

23 August 2021

Attorney-General

**BORA Vet Advice: Crimes (Child Exploitation Offences) Amendment Bill (59-1) –
Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/340**

1. We have examined the Crimes (Child Exploitation Offences) Amendment Bill for consistency with the New Zealand Bill of Rights Act 1990. We have concluded that the Bill is not inconsistent with that Act.
2. The purpose of the Bill is to help protect young people (under the age of 16) from harm online. It will make it a criminal offence for persons of or over the age of 18 years to use a digital communication (such as a social media platform):
 - 2.1 to mislead a young person as to the defendant's age or identity and subsequently meet or arrange to meet with the young person; or
 - 2.2 intending to cause harm to a young person or being reckless as to whether the young person is harmed.
3. A digital communication means any form of electronic communication and includes any text message, writing, photograph, picture, recording, or other matter that is communicated electronically.
4. To achieve this, the Bill proposes amendments to the Crimes Act 1961. New sections 126A and 126B will be introduced into the principal Act to provide for the offences described above which will carry terms of imprisonment not exceeding 5 years and 7 years respectively.
5. The Bill also increases the penalty level for offences against s 131B of the Crimes Act. Section 131B concerns the sexual grooming of children and provides currently for a maximum penalty of 7 years' imprisonment. The Bill proposes an amendment for s 131B which would increase the maximum penalty to 10 years' imprisonment.

Consistency with s 14 Freedom of Expression

6. An enactment that criminalises communication will cause a prima facie inconsistency with s 14 of the Bill of Rights Act. However, restricting the use of a digital communication in the manner proposed is a demonstrably justified limit on that freedom.

7. The purpose of cl 126A is to ensure that vulnerable minors are not misled in their digital communications as to a person's age or identity, such that it may lead to meeting with or a plan to meet with that person. The purpose of cl 126B is to protect vulnerable minors from any harm intended to them or potential harm as a result of a digital communication.
8. These proposed restrictions on the right to freedom of expression are rationally connected with the broad objective expressed in the Explanatory note to the Bill, which is to address the incidences of harm experienced by young people in online platforms and to protect young people from harm online.
9. The Explanatory note notes that examples of harm experienced by young people include:
 - 9.1 receiving unwanted digital communications;
 - 9.2 receiving unwanted digital communications which cause a negative impact on daily activities, such as being contacted online by a stranger; or
 - 9.3 being asked to share a nude or nearly nude image of themselves.
10. Clauses 126A and 126B target specific conduct or behaviour which is more nuanced than the examples discussed. Nonetheless the conduct or behaviour that will attract an offence in either clause may be seen to derive from or align with the examples of harm experienced by young people.
11. Although it is not expressly addressed in the Explanatory note, it is reasonable to infer that cl 126A may also be intended to address the potential for online platforms to be used as a precursor to more serious offending against the young person. For example, if a young person is misled by a digital communication and meets or plans to meet with an older person, they may potentially be exposed to more serious harm.
12. It is also relevant that in the course of any criminal prosecution, a court would assess whether the person:
 - 12.1 intended to mislead the young person as to the person's age or identity as well as whether that person had met or arranged to meet the young person (cl 126A(1)) (It is important to note that both limbs of the proposed offence must be satisfied; simply connecting with the young person on-line will not therefore be enough); or
 - 12.2 intended to cause harm to the young person or was reckless as to whether the young person was harmed (cl 126B(1)).
13. The court would be required to assess these offences in a manner consistent with the s 14 right.

Consistency with s 25(c) – Reverse onus provision

14. Under cl 126A(3) and 126B(3), a defendant may only rely on defences that they had taken reasonable steps, before they took the action concerned, to find out whether the young person was of or over the age of 16 years or believed on reasonable

grounds that the young person was of or over the age of 16 years, if that person proves that defence.

15. By requiring a defendant to prove a defence to a criminal charge, these provisions limit the right to the presumption of innocence affirmed by s 25(c) of the Bill of Rights Act. However, that limit is justified here on the basis that:
- 15.1 the two defences each rely upon matters that are largely within the defendant's knowledge; and
 - 15.2 the reverse onus provisions have the effect of requiring those at risk of committing the offence to take steps not only to avoid offending, but also to avoid the conduct that reflects that offending.

Review of this advice

16. In accordance with Crown Law's policies, this advice has been peer reviewed by Kim Laurenson, Crown Counsel.

Debra Harris
Crown Counsel

Noted / Approved / Not Approved

Encl

Hon David Parker
Attorney-General
/ /2021