

Regulatory Impact Statement

Addressing Child Pornography and Related Offending

Agency disclosure statement

This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice.

It provides an analysis of options to address child pornography and related offending by proposing amendments to the Films, Videos, and Publications Classification Act 1993 and the Customs and Excise Act 1996. These Acts regulate the possession and use of objectionable publications.

The Government has stated that it will increase penalties for child pornography offences.¹ The specific nature of this proposal restricts the range of penalty related options that can be considered. Also, there are some constraints in the analysis:

- it is difficult to predict the effect of an increase in the maximum penalty for an offence. The Sentencing Act 2002 requires a number of factors to be taken into account by the sentencing judge. The maximum penalty for the offence is only one of these factors. Sufficiency of evidence, sentence negotiation, quality of sentencing submissions and early guilty pleas all affect the sentencing outcome
- because child pornography publications form a subset of other publications that are considered objectionable, it is not always possible to obtain specific statistics on child pornography prosecutions. Further, even where statistics are available, comparison between offenders may be difficult because sentences are specific to the individual and the circumstances of the offence. There is a range of material that can be considered child pornography and sentences will reflect the content of the specific publications as well as other factors
- some assumptions had to be made about prosecution statistics because it is not always clear which offences have been recorded under which offence category.

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¹ Enforcement agencies prefer the term “child exploitation material” as they believe it better reflects the nature of the material. The term “child pornography” has been used throughout document this because the public is more familiar with this term and this was the term used by the Government in public statements on the matter.

Status quo

Legislative framework

1. The Films, Videos, and Publications Classification Act 1993 (the Classification Act) contains the following offences for objectionable publications and maximum penalties:
 1. Strict liability offences where the offender had no knowledge or reasonable cause to believe that the publication was objectionable (punishable by fine only)
 2. Possession (5 years)
 3. Possession for the purposes of supply or distribution (10 years)
 4. Importation for the purposes of supply (10 years)
 5. Supply, distribution (including exporting), making (10 years)
2. Under the Customs and Excise Act 1996 (the Customs Act), import and export of child pornography (without the intent to distribute it) carries a maximum penalty of 5 years' imprisonment.
3. Unlike similar jurisdictions, such as Australia, New Zealand does not have a distinct child pornography offence. Child pornography is a subset of publications considered "objectionable" under the Classification Act. Objectionable publications can include some sexual material involving adults (eg, rape, necrophilia and bestiality) and non-sexual material (eg, manuals for bomb making or illegal drug manufacturing). The Office of Film and Literature Classification makes decisions on what is objectionable.
4. Under the Classification Act, one of the reasons a publication will be considered objectionable is if it promotes or supports, or tends to promote or support, the exploitation of children for sexual purposes. This is a broad definition and means that child pornography related objectionable publications can vary widely.
5. Publications that are considered objectionable range from banned books that promote crime or certain sexual behaviour through to images and videos depicting the actual sexual abuse of children. The Classification system relies on judges exercising their discretion to determine a sentence that is proportionate to the offence committed.

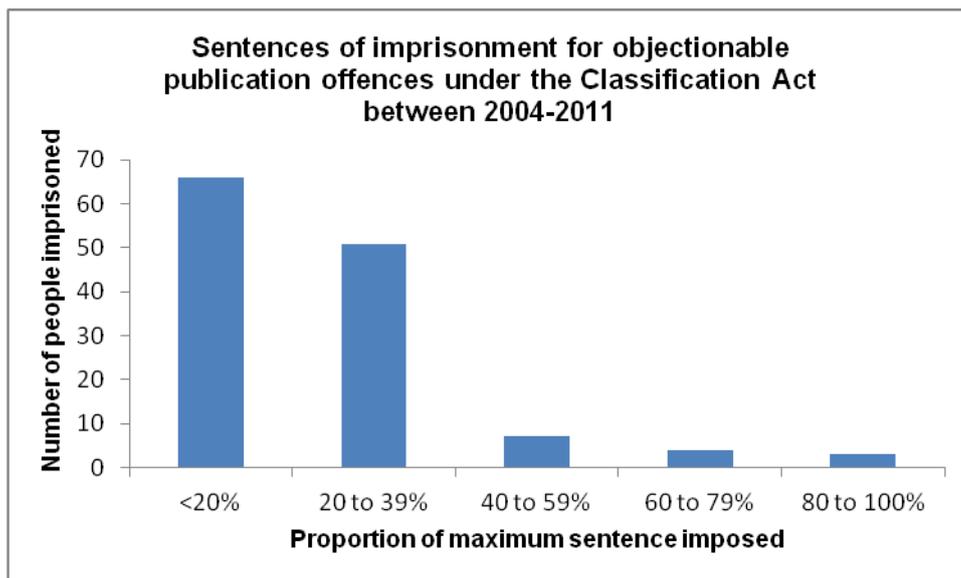
Offender profile

6. Child pornography offenders have particular characteristics that set them apart from other offenders. Child pornography offenders are almost universally male and their occupations vary widely. Offenders often distribute child pornography in order to access the collections of other offenders. Financial reward is very rarely a motivating factor for the distribution of child pornography in New Zealand.
7. Due to the diverse nature of child pornography offenders it is not always possible to make useful comparisons between offenders. However, the majority of offenders have no criminal history. Further, most child pornography offenders

plead guilty and readily acknowledge their involvement with this material. These mitigating factors can result in a reduced sentence.

Sentencing statistics

8. These statistics discussed below relate to all convictions for objectionable publication offences under the Classification Act (ie, not just child pornography related objectionable publications) and include convictions for strict liability offences. In the 8 year period between 2004 and 2011, 393 people were convicted of an objectionable publication offence. Of the 393 people convicted, only 131 (33%) were sentenced to a term of imprisonment.
9. During this same 8 year period, the maximum sentence that has been imposed for possession is 5 years (current maximum penalty of 5 years' imprisonment) and the maximum sentence that has been imposed for distribution is 5 years (current maximum penalty of 10 years' imprisonment). Of the 131 offenders *that have been sentenced to a term of imprisonment*, approximately 50% have been sentenced to less than 20% of the maximum sentence available and 89% have been sentenced to less than 40% of the maximum sentence available. The graph below shows the break-down of sentences of imprisonment by proportion of the maximum available sentence.



10. The graph above highlights that, for these offences, judges sentence at the lower end of the available maximum. In all but 14 cases, the offender received a term of imprisonment that was less than 40% of the maximum available sentence.
11. There are also low rates of recidivism. During the 10 year period between 2001 and 2010, only 8 people were convicted of a repeat objectionable publication offence.

Enforcement

12. The Police, the Department of Internal Affairs (DIA) and Customs all bring prosecutions for child pornography offences. Leave of the Attorney-General is required for some prosecutions under the Classification Act, but not for prosecutions under the Customs Act.

13. The Classification Act is generally operating well and enforcement agencies have commented on the advantages the flexible classification regime gives them.
14. Sometimes an offender who makes child pornography will also have committed physical offences against a child or be a party to that offending. In such a case, the offender will be liable for physical offending or commissioning physical offending as well as child pornography offending.

Problem definition

15. There are four key issues that the proposals in this paper address.

Offending is becoming easier and more damaging

16. Advances in technology mean that access to objectionable material is possible in ways and speeds not previously considered. The internet allows objectionable publications to be viewed and shared with ease. Offenders can possess collections of over 100,000 images of sexually exploited children. In 2009, it was estimated that globally 200 *new* images are put into circulation ever day.² The possession of these publications creates a market that encourages their creation and distribution.
17. There is also evidence that the content of the publications is getting worse and that the children are getting younger. In 2007, the United Kingdom's Internet Watch Foundation identified a trend towards websites depicting the most extreme and brutal forms of abuse.³ This trend is supported by observations made by the New Zealand Chief Censor and Deputy Chief Censor as well as New Zealand enforcement agencies. Images may never be removed from the internet and victims can feel re-victimised every time an image of them being abused is viewed.
18. Despite these trends, sentences for child pornography related offending are generally well short of the maximum penalty available. Judges have not yet sentenced an offender to more than 5 years imprisonment despite the maximum penalty for some offences being 10 years imprisonment.

Legislative gap: indecent communication with a child

19. Offences such as indecent exposure (section 27 Summary Offences Act 1981) and an indecent act in a public place (section 125 Crimes Act) cover acts done in a public place, but do not cover indecent acts performed in a private place but streamed over the internet.⁴
20. As the Classification Act relates to publications, in order to establish an offence against the Classification Act a record of the communication must be deliberately kept by the offender (ie, a publication made). Where the communication has

² Najat M'jid Maalla *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography* 13 July 2009 at [36].

³ Internet Watch Foundation Annual Report 2007 at 8. (www.iwf.org.uk/assets/media/IWF_Annual_Report_2007.pdf).

⁴ The *Shorter Oxford English Dictionary* (5th Ed), Oxford University Press 2002 defines "streaming", in relation to computing, as "a method of relaying data, esp. video and audio material, over the Internet or other network as a steady continuous stream."

occurred via an online chat programme, streaming video or texting messaging there will not always be a record of the communication.

21. Advances in technology have also made it easier for adults to indecently communicate with children. Social networking sites and online chat programmes are popular with children and allow them to easily communicate with adults. Other forms of communication such as texting are also very popular with children. With this ease of communication comes an increase in the risk of indecent communication.

Possession of computer files

22. The concept of possession has been interpreted in a flexible way by the courts. However, there is a risk that advances in technology will allow people to view objectionable computer files without possessing them.

Obtaining the Attorney-General's permission to prosecute

23. The requirement to obtain the leave of the Attorney-General to bring a prosecution under the Classification Act is no longer serving a useful purpose. DIA, Customs and Police are now experienced in bringing these kinds of prosecutions and have internal processes for checking the appropriateness of a proposed prosecution.

Objectives

24. The Government is aiming to ensure that sentences for child pornography offences reflect the seriousness of the offending and send a strong message that the exploitation and abuse of children, regardless of where the initial offence is committed, will not be tolerated. To achieve this, the Government wants to increase penalties for possession, distribution and making of child pornography.
25. The Government is also aiming to ensure the law prohibits indecent communication with children and that advances in technology do not make offences in the Classification Act obsolete.

Regulatory impact analysis

26. The regulatory impact analysis below has been separated into five sections. Only one option can be chosen from each section.
27. A simple increase in statutory penalties for child pornography offences may be ineffective by itself. It may be desirable to combine an increase in statutory penalties with other measures to discourage child pornography and other related offending. These other measures are also discussed below.

PENALTY RELATED CHANGES

1. Increase statutory maximum penalties

28. New Zealand already has high statutory penalties for objectionable publication offences when compared with physical offending. The tables below compare the current maximum penalties for certain physical offences with the current maximum penalties for offences relating to objectionable publications.

Physical Offences	
<i>Offence</i>	<i>Maximum Penalty</i>
Sexual violation	20 years
Sexual connection with a child under 12	14 years
Indecent act on a child under 12	10 years
Sexual connection with a young person under 16	10 years
Ill-treatment or neglect of a child by a person who has custody, control, or charge of the child	10 years
Indecent act on a young person under 16	7 years
Meeting young person following sexual grooming etc	7 years

Objectionable Publications	
<i>Offence</i>	<i>Maximum Penalty</i>
Making an objectionable publication	10 years
Distribution of an objectionable publication	10 years
Importation of an objectionable publication for the purposes of supply or distribution	10 years
Possession of an objectionable publication for the purposes of supply or distribution	10 years
Export or import of an objectionable publication (Customs Act)	5 years
Possession of an objectionable publication	5 years

29. Increasing penalties for objectionable publication offences risks distorting relativities with physical offences by treating physical offending as less serious than the depiction of that same offending.
30. The effect of increasing the maximum penalty is difficult to predict. While judges will view an increase in penalty as a signal from Parliament that this type of offending is considered serious, the maximum penalty for the offence is only one of many factors that a sentencing judge considers. Statistics show that judges

sentence the vast majority of these offenders to terms of imprisonment that are at the low end of the available maximum. Increasing the maximum available penalty is unlikely to change this.

31. The options in the table on the next page relate to changes that can be made to the maximum statutory penalties for objectionable publication offences.

Option	Achieves the Government's objective	Maintains the current classification system (which is operating well)	Does not distort sentencing relativities with physical sexual offences	Does not impose any additional costs on individuals or government (including increased defended hearings, increased prison beds and legal aid costs)	Maintains a distinction (in terms of penalty) between possession and distribution and making*
(a) maintain status quo	X	√	√	√	√
(b) increase the penalty for distribution and making to 14 years and possession to 10 years (recommended option)	√	√	X	X	√
(c) increase the penalty for possession and import/export to 10 years	√	√	X	X	X
(d) increase the penalty for possession and import/export to 7 years	X	√	√	√	√

* It may be desirable to maintain a distinction (in terms of maximum penalty) between possession and distributing or making because distributing or making is more injurious to the public good than possession.

Conclusion

32. Option (b) is the best option to achieve the Government's objective of sending a strong message that the exploitation and abuse of children will not be tolerated. However, the Ministry of Justice is concerned that option (b) undermines the relativities between objectionable publication and physical offences. This concern is somewhat mitigated by the fact that any issues of relativity with other offending and culpability are dealt with by the sentencing judge.

OTHER CHANGES

2. Presumption in favour of imprisonment

33. The options below relate to changes that would create a presumption in favour of imprisonment for child pornography offences, in certain circumstances.

Option (e) – maintain the status quo

34. This option involves retaining the status quo and not creating a presumption of imprisonment for child pornography offences.

Benefits

35. The main benefit of the status quo is that it gives judges the discretion to deal with different offenders in a way that is proportionate to the offending. Because of a range of factors a custodial sentence may not always be imposed. Further, child pornography offending is already specifically denounced at sentencing as an aggravating factor.

Risks

36. The main risk with maintaining the status quo is that it may not achieve the Government's objective of ensuring that child pornography offenders receive a sentence that reflects the seriousness of their offending.

Option (f) – create a presumption in favour of imprisonment for a repeat child pornography offence (recommended option)

37. This option only relates to people who are convicted of a repeat child pornography offence. It does not cover people who are convicted of offences that involve other objectionable material that is not child pornography.
38. This option creates a presumption that a person convicted of any child pornography offence (eg, possession, distribution or making) for a second time will be sentenced to a term of imprisonment. The offender will be sentenced to a term of imprisonment unless the court is satisfied that, because of the special circumstances of the offender or the offence, the offender should not be sentenced to prison. The Ministry of Justice recommends this option.

Benefits

39. A sentence of imprisonment is a strong deterrent as it highlights the seriousness of the offence and discourages recidivism. This option also specifically targets

child pornography offenders. The Department of Corrections has indicated that it is unlikely that this presumption of imprisonment will result in any measurable increase in the number of inmates.

Risks

40. There is a risk that this presumption could result in disproportionately severe sentences. For example, where a person is convicted of possessing a small amount of low-level publications (eg, fictitious cartoons) for the second time. Also, there is a risk that judges may interpret this presumption in favour of imprisonment as a signal to send offenders to prison only when they commit a repeat offence. This could have the undesirable effect of discouraging judges from sending first-time offenders to prison.
41. Child pornography offenders sent to prison will receive child sex offending rehabilitation only if they meet relevant risk-based eligibility criteria. Child pornography offenders do not usually meet this risk-based criteria and will therefore not usually receive this treatment.
42. Child pornography offenders already have very low rates of recidivism. Statistics show that over a ten year period between 2001 and 2010 only 8 people were convicted of a repeat objectionable publication offence under the Classification Act (there are not any statistics available on what penalty these 8 recidivists received). If most offenders do not re-offend this may indicate that the current penalties, along with the social stigma of a child pornography conviction, are adequate deterrents to re-offending.

3. Removing the requirement to obtain the Attorney-General's leave to prosecute

Option (g) – maintain the status quo

43. This option retains the current requirement to obtain the Attorney-General's leave to prosecute for some offences relating to objectionable publications under the Classification Act.

Benefits

44. The requirement to seek leave from the Attorney-General is a safe-guard against inappropriate prosecutions. Leave of the Attorney-General is commonly required to prosecute offences that impose limits on the right to freedom of speech. The requirement to seek leave from the Attorney-General plays a role in ensuring that the prosecutorial power is exercised appropriately and that the right to free speech is not curtailed.
45. The requirement to seek leave from the Attorney-General also filters out vexatious and frivolous private prosecutions. Given the nature of the offences in the Classification Act it is possible that inappropriate private prosecutions could be brought.

Risks

46. On some occasions, Customs may decide to charge a person under the Customs Act (which has a lower penalty than some offences in the Classification Act)

rather than seek leave of the Attorney-General to prosecute under the Classification Act.

Option (h) – remove the requirement to obtain the Attorney-General’s consent before bringing a prosecution under the Classification Act (other than for private prosecutions or prosecutions involving extra-territorial offending) (recommended option)

47. This option would remove the requirement to seek the leave of the Attorney-General before bringing a prosecution under the Classification Act. However, private persons wanting to bring a prosecution would still be required to seek the leave of the Attorney-General. The current requirement to obtain the Attorney-General’s permission to lay charges relating to an offence involving child pornography where the offending occurred outside New Zealand would also be retained. The Ministry of Justice recommends this option.

Benefits

48. DIA, Customs and Police are now experienced in bringing these kinds of prosecutions and the requirement to seek leave from the Attorney-General is no longer serving any useful purpose. DIA, Customs and Police have internal processes for checking the appropriateness of a proposed prosecution.
49. Crown Law processes approximately 50 applications for leave to prosecute per year. In 2009, applications took an average of three hours to process. Crown Law funds this work out of its baseline at an average annual cost of \$26,000 (in 2009), although the potential savings would not be realised as there would be no decrease in Crown Law’s staffing or overhead costs.

Risks

50. This option could lead to inconsistency in prosecutions as the Attorney-General (via the Crown Law Office) currently provides a check to ensure that the proposed prosecution does not amount to an unwarranted infringement on the right to freedom of speech. However, this risk is mitigated by the fact that the enforcement agencies are now very experienced at bringing these kinds of prosecutions and work collaboratively in many cases. A collaborative approach helps maintain consistency in prosecutions.

4. Indecent communication with a child

51. The options in this section aim to prevent adults from communicating indecently with children (or a person they believe to be a child).
52. Offenders who communicate indecently with children via the internet will be detected in a number of ways. These methods include information received from members of the public, covert operations and information received in the course of other investigations.

Option (i) – maintain the status quo

53. This option does not amend any current offences or create any new ones.

Benefits

54. This does not impose any new costs on government or individuals. Where a person communicates indecently with a child their conduct may be caught by Classification Act offences, if a record of the communication is kept.

Risks

55. The primary risk with this option is that it does not capture people who communicate indecently with a child but without keeping a record of that communication. This means that those who use online chat programmes, live web-cam-streaming or text messaging will be able to escape liability if they do not keep a record of the communication. Therefore, this option does not address the gap in the law.

Option (j) – create a new offence of indecent communication with a child (recommended option)

56. This option creates a new offence in the Crimes Act of indecent communication with a child. The offence would be medium neutral so that any type of communication is captured. A child is any person under the age of 16. The offence would only cover adults who communicate indecently with a child (or someone they believe to be a child).
57. The maximum penalty for this offence would be 3 years' imprisonment. The Ministry of Justice recommends this option.

Benefits

58. The term "indecent" is used elsewhere in the Crimes Act and its meaning has been considered by the courts on many occasions. This will help to provide clarity as to what amounts to an "indecent" communication. "Indecent" is not a low standard. The courts have held that for an act to be indecent it "must be something which will warrant the sanction of the law, not some trifling or unimportant episode".⁵ Indecency must be judged in light of time, place and circumstances.⁶ Whether something is indecent "is an objective question to be answered by what the jury assesses to be the standards of right-thinking members of the community."⁷
59. This new offence would also have a normative effect in that it would signal to the public that indecent communication with children is damaging and will not be tolerated. Also, enforcement agencies would have an identifiable offence with which to charge a person, rather than only being able to charge a person if he or she keeps a record of the communication.

Risks

60. Despite what the courts have said about the meaning of "indecent", there may still be some uncertainty as to what kind of communication is "indecent".

⁵ *R v Dunn* [1973] 2 NZLR 481 (CA) at 482.

⁶ *R v Dunn* [1973] 2 NZLR 481 (CA) at 484.

⁷ *R v Anna* [2008] NZCA 534 at [56].

61. As the offence would carry a maximum penalty of 3 years, the defendant would have the option of electing trial by jury. Jury trials are more expensive than judge alone trials. This may have cost implications.
62. As this would be a new offence, it is difficult to predict the number of new prosecutions that will be brought. However, the state of Queensland has an offence that is similar, although not as broad as, indecent communication with a child. This Queensland offence results in an average of 60 complaints to police each year. Given that the proposed offence of indecent communication with a child is broader than the Queensland offence, it is likely that 60 or more reported cases of indecent communication with a child would be dealt with by New Zealand police per year. This will have cost implications for enforcement agencies (Police and DIA), prosecution services, legal aid and the Department of Corrections.

5. Possession of objectionable publications

63. The options in this section address potential difficulties with the concept of “possession” in relation to computer files. There is currently a risk that offenders with particular technical expertise can view objectionable publications without downloading or saving them.

Option (k) – maintain the status quo

64. Option (k) retains the current situation and does not make any changes to the possession offences.

Benefits

65. The main benefit of this option is that it allows the common law definition of “possession” to develop along with advances in technology. This retains the flexibility to adapt the concept of possession as technology advances.

Risks

66. The main risk with option (k) is that the law may not adapt to prohibit people from viewing (but not necessarily possessing) objectionable publications, or the law may adapt too slowly.

Option (l) – amend the Classification Act to make it clear that possession includes the intentional viewing of objectionable publications (recommended option)

67. Option (l) amends the Classification Act to make it clear that possession includes the intentional viewing of objectionable publications. These amendments would be for the avoidance of doubt and would not add any new requirements to the test for possession. The Ministry of Justice recommends this option.

Benefits

68. These amendments remove the risk that people with particular technical expertise will use computers to view objectionable publications without possessing them. These amendments also future-proof the offences against unforeseeable advances in technology.

69. Website or server administrators hold information about internet users that have viewed websites known to display objectionable publications. A search warrant can be obtained by enforcement agencies to identify the relevant internet account holder. The Online Child Exploitation Across New Zealand unit within New Zealand Police, and other New Zealand enforcement agencies, are well positioned to act on this type of information and already receive a number of referrals from overseas investigations.
70. The Classification Act aims to prevent people viewing, distributing or making publications that are injurious to the public. These amendments help achieve this aim by making it clear that those who intentionally view objectionable publications will commit an offence.

Risks

71. In some circumstances, viewing a publication may require fewer active steps than possessing a publication. With fewer elements to prove there could be concern that the level of criminal liability is being set too low. Although, this risk is mitigated as technical analysis of a person's computer allows enforcement agencies to distinguish between accidental and deliberate viewing.
72. Cases will generally turn on technical evidence. For example, the outcome of forensic analysis of the defendant's computer to prove the elements of the offending might involve the calling of expert evidence. This will force defendants to engage computer experts in order to adequately defend themselves. This could raise issues of fairness and access to justice if defendants cannot afford such expert advice. This could also increase costs for legal aid if legally aided defendants require expert advice.

Summary of proposals

73. The Ministry of Justice recommends the following legislative amendments:
 1. increase the maximum penalty for possession of an objectionable publication to 10 years' imprisonment (Classification Act)
 2. increase the maximum penalty for import or export of an objectionable publication to 10 years' imprisonment (Customs Act)
 3. increase the maximum penalty for distributing or making an objectionable publication to 14 years' imprisonment (Classification Act)
 4. amend the Classification Act to make it clear that possession includes intentional viewing of an objectionable publication
 5. create a presumption of imprisonment for repeat child pornography offenders
 6. remove the requirement to obtain the Attorney-General's leave to prosecute objectionable publication offences under the Classification Act (other than for private prosecutions or prosecutions involving extra-territoriality)
 7. create a new offence in the Crimes Act of indecent communication with a child.

Consultation

74. The following agencies and organisations were consulted:

- DIA
- Customs
- Police
- Department of Corrections
- The Office of Film and Literature Classification
- WELLSTOP (a not-for-profit organisation that provides treatment to child pornography offenders)
- Crown Law Office

75. Officials from DIA expressed concern about substantial increases in maximum penalties and prefer increasing the maximum penalty for possession to 7 years' imprisonment and leaving the maximum penalties for distribution or making at 10 years' imprisonment.

76. Officials from Police prefer increasing the maximum penalty for possession to 7 years' imprisonment and increasing the maximum penalty for distribution and making to 12 years' imprisonment.

77. Officials from Customs prefer increasing the maximum penalty for possession to 10 years' imprisonment and increasing the maximum penalty for distribution and making to 14 years' imprisonment.

78. The Department of Corrections advise that increasing penalties, creating a presumption of imprisonment and creating a new offence will likely increase the number of new prison sentences per year and the length of sentences given. The Department of Corrections estimates that a further 5-10 prison beds will be required per annum as a result of this policy, at an estimated cost within the range of \$221,000 - \$442,000.

Implementation

79. The changes discussed in this Regulatory Impact Statement could be included in an Omnibus Bill that amends the Classification Act, Customs Act and Crimes Act.

Monitoring, evaluation and review

80. A review will be conducted after two years to assess what impact any changes have had to the sentences imposed on child pornography offenders and to assess the impact of the new offence of indecent communication with a child.

81. Because the length of a sentence is determined by a number of factors, the review will have difficulty in assessing the exact impact of any changes. Consequently, the review will have to focus on high level trends.