

Abusive and Offensive Communications: the criminal law of New Zealand¹

INTRODUCTION

- 1.1 This paper details the myriad criminal laws New Zealand has in place to deal with abusive and offensive communication. These range from old laws, such as blasphemy and incitement, to recent laws enacted specifically to deal with online communications. It will be apparent that, unfortunately, New Zealand's criminal laws now support different approaches to online and offline speech.

SPECIFIC LIABILITY FOR ONLINE COMMUNICATION: THE HARMFUL DIGITAL COMMUNICATIONS ACT 2015

The statutory regime

- 1.2 The most recent government response to abusive and offensive speech is the Harmful Digital Communications Act, which was passed in 2015. The Act was a response to cyberbullying, and based on a report by the New Zealand Law Commission which found that one in ten New Zealand internet users have experienced harmful communications on the internet.² It contains a criminal offence and a civil complaints regime administered by an approved agency, Netsafe. The Agency focusses on mediating the complaint and seeking voluntary take-down if appropriate, but has no powers to make orders. If the complaint cannot be resolved at this level, the complainant may take the matter to the District Court.³ Although the Act has both criminal and civil components, they are both described below in order to capture the comprehensiveness of the approach to online publication of harmful material.

- 1.3 The regime is based on a set of Digital Communication Principles, which are:

Principle 1

A digital communication should not disclose sensitive personal facts about an individual.

Principle 2

A digital communication should not be threatening, intimidating, or menacing.

Principle 3

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2 MB3: Ministerial Briefing, Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies (August 2012), <http://www.lawcom.govt.nz/our-projects/regulatory-gaps-and-new-media>, accessed 4 April 2017.

3 The primary court of first instance in New Zealand.

A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual.

Principle 4

A digital communication should not be indecent or obscene.

Principle 5

A digital communication should not be used to harass an individual.

Principle 6

A digital communication should not make a false allegation.

Principle 7

A digital communication should not contain a matter that is published in breach of confidence.

Principle 8

A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual.

Principle 9

A digital communication should not incite or encourage an individual to commit suicide.

Principle 10

A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

- 1.4 Both the approved agency and courts must take account of the communication principles and act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 when operating under the Act.⁴
- 1.5 The principles cover most of the forms of harmful speech recognised in New Zealand law. It is possible, then, that they would regulate more speech and have more serious effects than regulation of offline speech. The Act contains a number of safeguards against this. First, only an individual who has suffered harm can make a complaint. Harm is defined as serious emotional distress.⁵ Thus, the threshold is high. Secondly, a court can only consider a complaint if the agency has already attempted to deal with

4 Harmful Digital Communications Act 2015, s 6(2).

5 Harmful Digital Communications Act 2015, s 4.

it, and then only if there has been a serious, repeated or threatened breach of one or more of the Principles, and this has caused or is likely to have caused harm.⁶

- 1.6 The remedial powers in the Act are practical and extensive. The Court may make interim orders pending determination of an application for a final order.⁷ Both interim or final orders can take the following forms:
- an order to take down or disable material;
 - an order that the defendant cease the conduct concerned;
 - an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual;
 - an order that a correction be published;
 - an order that a right of reply be given to the affected individual; or
 - an order that an apology be published.⁸
- 1.7 The following orders can be made against content hosts:⁹
- an order to take down or disable public access to material;
 - an order that the identity of the author of an anonymous or pseudonymous communication be released to the court;
 - an order that a correction be published; or
 - an order that a right of reply be given to the affected individual.¹⁰
- 1.8 There is also power to direct orders to apply to third parties, to order a declaration that a Principle has been breached, and to order suppression of names.¹¹ Such declarations would not bind the hosts of offshore websites, but are intended to have symbolic effect.
- 1.9 A court is required to consider a number of factors before making an order, including the purpose of the communicator, and whether the communication was intended to harm. This does not mean lack of fault will result in no order being made. In some cases, even if there is no fault at all, it may still be a good idea to order removal of material from the internet, or publication of a correction in a relevant form. However,

6 Harmful Digital Communications Act 2015, s 11.

7 Harmful Digital Communications Act 2015, s 18.

8 Harmful Digital Communications Act 2015, s 19(1).

9 Online content host, in relation to a digital communication, means the person who has control over the part of the electronic retrieval system, such as a website or an online application, on which the communication is posted and accessible by the user: Harmful Digital Communications Act 2015, s 4.

10 Harmful Digital Communications Act 2015, s 19(2).

11 Harmful Digital Communications Act 2015, s 19(4).

the inclusion of this factor means that the issue of fault must be addressed and weighed in some way before any order is made. The Act also requires the question of whether the communication is in the public interest to be addressed, as well as the truth or falsity of the statement. Additionally, a court must consider the occasion, context and subject matter of the communication, the content of the communication and the level of harm caused, the extent to which the communication has spread beyond the original parties, the age and vulnerability of the affected individual, the conduct of the defendant, including any attempt to minimise the harm, the conduct of the affected individual or complainant, the technical and operational practicalities and the costs of an order, and the appropriate individual or other person who should be subject to the order.¹²

1.10 The Act also contains a criminal offence of posting a harmful digital communication with intent to cause serious emotional distress punishable by up to 2 years' imprisonment, or a fine.¹³ The offence provides:

- (1) A person commits an offence if—
 - (a) the person posts a digital communication with the intention that it cause harm to a victim; and
 - (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
 - (c) posting the communication causes harm to the victim.
- (2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—
 - (a) the extremity of the language used;
 - (b) the age and characteristics of the victim;
 - (c) whether the digital communication was anonymous;
 - (d) whether the digital communication was repeated;
 - (e) the extent of circulation of the digital communication;
 - (f) whether the digital communication is true or false;
 - (g) the context in which the digital communication appeared.

¹² Harmful Digital Communications Act 2015, s 19(5).

¹³ Harmful Digital Communications Act 2015, s 22.

- 1.11 Harm is defined as serious emotional distress.¹⁴ Online content hosts have protection from criminal or civil liability if they follow a complaint and take-down procedure in the Act.¹⁵

First defended case

- 1.12 The first defended criminal prosecution under the Act achieved some prominence, mostly due to misreporting of the outcome. *R v Iyer*¹⁶ concerned a husband separated from his wife who had posted semi-nude images of her on Facebook. The evidence of a friend stated Mrs Iyer became very depressed at seeing the images, and was frustrated, angry, anxious and upset. For several days she felt unfit for work, although did not recall taking any time off work. The District Court judge found the images were digital communications within the Act that had been posted as required. However, a required element of the offence is that the posting occurs with the intention to cause harm to the complainant, with harm defined as “serious emotional distress”.¹⁷ The Court held that this requires something more than trivial and does not cover merely being upset and annoyed, nor does it cover simply offensive, or morally repugnant conduct. However, distress does not require actual mental injury or a recognised psychiatric disorder, and the bar to a successful criminal prosecution should not be set too high.
- 1.13 The judge noted that the provision requires balancing between the two competing concerns of serious emotional harm and free speech. Although the prosecution was held to have established sufficient intent and a prima facie case that the posting would cause serious emotional distress to an objective person in the position of Mrs Iyer, the Court found that there was insufficient evidence to suggest the communication had actually caused harm to her. While the evidence pointed to some degree of emotional distress, the Court was not satisfied that the required threshold had been reached. This was widely reported in the media as a finding that posting such images cannot cause serious harm. However, it is clear the Court’s finding that a prima facie case had not been established was based on the judge’s view that there was a lack of specific evidence as to Mrs Iyer’s reactions, feelings, physical symptoms and duration. Nor was there expert evidence such as that of a psychologist or counsellor, none of which had been led by the prosecution.
- 1.14 Unsurprisingly, the decision was appealed and overturned. The High Court held that the decision as to whether serious emotional harm has been caused is that difficult beast, “part fact, part value judgement.”¹⁸ Obvious factors such as the nature of the emotional distress, its intensity, duration, manifestation, and context, including whether a reasonable person in the complainant’s position would have suffered serious emotional distress, should be considered. The Court went so far as to assert confidently that the concept of serious emotional harm is a “broad compendious

14 Harmful Digital Communications Act 2015, s 4. This is required in relation to the effect on the victim but also the intent of the defendant: *Brittin v Police* [2018] 2 NZLR 147.

15 Harmful Digital Communications Act 2015, ss 23-25.

16 [2016] NZDC 23957.

17 Harmful Digital Communications Act 2015, ss 22(1) and 4.

18 *Police v B* [2017] NZHC 526, [23].

expression that means what it says.”¹⁹ The District Court Judge had approached the issue incorrectly by not assessing the evidence as a whole and in context. The case was remitted for retrial.²⁰

Government statistics on the Act

1.15 Data provided by the police shows how prosecutions under the Act have increased since 2015. The police data table below shows the number of proceedings against offenders under the Harmful Digital Communications Act 2015 since it came into effect broken down by the method by which offenders were proceeded against and by year:

	2015*	2016	2017
Court Action	11	80	85
Warning (Formal and Informal)	12	84	80
Other Methods of Proceeding	0	33	34
Total	23	197	199

* August to December only

1.16 A “proceeding” counts each separate occasion when police deal with an alleged offender for one or more offences. Proceedings are usually classified according to the most serious offence that the offender is dealt with for on that occasion. This offence might not be the Harmful Digital Communications Act offence. The above table therefore presents counts of all proceedings involving at least one Harmful Digital Communications Act offence irrespective of whether that was the most serious offence in the proceeding.

1.17 Further information was also sought from the Ministry of Justice about how many prosecutions were successful, how many were successfully defended and how many involved guilty pleas. Additionally, a summary of the ages and genders for all successful prosecutions was sought. The information is presented in the following tables provided by the Ministry:

19 *Police v B* [2017] NZHC 526, [25].

20 See also *Brittin v Police* [2018] 2 NZLR 147, as to developing sentencing principles.

Table 1: Number of people charged under the Harmful Digital Communications Act 2015, by charge outcome

Charge outcome	2015/2016	2016/2017
Convicted	12	43
Other proved	3	6
Not proved	3	15
Other	0	1
Total	18	65

- This data counts an individual once per financial year for their most serious harmful digital communication offence each year.
- Financial years (July to June) are based on the charge outcome dates.
- "Other proved" may include Youth Court proved, Discharged without conviction or Adult diversion/Youth Court discharge). "Not proved" outcomes may include being acquitted or where the charge is withdrawn or dismissed. "Other" charge outcomes may include being found not guilty by reason of insanity or unfit to stand trial.

Table 2: Number of people charged under the Harmful Digital Communications Act 2015 who entered a plea, by plea type

Plea type	2015/2016	2016/2017
Guilty	14	43
Not Guilty	2	13
Total	16	56

- This data counts an individual once per financial year for the latest plea on their most serious harmful digital communication offence each year.
- Note that charges withdrawn early in the court process may not require a plea.
- Financial years (July to June) are based on the charge outcome dates.

Table 3: Number of people convicted under the Harmful Digital Communications Act 2015, by age group

Age group	2015/2016	2016/2017
19 and under	3	4
20-24	0	14
25-29	2	8
30-34	2	8
35-39	0	4
40-44	4	2
45-49	1	1
50-54	0	1
55 and over	0	0
Unknown	0	1
Total	12	43

- This data counts an individual once per financial year. Age is the offender's age at the offence date of their most serious conviction each year.
- Financial years (July to June) are based on the charge outcome dates.

Table 4: Number of people convicted under the Harmful Digital Communications Act 2015, by gender

Gender	2015/2016	2016/2017
Female	0	7
Male	12	35
Total	12	43

- Note: This data counts an individual once per financial year.
- Financial years (July to June) are based on the charge outcome dates.

Review of the Act

1.18 The Ministry of Justice will review the Act in November 2018. The review will assess the use of the new offences, whether there are any gaps in the criminal aspects of the law. It will also assess whether the civil regime is effective as a low cost, accessible and quick method of dealing with complaints. The Ministry will consult with stakeholders, including Netsafe, and the police. The results will reach the Minister in the form of a briefing, who will then make a decision as to next steps.

HARASSMENT AND STALKING

1.19 Harassment offences generally contain high liability thresholds in New Zealand. It is an offence under the Summary Offences Act 1981 to follow a person or watch or loiter

near a person's house or place of business, but only if this is done with intent to frighten or intimidate.²¹

- 1.20 The Harassment Act 1997 includes an offence of criminal harassment, and also establishes a civil regime that provides for the making of civil restraining orders where harassment is at a lower level.²² The offence of criminal harassment includes watching, loitering near, or preventing or hindering access to or from a person's home or workplace, following, stopping, or accosting that person, entering or interfering with a person's property, and making contact with a person (whether by telephone, correspondence, or in any other way).²³ Notable is the requirement that there be a mental intent to cause fear in the victim or recklessness as to that result.²⁴ Every person who commits the offence is liable, on conviction, to imprisonment for a term not exceeding two years.²⁵
- 1.21 There is a defence of lawful purpose but only to the civil regime restraining orders.²⁶ The burden of proving the lawfulness of the purpose lies on the respondent. "Lawful purpose" is not defined. This is a general defence that leaves the court with discretion to determine, in the context of each case, whether the particular act in question has been done for a lawful purpose.²⁷
- 1.22 Changes were made in 2015.²⁸ In particular, the Act now makes clear that a "continuing act" includes a specified act done on any one occasion that continues to have effect over a protracted period. It uses the example of offensive material about a person being placed in any electronic media and remaining there for a protracted period.²⁹ Further, a specified act that triggers the Harassment Act 1997 includes making contact with that person (whether by telephone, correspondence, electronic communication, or in any other way);³⁰ and giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person.³¹

21 Summary Offences Act 1981, s 21.

22 It has been held that the civil regime can be applied against bloggers who pursue online campaigns against other individuals: *Flanagan v. Sperling* DC CIV 2012-090-986 (4 Jun. 2013); *Brown v Sperling* [2012] DCR 753.

23 Harassment Act 1997, s 4.

24 Section 8(1)(a). This was recognised in the submission of the Commonwealth Press Union Ministry of Justice Report of the Ministry of Justice to Justice and Law Reform Committee on the Harassment and Criminal Associations Bill at 32.

25 Harassment Act 1997, s 8(2).

26 Harassment Act 1997, s 17.

27 Ministry of Justice Report on Late Submission on Harassment and Criminal Associations Bill (14 July 1997) at 8–10.

28 Under amendments made under the Harmful Digital Communications Act 2015. See the Harassment Act 1997, ss 3(3), 3(4) and 4(d).

29 Harassment Act 1997, s 3(4).

30 Harassment Act 1997, s 4(d).

31 Harassment Act 1997, s 4(ea).

THREATS

1.23 The Crimes Act 1961 deals with threats in the main in Part 11.

1.24 Section 307A deals broadly with threats of harm to people or property. Under this section:

- (1) Everyone is liable to imprisonment for a term not exceeding seven years if, without lawful justification or reasonable excuse, and intending to achieve certain effects stated, he or she:
 - (a) threatens to do an act likely to have 1 or more of the results described in subsection (3); or
 - (b) communicates information—
 - (i) that purports to be about an act likely to have 1 or more of the results described in subsection (3); and
 - (ii) that he or she believes to be false.
- (2) The effect has to be causing a significant disruption of 1 or more of the following things:
 - (a) the activities of the civilian population of New Zealand;
 - (b) something that is or forms part of an infrastructure facility in New Zealand;
 - (c) civil administration in New Zealand (whether administration undertaken by the Government of New Zealand or by institutions such as local authorities, District Health Boards, or boards of trustees of schools);
 - (d) commercial activity in New Zealand (whether commercial activity in general or commercial activity of a particular kind).
- (3) The required results are—
 - (a) creating a risk to the health of 1 or more people;
 - (b) causing major property damage;
 - (c) causing major economic loss to 1 or more persons;
 - (d) causing major damage to the national economy of New Zealand.

1.25 The provision states, for the avoidance of doubt, that the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that a person has committed an offence.

- 1.26 Generally, the section has been used to deal with serious bomb threats and the like. However, it has impacted on protest speech. In *Police v Joseph*³² an 18-year-old secondary school student had used his laptop to create a video clip that lasted over three minutes containing threats to the New Zealand Government. The content included images that linked the language with terrorism, such as pictures of the aerial attack on the World Trade Centre and images of Osama Bin Laden. A demand was made that the Government not pass a proposed amendment to the Copyright Act 1994 that created a specific regime to deal with copyright breaches arising from internet use. The clip stated that 11 September was the deadline for the demand to be met, but that deadline passed with apparently no steps taken in response to the clip by any organ, agency or group specified in section 307A(2) of the Act. However, the source and origin of the clip was investigated and the investigation eventually isolated the defendant's identity and residential address.
- 1.27 The Court had to address whether there was intent by the defendant to achieve a substantial disruption. Intention requires something more than mere recklessness as to the outcome of the posting. The level of disruption required is more than de minimis or more than of such little impact that it can be ignored. The Court suggested a test:
- has there been an interruption to the normal flow of things in the routine activity of an infrastructure, that is due to an element of influence that has generated a degree of disorder that requires particular application of attention – that requires a particular level of intensity and focus.³³
- 1.27 Notwithstanding there were “repugnant extremities of subversiveness expressed in the clip”,³⁴ the Court accepted the defendant thought it would soon be removed from the internet. He was a bright, cyber-savvy young man but his passion for protecting freedom of speech on the internet lacked sophistication and a clear conceptual base. Because it had not been established beyond reasonable doubt that Joseph had the intention to significantly disrupt an infrastructure, the charge was ultimately dismissed.
- 1.28 Other relevant statutory offences dealing with threats include threatening to kill or do grievous bodily harm, by which anyone who threatens to kill or do grievous bodily harm to any person, or sends or causes to be received, knowing the contents thereof, any letter or writing containing any threat to kill or do grievous bodily harm to any person, attracts possible imprisonment for a period of up to three years.³⁵ Threatening to destroy property applies to anyone who sends or causes to be received, knowing the contents, any letter or writing threatening to destroy or damage any property, or to destroy or injure any animal.³⁶ There is a defence of lawful justification or excuse, and without claim of right.

32 [2013] DCR 482.

33 *Police v Joseph* [2013] DCR 482, [22].

34 *Police v Joseph* [2013] DCR 482, [26].

35 Crimes Act 1961, s 306.

36 Crimes Act 1961, s 307.

- 1.29 Under the Crimes Act,³⁷ blackmail is committed by a person who threatens, expressly or by implication, to make any accusation against any person (whether living or dead), to disclose something about any person (whether living or dead), or to cause serious damage to property or endanger the safety of any person with intent to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and to obtain any benefit or to cause loss to any other person.³⁸ Everyone who acts in the manner described is guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose. Benefit means any benefit, pecuniary advantage, privilege, property, service, or valuable consideration.

HATE SPEECH

Sedition

- 1.30 Until 2009, New Zealand had sedition offences that appeared harsh on paper. Under section 83 of the Crimes Act 1961 everyone who made or caused, or permitted to be made or published, any statement that expressed any seditious intention was liable to imprisonment for a term not exceeding two years. Under section 84 anyone who, “with a seditious intention”, printed, published or sold or caused or permitted to be printed, published or sold any document, statement, advertisement or other matter that expressed any seditious intention was liable to imprisonment for a term not exceeding two years. These provisions appeared obsolete by 1989 and there was a failed attempt to repeal them.³⁹
- 1.31 Following two inappropriate prosecutions, recommendations were made by the New Zealand Law Commission that the sedition laws should be repealed and not replaced, following a brisk consultation.⁴⁰ The Commission concluded that the offences were too wide, were in breach of the New Zealand Bill of Rights Act 1990, were unclear, and had been used to muzzle vehement and unpopular political speech. The Commission also concluded that criminal behaviour covered by the sedition provisions could be punished under other existing criminal provisions. The recommendations were appropriately cognisant of the value of freedom of expression in a functioning democracy. They were accepted by the government, which accordingly consigned the sedition laws to the “dustbin of history”.⁴¹

Racial disharmony

- 1.32 New Zealand has a criminal form of hate speech in section 131 of the Human Rights Act 1993 that goes by the name of “inciting racial disharmony”. The provision makes it an offence to publish or broadcast threatening, abusive or insulting statements, these

37 Crimes Act 1961, s 237.

38 The plain meaning of threat “to endanger the safety of any person” includes threats of both direct and indirect harm: *Skeet v R* [2016] NZSC 120.

39 Crimes Bill 1989, which was not enacted into law.

40 See Law Commission Reforming the Law of Sedition (NZLC R96, 15 March 2007).

41 New Zealand Herald, 8 May 2007. See Crimes (Repeal of Seditious Offences) Amendment Act 2007 introduced on 8 June 2007.

statements being intended and likely to excite hostility or ill will against, or bring into contempt or ridicule any group of persons in New Zealand on the ground of the colour, race or ethnic or national origins of that group of persons.⁴² The offence is punishable by imprisonment for a term not exceeding three months or to a fine not exceeding \$7,000. The Attorney-General must consent to any prosecution.⁴³ There is only one reported prosecution in New Zealand - against a pamphleteer who vilified Jews.⁴⁴

- 1.33 There seem to be six ingredients of this offence.
- 1.34 First, the statement must be threatening, abusive or insulting.
- 1.35 Secondly, it must be likely to excite hostility or ill will against or bring into contempt or ridicule a group of persons.
- 1.36 Thirdly, the statement must be intended to have that effect. In other words, a person is only guilty under this section if she or he is deliberately stirring up disharmony. However, if the words used are sufficiently strong it will doubtless not be easy to rebut the presumption that the person intended the natural consequences of his or her act. But a researcher producing what is claimed to be scientific evidence of the characteristics of a certain race would probably not be within the section, for such statements are published to further knowledge and not to incite racial disharmony.
- 1.37 Fourthly, the derogatory statement must have been intended and likely to excite hostility against the group on the grounds of the "colour, race, or ethnic or national origins" of the group. This suggests that the statement is punishable only if it creates opposition on the grounds of race alone. No doubt crude allegations that a certain race has undesirable characteristics would be punishable under the section, even if the hostility it created would be on the grounds of these characteristics rather than purely on grounds of race alone.
- 1.38 Fifthly, the group attacked must be in New Zealand. Thus, damaging remarks about the nationals of an overseas country would not fall within the section unless there was a group of those nationals in New Zealand against whom the statement was meant to excite hostility, contempt or ill will. The requirement is difficult. For example, the question: "how many is a 'group'?" has not been answered.
- 1.39 Sixthly, the statement must be "published" or "distributed" to the public at large or any member or members of the public.
- 1.40 For the sake of fullness, it should be noted that section 61 of the same Act provides civil sanctions for published racist remarks. Complaints based on this racial disharmony provision may be made to the Race Relations Conciliator, whose office is part of the Human Rights Commission. The remedies are not punitive, but if the matter is not settled through conciliation, it can be referred to the Human Rights Review Tribunal. Among other remedies, the Tribunal may uphold the complaint, issue a

42 See *Brooker v Police* [2007] 3 NZLR 91 (SC) at [61].

43 Human Rights Act 1993, s 132.

44 *King-Ansell v Police* [1979] 2 NZLR (CA) 531. This case was prosecuted under the predecessor of s 131, s 25 of the Race Relations Act 1971.

declaration that the Human Rights Act has been breached, award damages or make a restraining order. Damages may be significant, covering pecuniary loss, loss of benefit, and humiliation, loss of dignity and injury to feelings. The threshold for satisfying this section is lower than for section 131. Section 61 makes it unlawful to publish or broadcast threatening, abusive or insulting matter likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race or ethnic or national origins of that group.⁴⁵ This differs from section 131 in that no intention is required; the words simply have to be likely to excite hostility against the group or bring it into contempt. As with section 131, that requirement may be quite easy to establish.

- 1.41 Because of the similarities of the two provisions, it is worth noting that in 2017, the Human Rights Tribunal refused to find that two cartoons published in a newspaper which the parties accepted were objectively offensive because they were racist breached s 61. The decision was upheld by the High Court in 2018 in a case which considered the provision for the first time.⁴⁶ The Court held the provision sets up a two-stage test which asks was the publication insulting and, if it was, was it likely to excite hostility against the target group or likely to bring the target group into contempt. In this case the two publications were judged to be not likely to excite hostility or contempt at the level of abhorrence, delegitimisation and rejection that could realistically threaten racial disharmony in New Zealand. The publication was assessed by reference to context and circumstance. The relevant publications were editorial cartoons and cartoons formed part of a rich tradition. The Court went so far as to state that satire would not, in the normal course of events, be hate speech even where it targets a group using vilification. It is likely that the Attorney General would take a similar view of any attempt to use section 131 to prosecute in similar circumstances, and would decline to do so.
- 1.42 In *Mendelssohn v Attorney-General*,⁴⁷ the Court of Appeal examined and indirectly endorsed a role for the offence of inciting racial disharmony even though New Zealand increasingly recognises domestic and international rights and freedoms, including freedom of expression.
- 1.43 In the course of making submissions on an impending Bill dealing with harmful digital publications,⁴⁸ the Human Rights Commission stated that the threshold for an offence under section 61 is now so high as to render it inoperable, and called for a review of the hate speech offence.⁴⁹

45 Human Rights Act 1993, s 61(1)(a).

46 *Wall v Fairfax New Zealand Ltd* [2018] 2 NZLR 471.

47 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA), especially at [16] to [18].

48 Which became the Harmful Digital Communications Act 2015. See above.

49 Human Rights Commission Annual Report 2013, October 2013, 20-21 <http://www.hrc.co.nz/files/4314/2352/7040/HRC_AR2013_FINAL.pdf> accessed August 2018. Reference to an offence was obviously not intended in the strictly criminal sense.

FALSITY

Deceit

1.44 The Crimes Act 1961 contains provisions which criminalise forms of deceit. Everyone is guilty of causing loss by deception who, by any deception and without claim of right causes loss to any other person. Deception means a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and knows that it is false in a material particular, or is reckless as to whether it is false in a material particular. It can also be an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it, or a fraudulent device, trick, or stratagem used with intent to deceive any person.⁵⁰ If the loss caused exceeds \$1,000, the deceiver is liable to imprisonment for a term not exceeding seven years. If the loss caused exceeds \$500 but does not exceed \$1,000, there is liability to imprisonment for a term not exceeding one year, and if the loss caused does not exceed \$500, there is liability to imprisonment for a term not exceeding three months.⁵¹

Hoaxing

1.45 A hoaxer can also occasionally be guilty of an offence. A person who knowingly makes a false statement to anyone giving rise to serious apprehension to the safety of any person or property commits an offence if he or she intends to cause wasteful deployment of police resources, or is reckless as to that result.⁵²

OBSCENITY AND INDECENCY

The Films, Videos and Publications Classification Act 1993

1.46 New Zealand long-ago abandoned the United Kingdom legal definition of obscenity in *R v Hicklin*.⁵³ On 1 October 1994, the previous tripartite system of classification of films, videos, and books and magazines was replaced by a streamlined, comprehensive classification system enforced and administered from one Office of Film and Literature Classification (hereafter “the Office”) under the empowering legislative umbrella of the Films, Videos and Publications Classification Act 1993 (hereafter “the Act”).

1.47 The censorship regime centres on a finding that material is “objectionable”.⁵⁴ Publications that promote or support, or tend to promote or support, certain types of behaviour listed in section 3(2) of the Act are automatically deemed to be likely to be injurious to the public good. Any other publications must be considered, giving particular weight to other factors. These are discussed below.

50 Crimes Act 1961, s 240.

51 Crimes Act 1961, s 241.

52 Summary Offences Act 1981, s 24.

53 *R v Hicklin* (1868) LR 3 QB 360 at [371].

54 Films, Videos and Publications Classification Act 1993, s 3.

The Office of Film and Literature Classification

- 1.48 The Act establishes an Office of Film and Literature Classification,⁵⁵ consisting of a Chief Censor, a Deputy Chief Censor and such classification officers as are required. The main function of the Office is to classify any publications submitted to it under the Act as objectionable or otherwise.⁵⁶ The punishment of offences is left to the ordinary courts, although the Office's jurisdiction is very wide. Section 2 defines "publication" as:
- a) any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide:
 - b) any print or writing:
 - 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:
 - 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.
- 1.49 The Office is responsible for the classification of a wide range of material, including films, videos, newspapers, magazines, computer discs, video games, CD-ROMS, printed clothing, posters and playing cards.⁵⁷ The courts interpret the definition of "publication" in the censorship legislation in a very broad fashion, particularly where material has been recovered from computers.

Types of decision

- 1.50 The Office may classify a publication as unrestricted, objectionable, or objectionable unless restricted to persons of a certain age (for example R18) to specified persons or classes of persons (for example to film society audiences), or to be used only for one or more specified purposes.⁵⁸ There is no guidance as to what is a "specified purpose" and the classifying body has been held to have the expertise to determine what this is.⁵⁹

55 Films, Videos and Publications Classification Act 1993, s 76. See <http://www.classificationoffice.govt.nz/>.

56 Films, Videos and Publications Classification Act 1993, s 77 sets out this function, and that of determining any question relating to the character of a publication referred by a court, determining any restrictions that might apply as part of classification, examining film posters and determining any exemptions from the Act's provisions. The Office must act independently.

57 Annual Report (2003) 24.

58 Films, Videos and Publications Classification Act 1993. s 23.

59 *Society for the Promotion of Community Standards v the Film and Literature Board of Review* [2005] 3 NZLR 403 (CA) at [118].

- 1.51 Classification may also involve restrictions on display, determined by taking into account the likelihood of offence being caused to reasonable members of the public.⁶⁰
- 1.52 Decisions as to classification are conclusive evidence of the status of the publication for all purposes,⁶¹ except for a possible challenge by a person charged with an offence under the Act.⁶²
- 1.53 Decisions are entered in a public register,⁶³ which, since 1 October 2012, has been a searchable electronic register.⁶⁴

Review

- 1.54 Owners, makers, publishers and authorised distributors of publications may seek a review of a classification decision, as may the Labelling Body, any party to court proceedings where a publication has been referred for classification, the Secretary of Internal Affairs, the Chief Executive of Customs, any other person who was given leave to submit, and any other person who obtains leave of the Secretary of Internal Affairs.⁶⁵ Review is undertaken by a Film and Literature Board of Review administered by the Department of Internal Affairs.

Appeal

- 1.55 The person who has sought the review, a person who is charged with an offence who has challenged a decision under section 41(3), any party to an application for review, and the owner, maker, publisher or authorised distributor of the publication may appeal the review decision to the High Court on a point of law.⁶⁶ Any party to the High Court proceedings may appeal against the decision to the Court of Appeal on a point of law.⁶⁷

Definition of “objectionable”

- 1.56 The Act contains a detailed definition of “objectionable”. Section 3 provides:
- (1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime,

60 Films, Videos and Publications Classification Act 1993, s 27(1)(c).

61 Films, Videos and Publications Classification Act 1993, s 41. See *R v Spark* [2009] 3 NZLR 625 (CA).

62 Films, Videos and Publications Classification Act 1993, s 41(2).

63 Films, Videos and Publications Classification Act 1993, s 39. Sections 42A-C provide for the maintenance of the register containing decisions made prior to 1 October 2012 which can be physically inspected during office hours.

64 Films, Videos and Publications Classification Act 1993, s 40, and reg 35 of the Films, Videos, and Publications Classification Regulations 1994: <http://www.classificationoffice.govt.nz/search-for-a-classification/search-for-a-classification.html>.

65 Films, Videos and Publications Classification Act 1993, s 47.

66 Films, Videos and Publications Classification Act 1993, sn 58.

67 Films, Videos and Publications Classification Act 1993, s 70.

cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

- (2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,—
- (a) the exploitation of children, or young persons, or both, for sexual purposes; or
 - (b) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
 - (c) sexual conduct with or upon the body of a dead person; or
 - (d) the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or
 - (e) bestiality; or
 - (f) acts of torture or the infliction of extreme violence or extreme cruelty.
- (3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication—
- (a) describes, depicts, or otherwise deals with—
 - (i) acts of torture, the infliction of serious physical harm, or acts of significant cruelty:
 - (ii) sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:
 - (iii) other sexual or physical conduct of a degrading or dehumanising or demeaning nature:
 - (iv) sexual conduct with or by children, or young persons, or both:
 - (v) physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:
 - (b) exploits the nudity of children, or young persons, or both:
 - (c) degrades or dehumanises or demeans any person:
 - (d) promotes or encourages criminal acts or acts of terrorism:
 - (e) represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being

a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

- (4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable, the following matters shall also be considered:
- (a) the dominant effect of the publication as a whole:
 - (b) the impact of the medium in which the publication is presented:
 - (c) the character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:
 - (d) the persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:
 - (e) the purpose for which the publication is intended to be used:
 - (f) any other relevant circumstances relating to the intended or likely use of the publication.

1.57 Section 3 of the Act contains a rigorous breakdown of criteria to be used in determining whether a publication is objectionable. It reflects the government's declared aim of toughening up the approach to pornography.⁶⁸ The legislation clearly resulted in regulation of material that was not regulated before.⁶⁹ What follows is a selective examination of significant decisions that interpret the criteria in section 3 and are of importance to freedom of expression.

Decisions

Promotes or supports, or tends to promote or support

1.58 Section 3(2) has not created a new category of automatically banned material. Total prohibition of material containing the specific activities described in the subsection can only follow if the publication "promotes or supports, or tends to promote or support" the activities shown. Pure description, or depiction, is not enough. Therefore, the inflexibility created by the list of behaviour in section 3(2) is offset by the flexibility of the "promotes or supports" test. At the same time, the latter takes the full weight of the censorship decision. To avoid total prohibition, it must be argued that nothing in the publication has the effect of promoting or supporting what is shown.

1.59 In *Society for the Promotion of Community Standards v Film and Literature Board of Review*,⁷⁰ it was held that the meaning of the phrase "tends to" support or promote

68 See (1992) 532 NZPD 12761.

69 See U Cheer "A State's Increasing Role in Monitoring Expression: New Zealand's New Censorship Regime" (1996) *Canta LR* at 333.

70 *Society for the Promotion of Community Standards v Film and Literature Board of Review* [2005] 3 NZLR 403.

specified activity has a sliding scale, with the closest synonym being “likely to”, but the determination of meaning is for the expert classifying body to determine. There must, however, be a real or substantial risk that publication would support or promote the specified activity. A great deal of effort is apparently taken to ensure that art and literature do not fall foul of section 3(2).⁷¹

- 1.60 Material apparently promoting criminal activities will not automatically be prohibited. Books that provide guides to cultivating cannabis have been found to be objectionable as promoting criminal acts.⁷² However, where such a publication is politically oriented with a strong focus on lifestyle and law reform associated with cannabis, the classification may be R18.⁷³ However, in 2007, the Office banned a book by Dr Philip Nitschke entitled *The Peaceful Pill Handbook*.⁷⁴ The book advocated law reform and gave advice about how the seriously ill and elderly could consider ending their own life, including comparisons of various methods of suicide.

The New Zealand Bill of Rights Act 1990

- 1.61 It became apparent very quickly that the Office and the Board would have to deal regularly with Bill of Rights arguments put forward to avoid publications being classified as objectionable or made subject to restrictions. The relevant sections of the New Zealand Bill of Rights Act 1990 (the Bill) are sections 4, 5, 6 and 14.
- 1.62 This area of the law has attracted high profile challenges to freedom of expression in New Zealand. In 2006, the Classification Office found an issue of the Otago University Students' Association magazine *Critic* (Issue 23) to be objectionable.⁷⁵ The edition, entitled “Censored”, was submitted to the Office by the police because it contained a notorious article which was a “How-to” guide for drug rapists. The Office found that the magazine was objectionable because it tended to promote and support the use of violence and coercion to compel any person to participate in, or submit to, sexual conduct. It was also found that the magazine promoted or encouraged criminal acts to a large extent. The Office here indicated that it had considered the effects of the Bill of Rights when reaching its decision, but merely stated this in a brief mantra which said that it was Parliament’s intention under the Act that if a publication tends to promote or support an activity listed, then it should not be available to the New Zealand public. Such restriction was said to reflect a concern of our democratic society to limit such publications in order to protect the public good from the injury caused by such

71 See U Cheer “When Correctly Viewed, Everything is Lewd: Art and Censorship in New Zealand” (2009) 4(2) *International Journal of the Arts in Society* at 447.

72 Films, Videos and Publications Classification Act 1993, s 3(3)(d). OFLC 9601447, 9601479, 9601478 (June 1997); 9601476, 9600866 (July 1997), OFLC Ref 1200339.000 (31 May 2012).

73 Decision of the Board, Decision 1/98. See also OFLC 00735 (Student newspaper articles about suicide injurious to public good if made available to young people and therefore potentially damaging to society. Objectionable except to those over 16); (2000) OFLC Ref 001858 (Pyrotechnics Cookbook manual downloaded from internet. The manual promoted and encouraged criminal acts to such extent and degree that its availability was likely to be injurious to the public good).

74 Dr Philip Nitschke and Dr Fiona Stewart, “The Peaceful Pill Handbook” OFLC No 700240, 7 June 2007.

75 OFLC 501845, *Critic Te Arohi*, 23, 31 January 2006.

publications. It was also noted that the classification supported the right of women to security of person.

1.63 *Living Word Distributors Ltd v Human Rights Action Group (Wellington)*⁷⁶ is also a significant decision of the Court of Appeal which has had profound effects on censorship and Bill of Rights jurisprudence. In *Living Word*, the Court overturned a decision of the High Court banning as objectionable two videos discussing the rights of homosexuals in an extremely negative context. The Court of Appeal had to consider the effect of section 3(3)(e) of the Act, and whether this trumped freedom of expression. That section provides that material which represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class - being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993 - can be found to be objectionable. The Court held that there was no clash of rights values because the section did not create a special stand-alone topic for censorship which could embrace the videos. It merely pointed to factors that may be given weight in the censorship process. Freedom of expression was to be given full weight in assessing whether the videos were likely to injure the public good. The judgment emphasises the importance of freedom of expression in the process of censorship, but unfortunately gives a rather vague place to values underlying human rights in relevant cases. This part of the decision caused some concern from human rights activists, who now see little purpose for the inclusion of section 3(3)(e) in the Act.⁷⁷

1.64 In *Living Word*, the Court also clarified the limited categories of material to which the censorship legislation applies, by describing a "subject gateway". This subject gateway is established by section 3(1), which provides:

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.

1.65 The Court held the section has two purposes: to define the subject-matter covered by the Act, and to describe the character of that subject-matter (as being injurious to the public good). The subject-matter is limited by reference to the list (sex, horror and so forth) because those words establish a class of relevant publication, and although the words "such as" allow other examples, these have to be of the same kind as the class established in the statute. Furthermore, the Court elaborated, the words used in the class point to activity rather than expression of opinion. This makes clear the requirement of a connection between such categories and likely injury to the public good.

76 *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570 (CA).

77 These groups took their concerns to the Government Administration Committee Inquiry into Censorship Issues. The Committee issued a conservative report on these issues: Report of the Government Administration Committee, March 2003, 1.5A. No reform has occurred in this area.

Young people, selfies and offensive language

1.66 *Living Word* removed some material from the censorship process.⁷⁸ In particular, it appeared that offensive language and publications that are the result of covert filming which may show nudity, but do not involve sexual behaviour, could not now get through the subject-matter gateway and therefore could not be classified or restricted. Therefore, new subsections (1A) and (1B) and ss 3A–3D were added to the Films, Videos and Publications Classification Act 1993 in 2005. Section 3(1A), 3A and 3B read as follows:

3(1A) Without limiting subsection (1), a publication deals with a matter such as sex for the purposes of that subsection if—

- (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, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.

1.67 This provision allows the Office to deal with “selfies” where young teenagers have created and sent sexually suggestive or explicit images of themselves.⁷⁹ The new provision was intended to remove 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. However, in the main, covert filming is a privacy matter and is now covered by the intimate covert filming provisions in the Crimes Act 1961,⁸⁰ and the Harmful Digital Communications Act 2015, both discussed elsewhere.

1.68 A further amendment was made to deal with harms to young people in particular:

3A. Publication may be age-restricted if it contains highly offensive language likely to cause serious harm—

- (1) A publication to which subsection (2) applies may be classified as a restricted publication under section 23(2)(c)(i).
- (2) This subsection applies to a publication that contains highly 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 a specified age, to cause serious harm to persons under that age.
- (3) In this section, highly offensive language means language that is highly offensive to the public in general.

78 See Annual Report of the Office of Film and Literature Classification (2003) at 10.

79 Annual Report of the Office of Film and Literature Classification (2014) at 15.

80 Sections 216G–216N.

3B. Publication may be age-restricted if likely to be injurious to public good for specified reasons—

- (1) A publication to which subsection (2) applies may be classified as a restricted publication under section 23(2)(c)(i).
- (2) This subsection applies to a publication that contains material specified in subsection (3) to such an extent or degree that the availability of the publication would, if not restricted to persons who have attained a specified age, be likely to be injurious to the public good for any or all of the reasons specified in subsection (4).
- (3) The material referred to in subsection (2) is material that—
 - (a) describes, depicts, expresses, or otherwise deals with—
 - (i) harm to a person's body whether it involves infliction of pain or not (for example, self-mutilation or similarly harmful body modification) or self-inflicted death; or
 - (ii) conduct that, if imitated, would pose a real risk of serious harm to self or others or both; or
 - (iii) physical conduct of a degrading or dehumanising or demeaning nature; or
 - (b) is or includes 1 or more visual images—
 - (i) of a person's body; and
 - (ii) that, alone, or together with any other contents of the publication, are of a degrading or dehumanising or demeaning nature.
- (4) The reasons referred to in subsection (2) are that the general levels of emotional and intellectual development and maturity of persons under the specified age mean that the availability of the publication to those persons would be likely to—
 - (a) cause them to be greatly disturbed or shocked; or
 - (b) increase significantly the risk of them killing, or causing serious harm to, themselves, others, or both; or
 - (c) encourage them to treat or regard themselves, others, or both, as degraded or dehumanised or demeaned.

Offences

1.69 Part VIII of the Act sets out a series of offences. Sections 122 to 132 cover offences of supply and possession of objectionable or restricted publications. Section 123 makes it an offence to make, supply, distribute, display, advertise or exhibit for supply or in expectation of payment, or deliver to any other person so that they can breach the

Act, an objectionable publication. Supply may be by way of electronic transmission as well as physical transfer. The section clearly covers transmission of material using the internet.⁸¹ It also applies to distributing or giving objectionable publications to another person without the motivation of financial gain, importing and exporting and providing access to a publication. An individual may be fined up to \$10,000 for committing the offence and a body corporate up to \$30,000. Most significantly, the offence is strict liability — it is no defence that the defendant had no knowledge or no reasonable cause to believe the publication was objectionable.

- 1.70 Section 124 describes a similar offence, but incorporates a mental element of knowing or having reasonable cause to believe the publication was objectionable.⁸² It therefore attracts greater penalties: an individual may be subject to imprisonment for a term not exceeding 10 years, while a body corporate may be fined up to a limit of \$200,000.
- 1.71 Sections 125 and 126 establish similar offences of strict liability and incorporating knowledge in relation to restricted publications. The strict liability offence in section 125 attracts a fine of up to \$3,000 for an individual and up to \$10,000 for a body corporate, while the knowledge offence in section 126 sets limits of \$10,000 and \$25,000 respectively.
- 1.72 Section 127 prohibits exhibition to persons younger than 18, both in strict liability and knowledge circumstances, section 129 defines similar offences of exhibition or display in or within view of a public place and section 130 provides for breach of conditions of display.
- 1.73 Section 131 contains a controversial possession offence of being in possession of an objectionable publication without lawful authority or excuse. There is no defence of no knowledge or no reasonable cause to believe the publication was objectionable, and the offence is punishable by a fine of up to \$2,000 for individuals and \$5,000 for a body corporate.
- 1.74 Section 131A, added in 2005, provides for a new knowledge offence in this area, of doing an act that constitutes a possession offence, knowing or having reasonable cause to believe the publication was objectionable. This offence attracts a fine of up to \$50,000 for an individual and \$100,000 for a body corporate. This offence may also be problematic for Internet Service Providers.
- 1.75 The offences in sections 123 to 129, 131 and 133 may not be prosecuted without leave of the Attorney-General.⁸³
- 1.76 The offences of most concern are those relating to supply and display in sections 123 to 126 and the possession offence in section 131. A person publishing could be liable not only for publishing objectionable material, but also for possessing it within electronic systems, in particular within the hard drive of a computer stored on files or

81 For example, *Overend v Department of Internal Affairs* (1998) 15 CRNZ 529 (HC); *Kellet v Police* (2005) 21 CRNZ 743 (HC).

82 For example: *Shaw v Department of Internal Affairs* [2005] DCR 898 (HC).

83 Films, Videos and Publications Classification Act 1993, s 144.

sent and received as email. The offences have been much criticised, both before the passage of the Act and since its enactment.⁸⁴

Classification and the future - on demand services

1.77 The law governing classification of online (video on demand) content in New Zealand is currently unclear, and the Classification Office accepts that on-demand services such as Netflix are not required to get content classified before release. This meant the controversial series *13 Reasons Why: Season 1*, which dealt with the suicide of a young person, was available in New Zealand without restriction of any kind. However, the Classification Office can require that specific content is classified if there are concerns that it might be harmful to the public.⁸⁵ The Chief Censor therefore called in the entire series of *13 Reasons Why: Season 2* for classification on 7 May 2018 after having become concerned at the subject matter following a preview screening of the series made available to the Classification Office by Netflix in early May. The series was given a special classification of RP18, limiting them to those 18 years or older unless supervised by an adult viewer, ordinarily a parent but potentially another responsible adult, adult sibling or guardian.⁸⁶ Although the classification can be displayed by Netflix, its enforcement is completely uncertain, rendering the decision essentially an educational one.

STATUTES DEALING WITH INDECENCY

1.78 While the Films, Videos and Publications Classification Act 1993 is clearly the most important single statute dealing with objectionable material, indecency is still regulated in New Zealand by a wide range of other statutory provisions. In many of them, the term “indecent” is not defined.

1.79 Under section 124 of the Crimes Act 1961, it is an offence to exhibit an indecent object, or an indecent show or performance, in view of any place to which the public has access; it is also an offence to exhibit an indecent show or performance to any person for payment. It is a defence to prove that the public good was served by the acts done.⁸⁷ A prosecution under this section requires the consent of the Attorney-General.⁸⁸ In a case involving an indecent performance in a strip club the Court of Appeal refused to apply the *Hicklin* test of tendency to deprave and corrupt, but held that the word “indecent” in section 124 should be given the meaning accorded to it in general use; judicial attempts at definition only confuse the issue.⁸⁹ The provision

84 See in particular Dean Knight “An Objectionable Offence: A Critique of the Possession Offence in the Films, Videos, and Publications Classification Act 1993” (1997) 27 VUWLR 451.

85 Films, Videos and Publications Classification Act 1993, s 13(3).

86 See OFLC ref: 1800229.000, 18 May 2018. See also <https://www.classificationoffice.govt.nz/news/featured-classification-decisions/13-reasons-why-season-2/> accessed 15 August 2018.

87 Crimes Act 1961, s 124(2). It is a question of law whether the act might in the circumstances serve the public good, but a question of fact whether it did serve the public good (s 124(3)).

88 Crimes Act 1961, s 124(5).

89 *R v Dunn* [1973] 2 NZLR 481 (CA). In 1972 there was a prosecution of those concerned with the stage show “Hair”. The jury returned a verdict of not guilty.

cannot apply to any publication which comes under the Films, Videos and Publications Classification Act, which means its application is very limited. It is rarely used.

- 1.80 Section 4 of the Summary Offences Act 1981 provides that every person who uses “indecent or obscene” words in a public place, or within hearing of a public place, is liable to a fine. The only real difference between the two words “obscene” and “indecent” in the section appears to be in degree. In *Jeffrey v Police*,⁹⁰ Tipping J adopted the approach taken in an earlier Court of Appeal decision involving a charge of obscene language under section 48 of the then Police Offences Act 1927.⁹¹ Turner P held that the word obscene did not require a tendency to deprave or corrupt, and McCarthy J considered that “indecent” and “obscene” were not alternatives. Obscenity was the graver of the two, but they were both simply different steps on the scale of impropriety, describing different levels of offensiveness in the conduct under review. Ultimately, the matter was to be decided by looking at current standards and at the particular circumstances in the case and asking whether the act or language offends against the contemporary standards of propriety in the community. Tipping J adopted this interpretation to a charge of using obscene words under section 4 of the Summary Offences Act 1981. The court must have regard to all the circumstances, including whether any person who might have overheard would have been offended.⁹²
- 1.81 By the Broadcasting Act 1989 broadcasters are responsible for maintaining in their programmes generally acceptable community standards and they must have regard, among other things, to the observance of standards of good taste and decency.⁹³ The principal mode of enforcement is a complaints procedure under the Act.⁹⁴ The standards approved by the Broadcasting Standards Authority also contain guidelines on indecency and violence.
- 1.82 The Broadcasting Standards Authority may also make orders in respect of series that contain objectionable material. Under section 13A of the Act, the Authority may consider broadcast series dealing with sex, violence, degrading, dehumanising or demeaning sexual or physical conduct, sexual conduct with or by children, exploitation of the nudity of children, or promoting or encouraging criminal acts or acts of terrorism,⁹⁵ and determine whether the manner in which these themes are dealt with are injurious to the public good. The Authority must have regard to contextual matters in making its decision.⁹⁶ It may look at recordings and transcripts relating to further

90 *Jeffrey v Police* (1994) 11 CRNZ 507 (HC).

91 *Police v Drummond* [1973] 2 NZLR 263 (CA). The Judge in *Jeffrey* noted that the sections were not exactly the same but the ground covered was similar in that there is a conjunction of the words indecent and obscene (at 511).

92 *Jeffrey v Police* (1994) 11 CRNZ 507, at 513; Summary Offences Act 1981, s 4(3). See also *Brooker v Police* [2007] 3 NZLR 91, *Evans v R* [2008] DCR 199 and *Rowe v R* [2018] NZSC 55.

93 Broadcasting Act 1989, s 4.

94 See www.bsa.govt.nz.

95 Broadcasting Act 1989, s 13A.

96 Broadcasting Act 1989, s 13A(2): The dominant effect of: the programme as a whole; the impact of the programme given the medium in which the programme is presented; the character of the programme, including any merit, value or importance the programme has in relation to artistic, social, cultural, educational, scientific or other matters; the persons, class of persons, or age of persons by whom the

programmes in the series and direct withdrawal of any programme or impose conditions,⁹⁷ or order withdrawal of the entire series or part of it.⁹⁸ Failure to comply with an order or contravention of an order attracts a fine of up to \$100,000.

- 1.83 Certain statutes other than the Films, Videos and Publications Classification Act 1993 deal with written and printed matter. First, by virtue of the Customs and Excise Act 1996 it is an offence to import “prohibited imports”.⁹⁹ Among the list of prohibited matter are “all publications as defined in s 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”.¹⁰⁰ It is also unlawful to import any electronic publication which is objectionable within the meaning of the Act.¹⁰¹ Customs officers have power to seize such articles, which are deemed to be forfeited to the Crown.¹⁰² If in doubt they may refer publications to the Classification Office.
- 1.84 Secondly, section 22 of the Postal Services Act 1998 provides that an offence is committed by anyone who posts a postal article containing any indecent article or representation of any kind, although only if it is posted with the intention of offending the recipient. If it has reason to suspect an infringement a postal service operator may detain the article and open it.¹⁰³ It is an offence to divulge without reasonable excuse information from or about the contents of a postal article not intended for the person who so divulges.¹⁰⁴ It is also an offence, without reasonable excuse, to post or cause to be posted any postal article containing an objectionable thing, in this case confined to any noxious substance or thing, or any dead animal.¹⁰⁵

PRIVACY OFFENCES (INCLUDING DISCLOSING PRIVATE SEXUAL MATERIAL WITHOUT CONSENT)

- 1.85 The Crimes Act 1961 contains a number of offences against personal privacy. It is an offence punishable by imprisonment for up to two years intentionally to intercept any private communication by means of an interception device.¹⁰⁶
- 1.86 These provisions were tested in a notorious case involving media. Prior to the November 2012 election, the Prime Minister, John Key, referred the matter of an

programme was intended, or is likely, to be viewed; the purpose of the programme; and any other relevant matter relating to the broadcasting of the programme.

97 Broadcasting Act 1989, s 13A(3).

98 Broadcasting Act 1989, s 13A(4).

99 Customs and Excise Act 1996, s 54.

100 Customs and Excise Act 1996, s 54(1)(aa).

101 Customs and Excise Act, s 54(1)(aa). See *Zheng v New Zealand Customs Department HC Auckland CRI-2009-404-132*, 27 August 2009.

102 Sections 167(2) and 225.

103 Section 5 of the Postal Services Act 1998.

104 Postal Services Act 1998, s 20(2).

105 Postal Services Act 1998, s 21.

¹⁰⁶ Crimes Act 1961, s 216B.

audio recording he said was illegally obtained to the police. Mr Key and a political ally, Mr Banks, had held a meeting to which media were invited in the week running up to election day. The two men enjoyed a cup of tea in a café, but prior to having discussions, media were asked to remove themselves to a position outside where they could film but not record the conversation. After the meeting, Mr Key discovered a recording device had been left on the table. A cameraman, Bradley Ambrose, who owned the device, obtained a recording remotely from it, which he later released to a newspaper when Mr Key accused him of deliberately recording the conversation. The question arose whether Mr Bradley had intentionally intercepted a private communication using an interception device.¹⁰⁷ The newspaper refused to release the recording on the basis that it could be breaching the provision prohibiting disclosure of such communications.¹⁰⁸ A media storm erupted, focused on the content of the tape. No mainstream media released it, although hints were reported once another political candidate, Winston Peters, suggested in a campaign speech that the PM had made derogatory comments about the elderly on the tape.

- 1.87 Mr Bradley meanwhile sought a declaration that the discussion between Mr Banks and Mr Key was not a private one. The judge refused to adjudicate on the grounds that insufficient facts were before her and the police had not completed their investigation.¹⁰⁹ The police eventually announced they would not prosecute Mr Ambrose who had written a letter of regret, but delivered a warning to him and to the media that his actions were probably illegal and any publication of the tape would be also. However, the tape had been leaked long since by prominent media law bloggers linking to it, arguing that the meeting could never have been private, and any media publishing the tape would not be in breach of the criminal law either.
- 1.88 A provision is contained in the Crimes Act 1961 which is intended to apply to “hacking”, whereby individuals attempt to access computer systems without authority to demonstrate their skill at overcoming any measures in place protecting the system, but without any intention to cause harm.¹¹⁰ There must be intention to gain access, directly or indirectly, to the computer system. However, the offence does not include unauthorised behaviour by authorised persons,¹¹¹ nor is there any offence by a law enforcement agency which has accessed a computer system under authority of any interception warrant or a search warrant.¹¹² It is an offence, intentionally or recklessly, to, destroy, damage or alter any computer system if a person knows or ought to know that danger to life is likely to result.¹¹³ Further, it is an offence, intentionally or recklessly, and knowing there is no authorisation, to damage, delete, modify or otherwise interfere with or impair any data or software in any computer system, to cause any data or software in any computer system to be damaged, deleted, modified

107 Crimes Act 1961, ss 216A–B.

108 Crimes Act 1961, s 216C.

109 *Ambrose v Attorney-General* [2012] NZAR 23.

110 Crimes Act 1961, s 252(1).

111 Crimes Act 1961, s 252(2).

112 Crimes Act 1961, s 252(3).

113 Crimes Act 1961, s 250(1).

or otherwise interfered with or impaired, or to cause any computer system to fail or deny service to any authorised users.¹¹⁴

1.89 There is no statute law against photographing a person without his or her consent. Normally, even the publication of a photograph taken without consent is not wrongful, although in some circumstances it could be. For instance, it might be defamatory.¹¹⁵ The Copyright Act 1994 conveys a moral right to privacy of photographs and films on a person who has commissioned the work for a private and domestic purpose, where the copyright itself is owned by the person who has made the work and not the person who has commissioned it.¹¹⁶ Such photographs or films are not to be copied and issued, exhibited or shown in public, or broadcast or included in a cable programme. There are exceptions relating to incidental copying, parliamentary and judicial proceedings, royal commissions and statutory inquiries, acts done under statutory authority, and anonymous or pseudonymous works.¹¹⁷ Infringement of this right is actionable by the person entitled, who can sue for damages and an injunction.¹¹⁸

1.90 Under the Crimes Act 1961,¹¹⁹ there are offence provisions intended to deal with intimate visual recording, colloquially known as “up-skirting” and “down-blousing” covert filming activities. Intimate visual recording is defined as:¹²⁰

- (1) a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device without the knowledge or consent of the person who is the subject of the recording, and the recording is of—
 - (a) a person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and that person is—
 - (i) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or
 - (ii) engaged in an intimate sexual activity; or
 - (iii) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
 - (b) a person’s naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—

114 Crimes Act 1961, s 250(2).

115 See above.

116 Copyright Act 1994, s 105. See *R v Barai* [2004] DCR 71. See also Susy Frankel “The Copyright and Privacy Nexus” (2005) 36 VUWLR 507.

117 Copyright Act 1994, s 105(3).

118 Copyright Act 1994, s 125.

119 Crimes Act 1961, ss 216G–216N.

120 Crimes Act 1961, s 216G(1).

- (i) from beneath or under a person's clothing; or
- (ii) through a person's outer clothing in circumstances where it is unreasonable to do so.

1.91 A Court of Appeal decision has made it clear that the mischief intended to be addressed by the legislation is the act of covert filming. In *Diffin v R*,¹²¹ the accused had filmed an image looking down an elderly woman's blouse as she sat or bent forward and had captured on film parts of her breast and brassiere that would not normally have been visible to others. The Court rejected an argument that the words: "from beneath or under clothing" meant that the filming had to take place below the breasts. The words do not refer to the location of the recording device. They simply signify that a qualifying intimate recording must depict breasts seen beneath or under clothing, which means filming can take place from above or below.

1.92 The definition covers live recording and transmission.¹²² Making such a recording can attract a prison term of up to 3 years. There must be intention or recklessness as to every element of the recording, and no consent.¹²³ There are also offences of possession¹²⁴ and publishing, importing, exporting or selling.¹²⁵

INCITEMENT

1.93 New Zealand has criminalised various forms of incitement. Blasphemy is also dealt with under this heading as it is a form of public order offence relating to published speech, although effectively a dead letter in New Zealand.

Blasphemy

1.94 Prosecutions for blasphemous libel are rare; in New Zealand there is only one reported example.¹²⁶ Surprisingly, however, the offence remains on the statute books and carries a penalty of up to one year's imprisonment.¹²⁷ Fortunately, the leave of the Attorney-General is necessary before a prosecution may be brought.¹²⁸ The constituents of blasphemy are nowhere defined in our statute; all the legislature has done is to define what it is not:¹²⁹

121 (2013) 26 CRNZ 368, [9]-[12]. Most of the cases involve challenges to police obtaining of the evidence of covert filming. The courts regard the offence as serious and do not often allow such challenges to succeed: see eg: *W v R* [2017] NZCA 522.

122 Crimes Act 1961, s 216G(2).

123 Crimes Act 1961, s 216H. This means accidental filming, such as by a CCTV camera used to detect criminal behaviour in public, will not constitute an offence under the section.

124 Crimes Act 1961, s 216I.

125 Crimes Act 1961, s 216J.

126 *R v Glover* [1922] GLR 185 (SC).

127 Crimes Act 1961, s 123.

128 Section 123(4).

129 Section 123(3).

It is not an offence ... to express in good faith and in decent language, or to attempt to establish by arguments used in good faith and conveyed in decent language, any opinion whatever on any religious subject.

In the view of a New Zealand Judge, the very basis of the offence is to prevent disorder and even violence in the community and to this end to avoid the provocation and outrage of religious feelings.¹³⁰

- 1.95 In New Zealand, publications, including films, continue to provoke some persons to threaten proceedings for blasphemy, but no prosecutions have been commenced. An example was the outrage caused by a display by Te Papa, the Museum of New Zealand, of a work by Tania Kovats. *Virgin in a Condom* was a 7-cm high statue of the Virgin Mary covered by a condom. It was physically attacked by a member of the public, and protest groups marched outside the museum. A Member of Parliament and a priest applied to the Solicitor-General for charges of blasphemous libel to be laid. Permission was refused primarily because the Solicitor-General considered that New Zealand law now recognises freedom of expression as a value, most recently in the New Zealand Bill of Rights Act 1990. The Solicitor-General also noted that the item was displayed in a museum that was a place for artistic expression, and was part of an exhibition for which a charge was made, which rendered viewing a personal choice.¹³¹
- 1.96 In February 2006, the New Zealand media became involved in an international controversy over what many Muslims considered were blasphemous caricatures of the Prophet Mohammad that had been published previously by a Danish newspaper. Wellington's *Dominion Post* and *The Press* in Christchurch joined a number of European newspapers in re-printing the Danish cartoons. Amidst threats of blasphemy action, the Human Rights Commission hosted a meeting between interest groups, which resulted in the release of a statement.¹³² In this, the parties affirmed without dissent the importance of freedom of the media, but also noted that such freedom is not absolute and comes with responsibilities. Those responsibilities include: sensitivity to diverse cultures and beliefs, and recognition of the diversity within cultures and beliefs; responsibility to inform the community about diverse cultures and beliefs; and the provision of dialogue and channels of communication between the media and faith communities. Nonetheless, the meeting acknowledged that the media has to make difficult calls on such issues on a daily basis and these need to be considered in an international context of conflict, and accepted that the media which published the cartoons did not set out to insult or offend, only to inform. Those media apologised for the offence caused, but did not reside from the decision to publish based on the

130 *R v Glover* [1922] GLR 185 (SC) at [187] per Hosking J.

131 The statue was not removed from display: *The Press*, 9 March 1998, 28 March 1998; *Sunday Star Times*, 15 March 1998. The museum also displayed a work entitled *Wrecked* by Sam Taylor-Woods, depicting the Last Supper with a bare-breasted woman substituted for the figure of Christ, which was also the subject of complaints.

132 Press Release: Human Rights Commission, "Statement from Media and Religious Representatives", 9 February 2006.

context at that time. The two newspapers also gave an undertaking not to publish the cartoons again.¹³³

- 1.97 In spite of the view that blasphemy could be seen as a dead letter, some time ago our Court of Appeal examined and indirectly endorsed a role for the offence to continue to play. In *Mendelssohn v Attorney-General*,¹³⁴ the Court examined the rights protecting religious freedom in the New Zealand Bill of Rights Act 1990¹³⁵ and held the Bill did not impose positive duties on the state in any relevant sense to protect religious freedom. The Court also examined New Zealand's international obligations, and noted that art 18 of the International Covenant on Civil and Political Rights 1966 protects freedom of religion, but primarily affirms a freedom from state interference. In the Court's view, art 20 unambiguously requires protective action in favour of religion, but only in limited extreme situations.
- 1.98 New Zealand entered a reservation to this article which stated that it had legislated in various relevant areas, being those restricting the advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons. In *Mendelssohn*, the Court of Appeal identified the relevant legislation referred to in the reservation as including the crime of blasphemous libel.
- 1.99 In spite of *Mendelssohn*, it is apparent the crime of blasphemy serves little practical purpose any longer in New Zealand law. The intervention of the Human Rights Commission in the Prophet Mohammad cartoon controversy prevented a further testing of blasphemy laws in New Zealand, and, in particular, whether they survive the Bill of Rights and whether they apply to non-Christian religions. Blasphemy is anomalous in a secular society, and represents a threat to freedom of expression. Furthermore, while the offence remains on the books, religious groups continue to have their hopes dashed about the protections available to their interests.

Incitement

- 1.100 The verb "incite" means "urge" or "encourage", and this can be done by a general article in a newspaper as well as by one individual speaking to another, or writing an online blog.¹³⁶ Incitements of various sorts are proscribed in New Zealand law.
- 1.101 It is a punishable contempt to incite persons not to obey a court order.¹³⁷
- 1.102 By sections 66 and 311 of the Crimes Act 1961 it is wrongful to "incite, counsel or procure" any person to commit an offence, whether or not the offence is eventually committed. If the offence is actually committed, the inciter is a party to it and liable to

133 The cartoons were published again worldwide in 2008, although not by The Press or the Dominion Post. Unfortunately, similar controversies continue to arise amid increasing polarisation between eastern and western cultures and religions. See eg: the Charlie Hebdo terrorist attack fall-out: 'Cartoonists' tributes to those killed in Paris attack,' Stuff, 8 January 2015, <http://www.stuff.co.nz/world/64752063/Cartoonists-tributes-to-those-killed-in-Paris-attack>, accessed 2 March 2015.

134 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) especially at [16]–[18].

135 New Zealand Bill of Rights Act 1990, ss 13, 14, 15, 17 and 20.

136 *R v Most* (1881) 7 QBD 244.

137 *Fry v Bray* (1959) 1 Fed LR 366 (IRC).

the penalty prescribed for that offence;¹³⁸ if the incitement does not result in the commission of the offence, the inciter is liable to half the maximum penalty for the offence itself.¹³⁹ The most likely way in which one could offend against these sections would be to encourage persons to disobey an unpopular law.¹⁴⁰ It is not an uncommon occurrence for a particular law to fall out of favour with a section of the community. When this happens, there may be both pressure for repealing legislation and incitements to the populace to flout the unpopular law; examples in New Zealand include the abortion laws and the secrecy provisions of our secret service legislation. Whereas the former of these expedients is legal, the latter is not; it is a clear infringement of the sections being discussed.

1.103 However, there can be a fine line between incitement, which is illegal, and mere description, which is not necessarily so. There can be some borderline cases. At the time of the Springbok tour of New Zealand in 1980, certain protesters printed a pamphlet describing actions that could be taken by protesters. Although the police investigated the pamphlet, no prosecution was laid. Again, while books describing the cultivation of cannabis can be classified as objectionable,¹⁴¹ one may wonder whether they “incite” so as to “infringe” this branch of the law.

1.104 Although attempted suicide is no longer a crime in New Zealand, it is an offence to incite or counsel another to commit suicide if, as a result, that other commits or attempts to commit suicide.¹⁴² It is also an offence to aid and abet suicide.¹⁴³ There has to be a causal connection between counselling or inciting and suicide, and an intentionally formed deliberate encouragement or urging that suicide should occur, although presence at the suicide is not necessary.¹⁴⁴ In 2015, following a review of harms arising from online publication, the provision was amended to clarify that the offence is committed even if the other person does not commit or attempt to commit suicide in consequence of the inciting conduct.¹⁴⁵

1.105 Section 8 of the Summary Offences Act 1981 provides that it is an offence, punishable by imprisonment for up to three months or a fine not exceeding \$2,000, to print or publish for purposes of sale or distribution any document or thing that describes or depicts the manufacture of any explosive device or incendiary device or restricted weapon¹⁴⁶ (for example, an automatic pistol). However, no offence is committed if the

138 *Burnard v Police* [1996] 1 NZLR 566 (HC).

139 Crimes Act 1961, s 311(1).

140 Or indeed, any law. In 2003, TV personality Marc Ellis was reported to have been spoken to by police over a dare broadcast on TV2 inciting people to streak during a Ranfurly Shield rugby game: *The Press*, 16 October 2003.

141 See the discussion of the Films, Videos and Publications Classification Act 1993 above.

142 Crimes Act 1961, s 179(1)(a). The penalty can be imprisonment of up to 14 years. See *Carter v The Coroner's Court at Wellington* [2018] NZHC 1781, *R v Tamatea* (2003) 20 CRNZ 363 (HC) at [28], and *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.

143 Crimes Act 1961, s 179(1)(b). See also *R v Ruscoe* (1992) 8 CRNZ 68 (CA), on sentencing principles.

144 *R v Tamatea HC Auckland T023084*, 19 June 2003.

145 Crimes Act 1961, s 179(2) and (3).

146 See the Arms Act 1983, s 2.

document is of a technical, scientific, literary or artistic character, and the accused has a defence if he or she can prove that it was reasonable in all the circumstances to do as he or she did.¹⁴⁷

- 1.106 Under section 77 of the Crimes Act 1961 it is an offence to incite members of the forces to mutiny. The purpose to incite would have to be established and that determination would require freedom of expression under the New Zealand Bill of Rights Act 1990 to be taken into account. There appear to be no prosecutions arising from this provision.

CONCLUSION

- 1.107 New Zealand now has a criminal offence regime made up of myriad and varying provisions which impact on abusive and offensive communications. Specific crimes such as threats, blackmail and forms of incitement come under our criminal code, the Crimes Act 1961, as does the old offence of blasphemy, unprosecuted now because of the New Zealand Bill of Rights Act 1990 and freedom of expression. Hate speech is covered by a criminal and civil regime, but is also almost a dead letter due to increasing deference paid to the right of freedom of expression. Objectionable material is dealt with under its own statutory regime, which contains offence provisions also. There too, freedom of expression must be taken into account. “Upskirt” and “down blouse” forms of offensive covert filming, and hacking, have both been incorporated into the Crimes Act relatively recently as they have become more prevalent.
- 1.108 The most recent legislative response, however, has been the Harmful Digital Communications Act 2015. This was enacted as a specific political response to cyberbullying, online stalking and “revenge pornography”. Thus, the Act establishes a special regime that only applies to online publication which causes serious emotional harm of some kind. The criminal offence within the Act co-exists with a civil complaints regime which is intended to be accessible and cheap to use for those wishing to have harmful material removed from the internet, or for publication to cease. However, it is regrettable that such a system is not available for all forms of harmful published speech.
- 1.109 It appears the risk, noted above, that the Act regulates more speech and has more serious effects than regulation of offline speech, may be justified. The breadth of the digital regime is proving to be of concern. In late 2018, it was reported that a prominent New Zealander, Sir Ray Avery, had laid a complaint against a news outlet under the Act over stories published online as part of an ongoing news investigation into his background, products and promises. The complaint was, of course, interpreted by media as an attempt to chill news gathering and publication.¹⁴⁸ There is no specific exemption for media under the Act, as there is under the hate speech provisions in the Crimes Act, for example, although there is a requirement to act

147 As yet there are no reported cases on this section. But in 1976 a man was fined \$50 in the Magistrates’ Court in Christchurch for publishing an article giving instruction on making incendiary bombs; he was dealt with under s 34 of the Police Offences Act 1927, now repealed.

148 <https://www.newsroom.co.nz/2018/09/10/230522/avery-targets-newsroom-citing-digital-harm>, accessed 5 October 2018.

consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 when operating under the Harmful Digital Communications Act.

- 1.110 It is apparent that it would have been preferable if all areas of the criminal and civil law impacting on serious speech harms had been reviewed for consistency and perhaps consolidation at the time the Harmful Digital Communications Act was passed. Relevant laws could then be amended to provide appropriate and consistent defences and the New Zealand Bill of Rights Act and freedom of expression in particular could have been given due prominence.