Review from 9 to 6 makes it undesirable for the powers of the Board to be able to be exercised by (even smaller) divisions.

Clause 20(2) makes a consequential amendment.

Clause 21(1) repeals section 109 and substitutes *new sections 109 to 109C*, which relate to search warrants.

New section 109 re-enacts the power in section 109 to issue search warrants for specified publications offences.

New section 109A and 109B enable search warrants to be issued in connection with the suspected commission of a new offence, namely the offence of having possession of an objectionable publication knowing, or having reasonable cause to believe, that the publication

is objectionable. The new offence is created by *new section 131A* (inserted by *clause 29(1)*).

New section 109A(1) gives District Court Judges a discretion to issue search warrants under the principal Act in connection with the suspected commission of the new offence. In exercising the discretion, the District Court Judge must have regard to the matters specified in *new section 109A(2)*.

New section 109B enables a Justice, Community Magistrate, or Registrar to issue a warrant in respect of the new offence. However, the Justice, Community Magistrate, or Registrar may issue the warrant only if satisfied, in the particular case,—

- that all reasonable efforts have been made to obtain a warrant under *new section 109A*; but
- that no District Court Judge is available to deal with an application under *new section 109A*; and
- that delaying a search until a warrant under *new section 109A* could be obtained would create a real risk that the purpose of that search would be frustrated.

New section 109C specifies who may apply for a search warrant under *new section 109*, *new section 109A*, or *new section 109B*.

Subclauses (2), (3), and (4) of clause 21 make consequential amendments to sections 2, 111(2), and 118(5) respectively.

Clause 21(5) amends section 198 of the Summary Proceedings Act 1957 to make it clear that warrants cannot be issued under that section for offences against the principal Act.

Clause 22 inserts a *new section 118A*. *New section 118A(1)* makes it clear that specified sections of the Customs and Excise Act 1996 apply in relation to offences against the principal Act concerning the importation or exportation of objectionable publications. *New section 118A(2) and (3)* makes available powers under section 174 of the Customs and Excise Act 1996 to arrest without warrant if a Customs officer has reasonable cause to suspect that a person has committed certain offences against the principal Act involving the importation or exportation of objectionable publications. *New section 118A(4)* makes it clear that nothing in *new section 118A* limits the application of any provisions of the Customs and Excise Act 1996 that confer powers (for example, powers relating to prohibited goods).

Clause 23 substitutes a new section 122. The new section expands the meaning of **distribute** in sections 123 to 132 so that, in relation to a publication, the term means not only—

- delivering, giving, or offering the publication; but also
- providing access to the publication.

Clause 24(1) substitutes new section 123(1)(c) to (f). The amendment—

- creates in the principal Act a new offence of strict liability relating to importing into New Zealand (including by way of electronic transmission) an objectionable publication (*new paragraph (c)*); and
- rationalises in the principal Act other offences of strict liability relating to objectionable publications, for example, the offence of supplying or distributing an objectionable publication (including by way of exportation from New Zealand by means of electronic transmission) to any other person (*new paragraphs (d) to (f)*).

Clause 24(3) makes a consequential amendment.

Clauses 24(2), 25, 27 and 28 increase maximum penalties for offences against the following sections respectively:

- section 123(1)—offences relating to objectionable publications, for example, supplying or distributing objectionable publications (strict liability);
- section 124(1)—offences in relation to objectionable publications, for example, supplying or distributing objectionable publications (involving knowledge);
- section 127(1)—exhibition or display of objectionable publications to persons under 18 years of age (strict liability);
- section 127(4)—exhibition or display of objectionable publications to persons under 18 years of age (involving knowledge);
- section 129(1)—exhibition or display of objectionable publications in or within view of, or distribution of objectionable publications in, a public place (strict liability);
- section 129(3)—exhibition or display of objectionable publications in or within view of, or distribution of objectionable publications in, a public place (involving knowledge).

The following table sets out:

- the increases in maximum penalties (terms of imprisonment and fines) for offences against those sections; and
- the maximum penalty for the new offence (related to possession of an objectionable publication and involving knowledge) in *new section 131A* (inserted by *clause 29(1)*).

offence against	Strict liability offences			
	individual		body corporate	
	current	new	current	new
section 123(1)	\$5,000	\$10,000	\$15,000	\$30,000
section 127(1)	\$5,000	\$10,000	\$15,000	\$30,000
section 129(1)	\$5,000	\$10,000	\$15,000	\$30,000

offence against	Offences involving knowledge			
	individual		body corporate	
	current	new	current	new
section 124(1)	1 year <i>or</i> \$20,000	10 years*	\$50,000	\$200,000
section 127(4)	1 year <i>or</i> \$20,000	10 years*	\$50,000	\$200,000
section 129(3)	\$5,000	1 year <i>or</i> \$20,000	\$15,000	\$50,000
<i>new section 131A(1)</i>		2 years <i>or</i> \$50,000		\$100,000

*If an enactment provides that a court may sentence an offender to imprisonment but does not prescribe a fine, ordinarily the court can sentence the offender to pay a fine instead of sentencing the offender to imprisonment: Sentencing Act 2002, section 39.

(An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty: Sentencing Act 2002, section 6.)

Clause 25 is analysed with *clause 24(2)*.

Clause 26 inserts a *new section 124A*. The new section creates, for official and other lawful purposes, exemptions and defences to objectionable publications offences in the principal Act. It is similar to the following sections:

- section 131(4) of the principal Act; and
- section 209A of the Customs and Excise Act 1996 (which is proposed to be amended by *clause 41*).

Clauses 27 and 28 are analysed with *clause 24(2)*.

Clause 29(1) inserts a *new section 131A*. The new section creates a new offence. A person commits the new offence if the person—

- has possession of an objectionable publication without lawful authority or excuse; and
- knows, or has reasonable cause to believe, that the publication is an objectionable publication.

The penalty for the offence is stated in the table that is part of the analysis of *clause 24(2)* and associated clauses.

Clause 29(2) consequentially amends section 144(1), which requires the consent of the Attorney-General (or of an authorised delegate or authorised subdelegate) to be obtained before prosecutions for offences against certain sections of the principal Act can be commenced. The amendment inserts a reference to the offence against *new section 131A*.

Clause 30 inserts a *new section 132A*. The new section requires courts, in sentencing or otherwise dealing with an offender for specified objectionable publications offences, to take into account as an aggravating factor the extent (if any) to which any relevant publication is objectionable because it does such things as deal with sexual conduct with or by children, or young persons, or both. The application of the Sentencing Act 2002 (including the aggravating and mitigating factors in section 9 of that Act) is not affected (*new section 132A(4)*).

Clause 31(1) inserts a *new section 141A*. The new section relates to the offences against sections 124(1) and 127(4), and the offence against *new section 131A(1)* (inserted by *clause 29(1)*). The new section makes those offences punishable, in the light of the applicable maximum penalties, on conviction on indictment. *Clause 31(2)* makes a consequential amendment.

Clause 32(1) inserts *new sections 145A to 145C*.

New section 145A provides for extraterritorial jurisdiction for certain offences. This jurisdiction will ensure New Zealand complies with obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by the General Assembly of the United Nations at New York on 25 May 2000 (the **Optional Protocol**). Under *new section 145A(2)*, even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for a relevant offence (as defined in *new section 145A(1)*) that involves child pornography (as so defined) if the person to be charged has been found in New

Zealand and has not been extradited on the grounds that he or she is a New Zealand citizen.

New section 145A(3) makes it clear that other extraterritorial jurisdiction, under provisions of the Crimes Act 1961, is not affected.

New section 145B requires the Attorney-General's consent to be obtained where jurisdiction is claimed under *new section 145A*.

New section 145C(1) deems every relevant offence (as defined in *new section 145A(1)*) that involves child pornography (as so defined) to be an offence described in extradition treaties—

- concluded before the insertion of *new section 145C*; and
- for the time being in force between New Zealand and a foreign country that is a party to the Optional Protocol.

That deeming will ensure New Zealand complies with obligations under the Optional Protocol.

Clause 32(2) makes a consequential amendment to section 101A(2) of the Extradition Act 1999.

Clause 33 amends section 149, which contains regulation-making powers. The amendment adds a power relating to the affixing of labels in accordance with conditions imposed pursuant to *new section 27(4)(a)* (substituted by *clause 9(1)*).

Clauses 34 to 36 are analysed with *clause 14*.

Part 2

Amendments to other Acts

Amendments to Customs and Excise Act 1996

Clause 37 substitutes new definitions of **electronic publication**, **exportation**, **prohibited exports**, and **prohibited imports** in section 2(1) of the Customs and Excise Act 1996.

The definition of **electronic publication** aligns that term with the definition of **publication** in section 2 of the Films, Videos, and Publications Classification Act 1993 (as amended by *clause 3(2)*).

The definition of **exportation** makes clear how an electronic publication may be exported for the purposes of the Customs and Excise Act 1996. (The definition is, in this respect, aligned with the definition in that Act of the term **importation**.)

The new definitions of **prohibited exports** and **prohibited imports** include minor drafting changes to make them more uniform than their predecessors.

Clause 38 substitutes a *new section 54(1)(aa)* of the Customs and Excise Act 1996. The amendment combines related provisions. *New section 54(1)(aa)* prohibits the importation into New Zealand of all objectionable publications and of all other indecent or obscene articles. Currently, section 54(1)(aa) of that Act deals with objectionable *electronic* publications only. The importation into New Zealand of all *other* objectionable publications, and of all other indecent or obscene articles, is currently prohibited by section 54(1)(a) and the first item of the First Schedule of that Act. That item is consequentially repealed by *clause 42*.

Clause 39 substitutes a *new section 56(1) and (1A)* of the Customs and Excise Act 1996. The amendment—

- makes the exportation from New Zealand of objectionable publications (including electronic publications) unlawful; and
- makes those publications prohibited exports under that Act.

Section 209 of the Customs and Excise Act 1996 contains offences in relation to the importation or exportation of prohibited goods (prohibited exports or prohibited imports). *Clause 40(1) and (2)* makes amendments to section 209(1)(a), (b), (d), and (e) of that Act that are consequential on the amendments made to sections 54 and 56 of that Act by *clauses 38 and 39*.

Clause 40(3) inserts a *new section 209(1A) and (1B)* of the Customs and Excise Act 1996. *New section 209(1A)* creates new offences related to the importation or exportation of objectionable publications (as defined in *new section 209(1B)*). *Clause 40(4)* makes a related consequential amendment to section 209(1)(c) and (e) of that Act. *Clause 40(5)* adds to section 209 of that Act *new subsections (5) and (6)*. *New subsection (5)*—

- states penalties for the offence against *new section 209(1A)*; and
- makes it clear that that offence is punishable on conviction on indictment.

New subsection (6) indicates that the offence against *new section 209(1A)* of the Customs and Excise Act 1996 is one for which there is extraterritorial jurisdiction under *new section 145A* of the Films,

Videos, and Publications Classification Act 1993 (inserted by *clause 32(1)*).

Clause 41 amends section 209A of the Customs and Excise Act 1996. That section relates to publications *imported* in the course of official duties. In the light of the amendments made by *clauses 39 and 40(3)*, *clause 41* amends section 209A so that it also deals with publications *exported* in the course of official duties.

Clause 42 effects a consequential repeal related to the amendment made by *clause 38*.

Amendment to Mutual Assistance in Criminal Matters Act 1992

Clause 43 amends the Schedule to the Mutual Assistance in Criminal Matters Act 1992 to ensure—

- that the Schedule refers to the Optional Protocol; and therefore
- that there is compliance with obligations under the Optional Protocol to provide mutual assistance in criminal matters.

Amendments to Summary Proceedings Act 1957

Clause 44 amends the First Schedule of the Summary Proceedings Act 1957 to ensure that the indictable offences introduced by *clauses 31(1) and 40(3)* are indictable offences triable summarily.

Regulatory impact and compliance cost statement

Statement of problem and need for Government action

Of most concern to domestic and foreign law enforcement authorities is the trade in child pornography, particularly via the Internet.

The scale of offending has changed; individuals can now obtain, share, and store thousands of images via Internet usage in a way that was never likely with distribution of hard copy publications.

Current offences are largely based on a commercial producer or supplier or consumer model. However the commercial element is not always central to serious offending. With child pornography in particular there is much more personal trading between individuals.

There is an increase in suspected offences of possession of objectionable material obtained electronically.

There is no offence of exporting objectionable publications. New Zealand is required to enact such an offence to meet its obligations under the Optional Protocol.

The current law does not adequately reflect the changes in the nature and scale of offending. Current maximum penalties do not reflect the seriousness of offending, in particular penalties relating to the making and distribution of child pornography. Unless there is a financial motive, distribution and sharing of objectionable material is not recognised as a significant offence. Possession of objectionable material (no matter what the quantity) is currently treated as a minor offence, for which there is no evidence-gathering power. The Department of Internal Affairs has evidence, including information from overseas, that would be investigated further if search warrants were available for a possession offence.

In addition, the meaning of “objectionable” in the Films, Videos, and Publications Classification Act 1993, which is the legal standard for prohibition, has come under scrutiny in recent Court of Appeal decisions. The Court has clarified the general scope of censorship law, in particular its focus on pornography, violence, and crime. However, there are discrete areas (child nudity and offensive language) where doubts have been raised about the implications of these decisions for the proper approach to classification. Unlike all the other matters listed in section 3(2) automatically deemed to be objectionable, the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct (section 3(2)(d)) is not a criminal offence.

Statement of public policy objectives

The main objectives of the policy proposals are:

- to ensure that penalties for dealing with child pornography and other objectionable material reflect the seriousness of offenders’ behaviour:
- to ensure that enforcement officers have appropriate powers to investigate serious offending:
- to facilitate compliance with New Zealand’s international obligations:
- to maintain, through clear classification criteria, an appropriate balance between freedom of speech and the protection of the community from material that is harmful to society.

*Statement of options for achieving desired objective***Non-regulatory options**

No feasible non-regulatory options have been identified for achieving the objectives.

Regulatory options*Status quo*

The current maximum penalties for objectionable material offences (including child pornography) under the Act are 1 year's jail for supplying, copying or trading objectionable material, and a \$2,000 fine for possessing objectionable material. The definition of "supply" in the Act is "to sell, or deliver by way of hire, or offer for sale or hire". Currently, possession of an objectionable publication is a "strict liability" (without knowledge) offence punishable by a maximum fine of up to \$2,000. A search warrant is not available for this "pure possession" offence.

Section 3(1) of the Act describes as follows the overall legal standard for prohibition: "For the purposes of the Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good".

Under section 3(2)(d), a publication is deemed to be objectionable if it "promotes or supports, or tends to promote or support, ... the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct".

Maintaining the status quo is not appropriate. It would still leave some doubt about the proper approach to the classification of nude pictures of children and offensive language. The current location of section 3(2)(d) is inconsistent with the harms-based approach to censorship law in New Zealand. The penalties for dealing with objectionable material would not reflect the seriousness of offending. Furthermore, it would not ensure that enforcement officers have appropriate powers to investigate serious offending.

Alternative option on definition of "objectionable"

Section 3 of the Act could be amended to remove the current requirement that material must relate to "matters such as sex, horror,

crime, cruelty, or violence”. The removal of the subject matter “gateway” in this option would extend the laws wider than is necessary to deal with the areas of uncertainty and potentially create more uncertainty in the law. It was considered that this option could open up the censorship laws as a potential vehicle to suppress the dissemination of information and opinion, and therefore this option was discarded.

Preferred option

The preferred options are:

To strengthen the enforcement and penal provisions of the Act through:

- the creation of a new offence of possession of objectionable material (including child pornography) with a search warrant available:
- increasing the maximum penalties for offences relating to objectionable material (including child pornography) to 10 years’ imprisonment for the trading or commercial offences and 2 years’ for the new possession offence:
- child pornography to be prescribed as an aggravating factor for sentencing purposes:
- the concept of “supply” to be expanded for the trading or commercial offences to include the distribution or giving of an objectionable publication to any person by any means:
- extension of the offences under the Act to include importing and exporting objectionable material for the purposes of supply or distribution punishable by a maximum penalty of 10 years’ imprisonment:
- supplementary amendments to the Customs and Excise Act 1996 to make both importing and exporting of objectionable material an offence with a maximum penalty of 2 years’ imprisonment.

To retain the essential features of the current definition of “objectionable” with discrete amendments:

- (a) to clarify that child nudity can be regarded as a “matter of sex” for classification purposes:
- (b) to clarify that age restrictions can be imposed for offensive language:

- (c) to amend section 3(2) and (3) of the Act to make the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct a factor that must be given particular weight in reaching a classification decision.

No other options were identified that could feasibly achieve the policy objectives.

Statement of net benefit of proposal

Benefits

The benefits of these proposals are mainly derived by the community at large and by the Government. These proposals will create a robust penalty regime to adequately address the gravity and extent of offending in relation to objectionable material (particularly child pornography). They will also assist enforcement agencies' ability to investigate and therefore prosecute persons dealing with objectionable material. The changes recognise the harm that is done to society by the proliferation of objectionable material and the community's interest in restricting the trade in this harmful material. The proposals will also help to fulfil New Zealand's international obligations and reputation by being seen to co-operate fully in global attempts to combat trade in objectionable material (particularly child pornography). By clarifying the meaning of "objectionable", the measures help to further clarify the scope of censorship laws. This is of benefit to decision-makers, distributors and retailers, and members of the public. The proposals also maintain an appropriate balance between freedom of speech and the protection of the community from material that is harmful to society.

Costs

The amendments to existing offence provisions and enforcement powers are expected to result in some additional costs for enforcement agencies and the criminal justice system. An overall increase in the number of detected offences and consequent prosecutions is likely. It is also expected that the increase in penalty levels will see a higher rate of defended hearings, and more offenders sentenced to imprisonment. While the additional cases could impact on court services, correction services, legal aid services, and prosecution and enforcement agencies, the financial implications are not expected to be significant, and therefore are projected by consulted agencies to be covered by existing baselines.

Consultation

The following Government agencies were consulted: the Ministries of Culture and Heritage, Education, Social Development, Foreign Affairs and Trade, Economic Development, Pacific Island Affairs, Women's Affairs, Youth Affairs, and Te Puni Kokiri; the Departments of Internal Affairs, Child, Youth and Family Services, Corrections, Prime Minister and Cabinet; Department for Courts, Parliamentary Counsel Office, Crown Law Office, New Zealand Police, New Zealand Customs Service, and the Treasury.

In addition, the following other agencies and interested parties were consulted: Legal Services Agency, Office of Film and Literature Classification, Human Rights Commission, and Film and Literature Labelling Body.

Hon Phil Goff

Films, Videos, and Publications Classification Amendment Bill

Government Bill

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<p>31 New section 141A inserted 141A Offences punishable on conviction on indictment</p> <p>32 New sections 145A to 145C inserted 145A Extraterritorial jurisdiction for certain offences as required by Optional Protocol 145B Attorney-General's consent required where jurisdiction claimed under section 145A 145C Offences deemed to be included in extradition treaties</p> <p>33 Regulations</p> <p>34 Decisions under Indecent Publications Act 1963</p> <p>35 Classification decisions under Video Recordings Act 1987</p> <p>36 Classification decisions under Films Act 1983</p>	<p style="text-align: center;">Part 2 Amendments to other Acts</p> <p style="text-align: center;"><i>Amendments to Customs and Excise Act 1996</i></p> <p>37 Interpretation</p> <p>38 Prohibited imports</p> <p>39 Prohibited exports</p> <p>40 Offences in relation to importation or exportation of prohibited goods</p> <p>41 Publications imported in course of official duties</p> <p>42 First Schedule amended</p> <p style="text-align: center;"><i>Amendment to Mutual Assistance in Criminal Matters Act 1992</i></p> <p>43 Schedule amended to refer to Optional Protocol</p> <p style="text-align: center;"><i>Amendments to Summary Proceedings Act 1957</i></p> <p>44 Part II of First Schedule amended</p>
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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Films, Videos, and Publications Classification Amendment Act **2003**.
- (2) In this Act, the Films, Videos, and Publications Classification Act 1993¹ is called “the principal Act”.

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¹ 1993 No 94

2 Commencement

- (1) The following sections (which relate to the issue under the principal Act of labels for restricted publications (other than films)) come into force on the day that is 3 months after the date on which this Act receives the Royal assent:
- (a) **section 3(1)**;
- (b) **sections 9 to 11**;
- (c) **sections 15 and 16**.
- (2) The rest of this Act comes into force on the day after the date on which it receives the Royal assent.

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Part 1 Amendments to principal Act

3 Interpretation

- (1) The definition of **label** in section 2 of the principal Act is amended by inserting, after the word “film”, the words “or other publication”. 5
- (2) Section 2 of the principal Act is amended by omitting paragraph (c) of the definition of **publication**, and substituting the following paragraphs:
- “(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: 10
- “(d) a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words”. 15

4 Meaning of objectionable 20

- (1) Section 3 of the principal Act is amended by inserting, after subsection (1), the following subsections:
- “(1A) Without limiting subsection (1), a publication deals with a matter such as sex for the purposes of that subsection if— 25
- “(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 reasonably capable of being regarded as sexual in nature.
- “(1B) **Subsection (1A)** is for the avoidance of doubt.” 30
- (2) Section 3(2)(d) of the principal Act is repealed.
- (3) Section 3(3)(a) of the principal Act is amended by inserting, after subparagraph (ii), the following subparagraph:
- “(ia) the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct.”. 35

- 5 Existing classifications conclusive unless successfully challenged**
- (1) In any proceedings after the commencement of **section 4**, section 41(1) of the principal Act (which provides that certain decisions are conclusive evidence of certain matters) applies to a subsisting decision of the Classification Office or of the Board that was made before that commencement in respect of any publication. 5
- (2) However, a person charged with an offence against the principal Act or any other enactment may challenge under this section a decision to which **subsection (1)** applies. 10
- (3) On a request made by or on behalf of a person so charged who wishes to challenge a decision under this section, the court must refer the decision to the Classification Office for reconsideration, or to the Board where the decision to be reconsidered is a decision of the Board. 15
- (4) A reference under **subsection (3)** must be treated as if it were a reference under section 41(3) of the principal Act.
- (5) This section does not affect any rights of reconsideration, review, or appeal under any of sections 41, 42, 47, 58, and 70 of the principal Act. 20
- 6 Submission of publications by others**
Section 13(1) of the principal Act is amended by inserting, after paragraph (a), the following paragraph:
“(ab) the Commissioner of Police:”. 25
- 7 New section 19 substituted**
- (1) The principal Act is amended by repealing section 19, and substituting the following section:
- “19 **Notification of submission**
- “(1) This section applies if a person (the **submitter**) submits a publication to the Classification Office under section 13. 30
- “(2) The Chief Censor must immediately determine the notice of the submission that is to be given to any person (other than the submitter) who the Chief Censor reasonably believes should be given notice of the submission by reason of that person’s interest in the publication (being an interest as owner, maker, distributor, or publisher of the publication). 35

- “(3) The Chief Censor may, before the publication has been classified by the Classification Office, determine—
- “(a) that notice of the submission is to be given to any other specified person or class of persons, in a manner and within a time the Chief Censor specifies: 5
 - “(b) that the fact that the submission has been made is to be publicised, in a manner and within a time the Chief Censor specifies.
- “(4) Having determined under **subsection (2) or subsection (3)** that notice is to be given or that a fact is to be publicised, unless **subsection (5)** applies the Chief Censor must direct the submitter to give that notice or to publicise that fact. 10
- “(5) The Chief Censor must arrange for the Classification Office to give that notice or to publicise that fact if satisfied that giving that notice or publicising that fact would place an undue burden on the submitter.” 15
- (2) Section 20(1)(c) of the principal Act is consequentially amended by omitting the words “paragraph (a) or paragraph (b)(i) of section 19 of this Act”, and substituting the words “**section 19(4) or (5)**”. 20
- (3) A direction given under section 19(a) or (b) (as it read immediately before the commencement of this section) must be treated as if it were given under **section 19(4)** (as substituted by this section).
- 8 Examination and classification** 25
- (1) Section 23(2)(c)(i) is amended by inserting, after the words “a specified age”, the words “not exceeding 18 years”.
- (2) Section 23(3) is amended by omitting the words “Without limiting the power of the Classification Office to classify a publication as a restricted publication, a”, and substituting the word “A”. 30
- (3) Section 23 of the principal Act is amended by adding the following subsections:
- “(4) A publication that would otherwise be classified as unrestricted may be classified as a restricted publication under subsection (2)(c)(i) if the publication contains offensive language to such an extent or degree that the availability of the publication would be likely, if not restricted to persons who 35

have attained a specified age, to be harmful to persons under that age.

- “(5) In determining whether to classify a publication as a restricted publication under **subsection (4)**, the Classification Office must consider the matters specified in paragraphs (a) to (f) of section 3(4). 5
- “(6) **Subsections (3) and (4)** do not limit the Classification Office’s power to classify a publication as a restricted publication.”

9 Conditions relating to display of restricted publications

- (1) Section 27(4) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph: 10
- “(a) that, when the publication is on public display, the classification given to the publication must be shown, by way of a label issued in accordance with a direction under **section 36A(2)** and affixed in a manner specified by the Classification Office, on— 15
- “(i) the publication; or
- “(ii) a package in which the publication is kept; or
- “(iii) both:”.
- (2) A condition imposed pursuant to section 27(4)(a) of the principal Act (as it read immediately before the commencement of this section, and in **subsection (3)(a)** called the **former provision**) must, after the commencement of this section, be treated as having been imposed pursuant to section 27(4)(a) (as substituted by **subsection (1)** of this section). 20 25
- (3) However, a condition to which **subsection (2)** applies must be treated as requiring the classification given to the publication concerned to be shown,—
- (a) if the Classification Office specified a manner under the former provision, in that manner; and 30
- (b) in every other case, in any manner the person who publicly displays the publication concerned thinks fit.

10 New section 36A inserted

The principal Act is amended by inserting, after section 36, the following section: 35

- “36A Issue of labels in respect of other publications that are classified as restricted publications**
- “(1) This subsection applies to a publication (other than a film) if the Classification Office has—
- “(a) examined the publication and classified it as a restricted publication; and
 - “(b) imposed pursuant to **section 27(4)(a)** a condition requiring the classification given to the publication to be shown when it is on public display.
- “(2) If **subsection (1)** applies to a publication, the Classification Office must direct the labelling body to issue in respect of the publication a label that—
- “(a) specifies the classification given to the publication; and
 - “(b) indicates that the label is affixed for the purpose of complying with a condition (imposed pursuant to **section 27(4)(a)**) in respect of the public display of the publication.
- “(3) Where, under **subsection (2)**, or following an order under **section 55(1)(da)**, the Classification Office directs the labelling body to issue a label in respect of a publication, each of the following things is, for the purposes of this Act, deemed to be cancelled:
- “(a) any label previously issued in respect of the publication by the labelling body; and
 - “(b) any previous direction by the Classification Office to the labelling body to issue a label in respect of the publication.”
- 11 Decisions of Classification Office**
- Section 38(2) of the principal Act is amended by repealing paragraph (d), and substituting the following paragraphs:
- “(d) in the case of a film, the terms of any direction given to the labelling body under section 36 to issue a label in respect of that film:
 - “(e) in the case of a publication (other than a film) that is the subject of a condition imposed pursuant to **section 27(4)(a)**, the terms of any direction given to the labelling body under **section 36A(2)** to issue a label in respect of that publication.”

- 12 Decisions to be conclusive evidence**
Section 41(2) of the principal Act is amended by omitting the words “recorded in any list produced in accordance with section 40 of this Act”, and substituting the words “, in accordance with section 40(3), first made open to inspection by the public in a list produced in accordance with section 40(1)”. 5
- 13 Reconsideration of publications**
Section 42(1) and (2) of the principal Act is amended by omitting the words “recorded in any list produced in accordance with section 40 of this Act” in both places where they occur, and substituting in each case the words “, in accordance with section 40(3), first made open to inspection by the public in a list produced in accordance with section 40(1)”. 10
- 14 Applications for review**
Section 48(1) of the principal Act is amended by repealing paragraph (b), and substituting the following paragraph:
“(b) be lodged with the Secretary before the deadline, which is the end of ordinary office hours on the 30th working day after the day on which the relevant decision of the Classification Office is, in accordance with section 40(3), first made open to inspection by the public in a list produced in accordance with section 40(1); and”. 15 20
- 15 Decision of Board**
Section 55(1) of the principal Act is amended by inserting, after paragraph (d), the following paragraph:
“(da) where the review is in respect of a publication (other than a film) and the Board imposes a condition pursuant to **section 27(4)(a)**, order the Classification Office to direct the labelling body, in accordance with **section 36A(2)**, to issue a label in respect of the publication; and”. 25 30
- 16 Functions of labelling body**
Section 71 of the principal Act is amended by inserting, after paragraph (b), the following paragraph:
“(ba) to issue, at the direction of the Classification Office under section 36 or **section 36A(2)**, and in accordance 35

with regulations made under this Act, labels in respect of the following publications:

“(i) a film to which section 36(1) or (2) applies:

“(ii) a publication (other than a film) that is the subject of a condition imposed pursuant to **section 27(4)(a)**.”.

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17 Membership

(1) Section 93(1) of the principal Act is amended by omitting the expression “9”, and substituting the expression “6”.

(2) Every member of the Board whose term of office has, on the commencement of this section, not expired,— 10

(a) continues as a member of the Board until the expiry of his or her term of office, unless he or she sooner dies or vacates office under section 96 of the principal Act; and

(b) in accordance with section 95 of the principal Act, continues as a member of the Board after the expiry of his or her term of office, by virtue of the appointment for the term that has expired, until an event specified in section 95(a) to (c) of that Act, unless he or she sooner dies or vacates office under section 96 of that Act. 15 20

(3) **Subsection (2)** overrides section 93 of the principal Act (as amended by **subsection (1)** of this section).

18 Continuation in office after term expires

Section 95(b) of the principal Act is amended by omitting the word “reappointed”, and substituting the word “appointed”. 25

19 Meetings of Board

Section 100 of the principal Act is amended by repealing subsection (2), and substituting the following subsection:

“(2) Every review must be conducted by the President and at least 3 other members of the Board.” 30

20 Section 101 repealed

(1) Section 101 of the principal Act is repealed.

(2) Section 100(3) of the principal Act is consequentially amended by omitting the words “of this section or under section 101 of this Act”. 35

21 New sections 109 to 109C substituted

(1) The principal Act is amended by repealing section 109, and substituting the following sections:

**“109 Search warrants for offences against specified sections
(other than section 131A) of this Act**

5

A District Court Judge, Justice, or Community Magistrate, or a Registrar (not being a member of the police) may, on an application in writing made on oath, issue a search warrant if satisfied that there are reasonable grounds for believing that there is in or on any place or thing—

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“(a) any objectionable publication that there are reasonable grounds to believe is being kept for the purpose of being so dealt with as to constitute an offence against section 123 or section 124 or section 127 or section 129; or

“(b) any thing that there are reasonable grounds to believe will be evidence of the commission of an offence of that kind; or

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“(c) any thing that there are reasonable grounds to believe is intended to be used for the purpose of committing an offence of that kind.

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**“109A Search warrants from District Court Judges for
offences against section 131A**

“(1) A District Court Judge may, on an application in writing made on oath, issue a search warrant if satisfied—

“(a) that there are reasonable grounds for believing that there is in or on any place or thing—

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“(i) an objectionable publication that there are reasonable grounds to believe is being so dealt with as to constitute an offence against **section 131A** (offences relating to possession of objectionable publications and involving knowledge); or

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“(ii) any thing that there are reasonable grounds to believe will be evidence of the commission of an offence against **section 131A**; and

“(b) that in all the circumstances it is reasonable to do so.

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“(2) In considering whether to issue a warrant under this section, the District Court Judge must have regard to—

“(a) the nature and seriousness of the alleged offending to which the application relates; and

- “(b) any information provided by the applicant about the importance, to the investigation of the offence, of the issue of a warrant; and
- “(c) any other matter the Judge considers relevant.

“109B **Search warrants from Registrars, etc, for offences against section 131A** 5

A Justice, Community Magistrate, or Registrar (not being a member of the police) may, on an application in writing made on oath, issue a search warrant if satisfied—

- “(a) that, in the particular case,— 10
 - “(i) that all reasonable efforts have been made to obtain a warrant under **section 109A**; but
 - “(ii) that no District Court Judge is available to deal with an application under **section 109A**; and
 - “(iii) that delaying a search until a warrant under **section 109A** could be obtained would create a real risk that the purpose of that search would be frustrated; and 15
- “(b) that there are reasonable grounds for believing that there is in or on any place or thing— 20
 - “(i) an objectionable publication that there are reasonable grounds to believe is being so dealt with as to constitute an offence against **section 131A** (offences relating to possession of objectionable publications and involving knowledge); or 25
 - “(ii) any thing that there are reasonable grounds to believe will be evidence of the commission of an offence against **section 131A**.

“109C **Who may apply for search warrants**

An application under **section 109** or **section 109A** or **section 109B** may be made by an Inspector or a member of the police.” 30

- (2) Section 2 of the principal Act is amended by omitting from the definition of **search warrant** the words “of this Act”, and substituting the words “or **section 109A** or **section 109B**”.
- (3) Section 111(2) of the principal Act is consequentially amended by repealing paragraph (d), and substituting the following paragraph: 35
 - “(d) to search for and seize anything referred to—

- “(i) in **section 109(a) to (c)**, if the warrant is issued under **section 109**; or
- “(ii) in **section 109A(1)(a)(i) or (ii)**, if the warrant is issued under **section 109A**; or
- “(iii) in **section 109B(b)(i) or (ii)**, if the warrant is issued under **section 109B**.” 5
- (4) Section 118(5) of the principal Act is consequentially amended by omitting the words “of this Act”, and substituting the words “or **section 109A or section 109B**”.
- (5) Section 198 of the Summary Proceedings Act 1957 is amended by inserting, after subsection (1), the following subsection: 10
- “(1A) Despite subsection (1), no search warrant may be issued under this section in respect of an offence against a provision of the Films, Videos, and Publications Classification Act 1993.” 15
- 22 New section 118A inserted**
- The principal Act is amended by inserting, after section 118, the following section:
- “118A Application of Customs and Excise Act 1996”** 20
- “(1) Sections 137, 139, 140, 143, 144, 148, 149B, 152, and 165 to 167 of the Customs and Excise Act 1996 apply in relation to offences against this Act concerning the importation or exportation of objectionable publications to the same extent as those sections apply to offences against section 209 of the Customs and Excise Act 1996 concerning the importation or exportation of objectionable publications. 25
- “(2) A Customs officer may arrest a person without warrant in accordance with section 174(1) of the Customs and Excise Act 1996, as if the person were suspected of an offence against section 209 of that Act, if the Customs officer has reasonable cause to suspect that the person has committed an offence against section 124(1) of this Act involving— 30
- “(a) the importation into New Zealand of an objectionable publication for the purposes of supply or distribution; or 35
- “(b) the supply or distribution, by way of exportation from New Zealand, of an objectionable publication.
- “(3) Section 174(3) and (4) of the Customs and Excise Act 1996 applies to an arrest by a Customs officer under **subsection (2)**.

- “(4) Nothing in this section limits the application of any provisions of the Customs and Excise Act 1996 that confer powers (for example, powers relating to prohibited goods).”
- 23 New section 122 substituted** 5
The principal Act is amended by repealing section 122, and substituting the following section:
- “122 **Meaning of distribute in sections 123 to 132**
In sections 123 to 132, unless the context otherwise requires, **distribute**, in relation to a publication, means— 10
“(a) to deliver, give, or offer the publication; or
“(b) to provide access to the publication.”
- 24 Offences of strict liability relating to objectionable publications**
- (1) Section 123(1) of the principal Act is amended by omitting paragraphs (c) to (f), and substituting the following paragraphs: 15
“(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 20
“(e) has in that person’s possession, for the purposes of supply or distribution to any other person, an objectionable publication; or 25
“(f) in expectation of payment or otherwise for gain, or by way of advertisement, displays or exhibits an objectionable publication to any other person.”
- (2) Section 123 of the principal Act is amended by repealing subsection (2), and substituting the following subsection: 30
“(2) Every person who commits an offence against subsection (1) is liable,—
“(a) in the case of an individual, to a fine not exceeding \$10,000;
“(b) in the case of a body corporate, to a fine not exceeding \$30,000.” 35

- (3) Section 123(4) of the principal Act is consequentially amended by repealing paragraphs (a) and (b), and substituting the following paragraphs:
- “(a) supplied (within the meaning of that term in section 2) for the purposes of any of **paragraphs (b) to (e)** of subsection (1); or 5
 - “(b) distributed (within the meaning of that term in **section 122**) for the purposes of any of **paragraphs (b) to (e)** of subsection (1); or
 - “(c) imported into New Zealand for the purposes of **paragraph (c)** of subsection (1),—”. 10
- 25 Offences involving knowledge in relation to objectionable publications**
- Section 124 of the principal Act is amended by repealing subsection (2), and substituting the following subsection: 15
- “(2) Every person who commits an offence against subsection (1) is liable,—
- “(a) in the case of an individual, to imprisonment for a term not exceeding 10 years:
 - “(b) in the case of a body corporate, to a fine not exceeding \$200,000.” 20
- 26 New section 124A inserted**
- The principal Act is amended by inserting, after section 124, the following section:
- “124A **Where distribution, importation, etc, not an offence** 25
- “(1) Nothing in section 123 or section 124 makes it an offence for a person referred to in any of paragraphs (a) to (l) of section 131(4) to do any or all of the following things for the purpose of, and in connection with, his or her official duties:
- “(a) import a publication into New Zealand (whether with the involvement of an overseas official or not): 30
 - “(b) export a publication from New Zealand to an overseas official:
 - “(c) distribute a publication to a person referred to in any of paragraphs (a) to (l) of section 131(4) if that person takes possession of the publication for the purpose of, and in connection with, his or her official duties: 35

- “(d) make a copy of a publication for the purposes of distribution of the kind specified in **paragraph (c)**:
“(e) be in possession of a publication for the purposes of distribution of the kind specified in **paragraph (c)**.
- “(2) In **subsection (1)**, **overseas official** means a person in a country other than New Zealand who holds an office in that country that corresponds to an office referred to in section 131(4), and who is exercising or performing the duties, functions, or powers of that office. 5
- “(3) This subsection applies to a charge under section 123 or section 124 that the defendant— 10
“(a) distributed a publication; or
“(b) made a copy of a publication for the purposes of distribution to any other person; or
“(c) possessed a publication for the purposes of distribution to any other person. 15
- “(4) It is a defence to a charge to which **subsection (3)** applies if the defendant proves that the act to which that charge relates was done, in good faith, in accordance with any of paragraphs (a) to (f) of section 131(5).” 20
- 27 Exhibition to persons under 18**
- (1) Section 127 of the principal Act is amended by repealing subsection (2), and substituting the following subsection:
- “(2) Every person who commits an offence against subsection (1) is liable,— 25
“(a) in the case of an individual, to a fine not exceeding \$10,000;
“(b) in the case of a body corporate, to a fine not exceeding \$30,000.”
- (2) Section 127 of the principal Act is amended by repealing subsection (5), and substituting the following subsection: 30
- “(5) Every person who commits an offence against subsection (4) is liable,—
“(a) in the case of an individual, to imprisonment for a term not exceeding 10 years: 35
“(b) in the case of a body corporate, to a fine not exceeding \$200,000.”

28 Offences in public place

(1) Section 129 of the principal Act is amended by inserting, after subsection (2), the following subsection:

“(2A) Every person who commits an offence against subsection (1) is liable,— 5

“(a) in the case of an individual, to a fine not exceeding \$10,000:

“(b) in the case of a body corporate, to a fine not exceeding \$30,000.”

(2) Section 129 of the principal Act is amended by repealing subsection (4), and substituting the following subsection: 10

“(4) Every person who commits an offence against subsection (3) is liable,—

“(a) in the case of an individual, to imprisonment for a term not exceeding 1 year or to a fine not exceeding \$20,000: 15

“(b) in the case of a body corporate, to a fine not exceeding \$50,000.”

29 New section 131A inserted

(1) The principal Act is amended by inserting, after section 131, the following section: 20

“131A Offences relating to possession of objectionable publications and involving knowledge

“(1) Every person commits an offence who does any act that constitutes an offence against section 131(1), knowing or having reasonable cause to believe that the publication is objectionable. 25

“(2) Every person who commits an offence against **subsection (1)** is liable,—

“(a) in the case of an individual, to imprisonment for a term not exceeding 2 years or to a fine not exceeding \$50,000: 30

“(b) in the case of a body corporate, to a fine not exceeding \$100,000.”

(2) Section 144(1) of the principal Act is consequentially amended by inserting, after the expression “section 131”, the words “or **section 131A**”. 35

30 New section 132A inserted

The principal Act is amended by inserting, after section 132, the following section:

- “132A **Aggravating factor to be taken into account in sentencing, etc, for certain publications offences** 5
- “(1) This section applies to an offence if it is committed after the commencement of this section and it is an offence against section 123, section 124, section 127, section 129, section 131, or **section 131A**.
- “(2) In sentencing or otherwise dealing with an offender for the offence, the court must take into account as an aggravating factor the extent to which any publication that was the subject of the offence is objectionable because it does any or all of the following: 10
- “(a) promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes: 15
- “(b) describes, depicts, or otherwise deals with sexual conduct with or by children, or young persons, or both:
- “(c) exploits the nudity of children, or young persons, or both. 20
- “(3) In deciding for the purposes of **subsection (2)** to what extent (if any) a publication is objectionable because it does any or all of the things specified in **subsection (2)(a) to (c)**, the court must have regard,— 25
- “(a) if there is a subsisting decision of the Classification Office, or of the Board, to the reasons for the decision given by the Classification Office, under section 38, or by the Board, under section 55; and
- “(b) if the publication has been referred to the Classification Office under section 29(1) or section 41(3), to the report provided by the Classification Office to the court under section 30. 30
- “(4) Nothing in this section affects the application of the Sentencing Act 2002 in respect of the offence.” 35

31 New section 141A inserted

- (1) The principal Act is amended by inserting, after section 141, the following section:

“141A Offences punishable on conviction on indictment

Every offence against any of the following sections of this Act is punishable on conviction on indictment:

“(a) section 124(1) (offences involving knowledge in relation to objectionable publications): 5

“(b) section 127(4) (offence of exhibiting or displaying objectionable publication to person under age of 18 years knowing or having reasonable cause to believe that publication is objectionable):

“(c) **section 131A(1)** (offences relating to possession of objectionable publications and involving knowledge).” 10

(2) Section 142 of the principal Act is consequentially amended by omitting the words “shall be”, and substituting the words “and that is not an offence against a section specified in **section 141A(a) to (c)** is”. 15

32 New sections 145A to 145C inserted

(1) The principal Act is amended by inserting, after section 145, the following sections:

“145A Extraterritorial jurisdiction for certain offences as required by Optional Protocol 20

“(1) In this section and **sections 145B and 145C**,—

“**child pornography** means—

“(a) a representation, by any means, of a person who is or appears to be under 18 years of age engaged in real or simulated explicit sexual activities; or 25

“(b) a representation of the sexual parts of a person of that kind for primarily sexual purposes

“**Optional Protocol** means the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by the General Assembly of the United Nations at New York on 25 May 2000 30

“**relevant offence** means an offence against—

“(a) section 124(1); or

“(b) section 127(4); or 35

“(c) section 129(3); or

“(d) **section 131A(1)**; or

“(e) **section 209(1A)** of the Customs and Excise Act 1996.

- “(2) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for a relevant offence that involves child pornography if the person to be charged—
- “(a) has been found in New Zealand; and 5
 - “(b) has not been extradited on the grounds that he or she is a New Zealand citizen.
- “(3) This section does not affect the application of any section referred to in **paragraphs (a) to (e)** of the definition of **relevant offence** in **subsection (1)** in respect of— 10
- “(a) acts that occurred wholly within New Zealand; or
 - “(b) an offence that, under section 7 of the Crimes Act 1961, is deemed to be committed in New Zealand; or
 - “(c) acts to which section 8 of that Act applies; or
 - “(d) acts that, under section 8A of that Act, are deemed to have taken place within New Zealand. 15
- “145B **Attorney-General’s consent required where jurisdiction claimed under section 145A**
- “(1) Proceedings for a relevant offence cannot be brought in a New Zealand court against a person without the Attorney-General’s consent, if jurisdiction over the person is claimed by virtue of **section 145A**. 20
- “(2) A person over whom jurisdiction is claimed by virtue of **section 145A** may be arrested for a relevant offence, or a warrant for the person’s arrest for the offence may be issued and executed, and the person may be remanded in custody or on bail, even though the Attorney-General’s consent to the bringing of proceedings against the person has not been obtained. 25
- “145C **Offences deemed to be included in extradition treaties** 30
- “(1) For the purposes of the Extradition Act 1999 and any Order in Council in force under section 15 or section 104 of that Act, every relevant offence that involves child pornography is deemed to be an offence described in any extradition treaty—
- “(a) concluded before the commencement of **section 32 of the Films, Videos, and Publications Amendment Act 2003**; and 35

- “(b) for the time being in force between New Zealand and any foreign country that is a party to the Optional Protocol.
- “(2) A person whose surrender is sought from New Zealand in respect of an act that amounts to an offence deemed by **subsection (1)** to be an offence described in an extradition treaty is liable to be surrendered in accordance with the Extradition Act 1999 and the applicable extradition treaty, whether the act occurred before or after the commencement referred to in **subsection (1)(a)**. 5 10
- “(3) However, **subsection (2)** does not apply in respect of an act that, had it occurred within the jurisdiction of New Zealand, would not, at the time that it occurred, have constituted an offence under New Zealand law.
- “(4) A certificate given and signed by the Minister of Foreign Affairs and Trade that a foreign country is a party to the Optional Protocol is, in the absence of proof to the contrary, sufficient evidence of that fact. 15
- “(5) For the purposes of this section, **child pornography**, **Optional Protocol**, and **relevant offence** have the meanings given to them by **section 145A(1)**, and **foreign country** includes a territory— 20
- “(a) for whose international relations the Government of a foreign country is responsible; and
- “(b) to which the extradition treaty and the Optional protocol extend.” 25
- (2) Section 101A(2) of the Extradition Act 1999 is amended by adding the following paragraph:
- “(i) **section 145C** of the Films, Videos, and Publications Classification Act 1993.” 30

33 Regulations

Section 149 of the principal Act is amended by inserting, after subparagraph (i), the following subparagraph:

- “(ia) the affixing of such labels, in accordance with the relevant condition imposed pursuant to **section 27(4)(a)**, to publications (other than films) that are classified as restricted publications:” 35

- 34 Decisions under Indecent Publications Act 1963**
Section 152(4) of the principal Act is amended by omitting the words “recorded in any list produced in accordance with section 40 of this Act”, and substituting the words “in accordance with section 40(3), first made open to inspection by the public in a list produced in accordance with section 40(1)”. 5
- 35 Classification decisions under Video Recordings Act 1987**
Section 161(5) of the principal Act is amended by omitting the words “recorded in any list produced in accordance with section 40 of this Act”, and substituting the words “in accordance with section 40(3), first made open to inspection by the public in a list produced in accordance with section 40(1)”. 10
- 36 Classification decisions under Films Act 1983**
Section 168(5) of the principal Act is amended by omitting the words “recorded in any list produced in accordance with section 40 of this Act”, and substituting the words “in accordance with section 40(3), first made open to inspection by the public in a list produced in accordance with section 40(1)”. 15

Part 2

Amendments to other Acts

Amendments to Customs and Excise Act 1996

- 37 Interpretation**
Section 2(1) of the Customs and Excise Act 1996 is amended by omitting the definitions of **electronic publication**, **exportation**, **prohibited exports**, and **prohibited imports**, and substituting, in their appropriate alphabetical order, the following definitions: 25
- “**electronic publication** means a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words 30
- “**exportation**,— 35

“(a) except where otherwise expressly provided, means any shipment in any craft for transportation to a point outside New Zealand; and

“(b) in relation to an electronic publication referred to in **section 56(1)(a)**, includes the sending of the electronic publication from New Zealand by any means (other than by broadcasting) to a point outside New Zealand

“**prohibited exports** means goods the exportation of which is prohibited, whether conditionally or unconditionally, by or under section 56

“**prohibited imports** means goods the importation of which is prohibited, whether conditionally or unconditionally, by or under section 54”.

38 Prohibited imports

Section 54(1) of the Customs and Excise Act 1996 is amended by repealing paragraph (aa), and substituting the following paragraph:

“(aa) all publications as defined in section 2 of the Films, Videos, and Publications Classification Act 1993 that are objectionable within the meaning of that Act in the hands of all persons and for all purposes; and all other indecent or obscene articles; or”.

39 Prohibited exports

Section 56 of the Customs and Excise Act 1996 is amended by repealing subsection (1), and substituting the following subsections:

“(1) It is unlawful to export from New Zealand—

“(a) all publications as defined in section 2 of the Films, Videos, and Publications Classification Act 1993 that are objectionable within the meaning of that Act in the hands of all persons and for all purposes; and

“(b) goods the exportation of which is prohibited by an order under subsection (2).

“(1A) Electronic publications the exportation of which is prohibited by **subsection (1)(a)** must be treated as if they were goods for the purposes of this Act (except for section 12 of the Goods and Services Tax Act 1985 which is deemed by section 1(3) of that Act to be part of this Act).”

40 Offences in relation to importation or exportation of prohibited goods

- (1) Section 209(1)(a), (d), and (e) of the Customs and Excise Act 1996 is amended by omitting the words “under section 54 of this Act” in each place where they occur, and substituting in each case the words “by or under section 54”. 5
- (2) Section 209(1)(b) of the Customs and Excise Act 1996 is amended by omitting the words “an Order in Council made under section 56(2) of this Act”, and substituting the words “or under section 56”. 10
- (3) Section 209 of the Customs and Excise Act 1996 is amended by inserting, after subsection (1), the following subsections:
- “(1A) Every person commits an offence who does any act referred to in paragraph (c) or paragraph (e) of subsection (1) in respect of an objectionable publication. 15
- “(1B) In this section, **objectionable publication** means, as the case requires, a publication as defined in section 2 of the Films, Videos, and Publications Classification Act 1993—
- “(a) the importation of which is prohibited by or under section 54; or 20
- “(b) the exportation of which is prohibited by or under section 56.”
- (4) Section 209(1)(c) and (e) of the Customs and Excise Act 1996 is amended by inserting, after the word “goods” in each place where it occurs, the words “(other than objectionable publications)”. 25
- (5) Section 209 of the Customs and Excise Act 1996 is amended by adding the following subsections:
- “(5) Every person who commits an offence against **subsection (1A)** is liable on conviction on indictment,— 30
- “(a) in the case of an individual, to imprisonment for a term not exceeding 2 years; or
- “(b) in the case of a body corporate, to a fine not exceeding \$100,000.
- “(6) An offence against **subsection (1A)** is a **relevant offence** as defined in **section 145A(1)** of the Films, Videos, and Publications Classification Act 1993 (which relates to extraterritorial jurisdiction).” 35

41 Publications imported in course of official duties

- (1) The heading to section 209A of the Customs and Excise Act 1996 is amended by inserting, after the word “**imported**”, the words “**or exported**”.
- (2) Section 209A of the Customs and Excise Act 1996 is amended by repealing subsection (1), and substituting the following subsection:
 - “(1) Nothing in section 209 makes it an offence for a New Zealand official to do either or both of the following things for the purpose of, and in connection with, his or her official duties:
 - “(a) import a publication (whether with the involvement of an overseas official or not):
 - “(b) export a publication (for example, an electronic publication) to an overseas official.”

42 First Schedule amended

The First Schedule of the Customs and Excise Act 1996 is amended by repealing the first item.

Amendment to Mutual Assistance in Criminal Matters Act 1992

43 Schedule amended to refer to Optional Protocol

The Schedule of the Mutual Assistance in Criminal Matters Act 1992 is amended by inserting, in its appropriate numerical order, the following row:

29	The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by the General Assembly of the United Nations at New York on 25 May 2000	An offence—	(a) against any of the following sections of the Films, Videos, and Publications Classification Act 1993:	25
			<i>section</i> <i>subject matter</i>	
			124(1) knowingly making or supplying objectionable publications, etc	30
			127(4) knowing exhibition to persons under 18	
			129(3) knowing distribution of objectionable publication in public place	35
			131A(1) knowingly having possession of objectionable publication; and	
			(b) that involves child pornography (as defined in section 145A(1) of that Act)	

An offence—		
(a)	against the following section of the Customs and Excise Act 1996:	
	<i>section</i>	<i>subject matter</i>
	209(1A)	knowing importation or exportation of objectionable publications; and
(b)	that involves child pornography (as defined section 145A(1) of the Films, Videos, and Publications Classification Act 1993)	

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Amendments to Summary Proceedings Act 1957

44 Part II of First Schedule amended

- (1) Part II of the First Schedule of the Summary Proceedings Act 1957 is amended by adding the following, in the appropriate columns, to the item relating to the Customs and Excise Act 1996:

209(1A)	Offences relating to importation or exportation of objectionable publications.
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- (2) Part II of the First Schedule of the Summary Proceedings Act 1957 is amended by inserting, in its appropriate alphabetical order, the following item:

The Films, Videos, and Publications Classification Act 1993	124(1)	Offences involving knowledge in relation to objectionable publications	25
	127(4)	Offence of exhibiting or displaying objectionable publication to person under age of 18 years knowing or having reasonable cause to believe that publication is objectionable	30
	131A(1)	Offences relating to possession of objectionable publications and involving knowledge.	35