YouthLaw Aotearoa

Crimes (Child Exploitation Offences) Amendment Bill Submission

Level 3 Park View Tower
21 Putney Way
Manukau
Auckland

0800 UTHLAW
(0800 884 529)

www.youthlaw.co.nz

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Who we are

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are a charity and part of the nationwide network of twenty-four community law centres throughout Aotearoa. Our service provides free legal advice and advocacy, specifically for children and young people under 25 years of age. We help children and young people facing issues with the police in a couple of ways:

- Our lawyers in the legal advice team support children and their families with information and advice to help them navigate criminal justice and online harm matters. We assist both perpetrators and victims of online harm. In 2020, our legal advice team helped young people in 156 police prosecution cases.
- We run legal education workshops about criminal law and online harm for children and young people or those supporting them.
- We publish youth-friendly information resources, undertake research, and make submissions on law and policy affecting children and young people.

This submission is informed by YouthLaw Aotearoa's insights from working with children and young people across New Zealand for over thirty years.

The submission has been prepared by Sarah Butterfield, a solicitor on our legal team, Charlie Harmer, law reform volunteer, and our YouthLaw staff and board.

Contact: Sarah Butterfield, Solicitor

Email: sarahb@youthlaw.co.nz

YouthLaw Aotearoa Submission

YouthLaw Aotearoa acknowledge and support the purpose of the Bill to protect young people in the ever-changing area of online digital communication. We share concerns about young people, the misuse of technology, and the lasting negative effects of unwanted, harmful, or misleading digital communication. We also share concerns about child grooming and the difficulty to prosecute under the current legislation.[1] However, we submit that there are issues regarding young people reporting online harm, education about online harm, and the proposed offences under the Bill. We offer the following comments on the Crimes (Child Exploitation Offences) Amendment Bill.

Overall Concerns

Children and young people reporting online harm

The Bill relies on the young person (under 16 years old) to report the offending to Netsafe or the Police. We are concerned that young people will be unable and/or unwilling to report offending because of their naivety, or lack of education about online harm, or trust in the police, or awareness of Netsafe, or their relationship with the perpetrator, or fear of repercussions from the perpetrator. Of note, a young person or child may be unwilling to report the perpetrator, even if they find out that the perpetrator misled them. This is because the perpetrator may have "groomed" the young person to accept and expect inappropriate actions (such as being misled about identifying information). If the young person finds out they have been misled by the perpetrator as to age, this may be something they can accept, as they have been groomed to accept other inappropriate actions from the perpetrator. In this situation, the hope would be that the young person or child tells an adult about the communications and that the adult is able to respond. However, even adults may struggle to know what the law is around harmful online communications and what the complaint options are. If the young person wants to protect the perpetrator, they could also delete their messages easily, which could result in Netsafe or the police being unable to help. Also of note, if the perpetrator has indecent images of the young person or the child, they may blackmail the young person.

The Bill also requires the young person to ascertain the age of the perpetrator. The young person could potentially find out the age of the perpetrator by:

- The perpetrator disclosing their true age after misleading the victim.
- Someone else who knows the perpetrator telling the victim the perpetrators true age.
- The victim meeting the perpetrator in person and realising that they are not the age they said they were. At this point, it may be too late, and harm may already have occurred.

Education about Online Harm

YouthLaw Aotearoa submit that a greater focus on the education of young people and children about their rights, online risks, and harm is needed. We recommend increased education about online harm to overcome the barriers to reporting we mentioned above.

Our YouthLaw Aotearoa legal education team frequently provides legal education in schools

[1] David Fisher "Girl's death: Hundreds of pages of texts between teen and teacher" (7 September 2016) NZ Herald <www.nzherald.co.nz/nz/girls-death-hundreds-of-of-pages-of-texts-between-teen-and-teacher/6FPCHCB5GTMTGZ2TPGQYYVOZVM/>

across New Zealand. We are guided by individual schools about what legal education would best benefit their students. Increasingly, we are being asked by schools to provide legal education about being safe online. We are concerned that there is a gap in the provision of education about online harm in schools. We are aware of the "Netsafe Schools" initiative, but we are concerned that schools can "opt-in" to this programme.[2] Occasionally, through our work on the advice line or through legal education, we are informed by clients that their school does not consider cyber-safety to be within their jurisdiction. We are concerned that this attitude is a barrier for schools to "opt-in" to "Netsafe Schools".

We are not aware of the exact content of the "Netsafe Schools" programme. We understand that the "Netsafe Schools" information is focused on protecting yourself from harm, rather than what to do if things go wrong. We would also question whether the programme clearly sets out the laws and consequences of online harm. For example, are educators being told by "Netsafe Schools", and then passing onto students, that it is an offence for a young person under the age of 18, to take nude pictures of themselves and send those pictures to anyone else? Also, are young people under the age of 16 being told that if someone over the age of 18 sends them nude pictures that is an offence?

We have also been told by clients that the "Netsafe Schools" programme has good information but lacks "real-life" experience and examples. Schools have told us that there is a gap in the information being given by "Netsafe Schools", their comprehension of that information, and their ability to then apply that information to "real-life" issues that students are experiencing.

There is also a need to teach young people to be critical of what they see online, i.e. is that a real picture? Is that a real person? Is this user being honest to me about who they say they are? Education about online harm also tends to be "one off"; however, to best protect children and young people there needs to be continuous day-to-day education about online harm and being critical of what you view online.

On another note, part of our cyber-safety training is that we advise children and young people to not disclose any personal information online as it could put them at risk. We support the intention of the Bill, but we are concerned that this could send some mixed messages to the community; i.e. do not give personal information away, but always give your age.

Without educating children and young people about online harm, this Bill will not have the desired legal effect of protecting young people and children. YouthLaw Aotearoa would be willing to discuss the possibility of receiving funding to carry out this important education.

Responsibility of providers

We also question whether online providers should be required to verify the identity of people who sign up to accounts. We understand that this is outside of the scope of this submission.

Effective Enforcement

As in our previous submission on the Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill, YouthLaw Aotearoa is also significantly concerned about the limits of

[2] Ministry of Education "Digital technology: A safe-use guide for schools" < https://www.education.govt.nz/school/digital-technology/digital-technology-guide-for-schools/>

Netsafe and the Police's powers to redress online harm. We have been told by clients that Netsafe and the Police are effectively powerless in specific online harm situations. The limitations that we have been informed of and recognise are that:

- It can be very difficult, or even impossible for Netsafe and the Police to take action against anonymous users. Whilst an 'unmasking' order can be applied for in the District Court, it may not be possible for the social media network to provide the user's real details (for example, if an anonymous email or false details have been used). Additionally, it is possible for one person to create many anonymous accounts and persistently post harmful digital communications. We have been contacted about situations where anonymous accounts are taken down but are instantly replaced by further anonymous accounts that carry out the same actions.
- Anonymous forms of communication, such as online role-playing games, Discord, Snapchat, etc.
- Many social media companies are not based in New Zealand, which can make it difficult for Netsafe and the Police to interact with them.
- Many users are not based in New Zealand, which limits Netsafe and the Police's powers.

We have the same concerns regarding this Bill.

Clause 126A

Catfishing

Many people create fake online profiles or create profiles with incorrect information. Often, these accounts are created to make the person look more impressive or "fit in" online. Whilst deceptive, these "catfishes" may not intend to harm people, but rather to hide insecurities.[3] For example, in the case of a twenty-year-old who plays online role-playing games, such as Minecraft or Roblox, they may feel embarrassed about disclosing their real age given that the mainstream target for the game is a juvenile audience. This person may not intend to maliciously deceive or harm other users. On the other hand, some people do intentionally mislead people online to defraud or harm. It is these people who intend to create harm through their online deception, who should be punished.

People with Disabilities

We are also concerned that people with disabilities who may be misleading people online about details of their identity could be prosecuted. For example, a person aged 18 who has an intellectual disability that makes them intellectually younger could be prosecuted if they lie about their age (but not their identity) and arrange to meet a young person to become their friend (not for malicious reasons). These actions could meet the criteria for the offence under s 126A, however, it is clearly problematic and unfair for this person to be charged. Although the conduct would constitute an offence, it may not be with the intent to harm the young person, but rather to connect with a person they may not feel comfortable connecting with if they knew their legal birth date.

Introduction of Harm Criteria in s126A

Our concerns about non-malicious vulnerable people being charged would be assuaged if a criterion to "intend to cause harm" was added to section 126A(1). We recommend that the following criteria be added to the proposed section 126A(1):

1) A person of or over the age of 18 years is liable to imprisonment for a term not exceeding 5 years if he or she —

(a) communicates, by means of a digital communication, with a person under the age of 16 years (the young person) with the intent to mislead the young person as to the person's age or identity; **and**

(b) subsequently meets or arranges to meet with the young person; and

c) undertakes these actions with the intention to harm the young person or being reckless as to whether the young person is harmed.

This amendment would also "close" the legislative gap under section 131B that requires the perpetrator meeting the young person after "sexual grooming".

[3] Cambridge Dictionary "Catfish" < https://dictionary.cambridge.org/dictionary/english/catfish>

Clause 126B

We submit that the proposed clause 126B is flawed, as the definition of harm is too broad, and the Harmful Digital Communications Act already covers similar situations of digital communications causing harm.

Overall, we recommend the deletion of this clause and the addition of (c) under clause 126A(1). If this clause does proceed to the second reading, we recommend that "harm" be clarified to mean "sexual harm".

Definition of harm

We question what the definition of "harm" would be under this clause 126B. Does harm only mean "physical harm" or "sexual harm", or could it also mean emotional and psychological harm? The definition of a "young person" being younger than 16 indicates to us that this section is concerned with preventing sexual harm, as the age of sexual consent is 16. The Hansard also indicates that the intention of these new offences was to prevent "grooming". However, this definition of harm is not explicit, and we submit that the harm could be interpreted to include all sorts of harm.

We foresee the following issues arising from this clause and the broad definition of harm:

- *Secondary schools* - Many secondary schools have "houses" that students are divided into for competitive reasons. If an online chat was created for students in the same house, this group could include students from 13 – 21 years of age. If an 18-year-old or older posted a communication berating younger students for their performance in a sport competition resulting in a loss of house points, could that potentially expose that 18-year-old to being charged with this offence? Obviously, older students should not be posting abusive communications, but we question the proportionality of an older student being charged with an offence with a maximum penalty of 7 years in response. In this situation, we would submit that the matter is best dealt with by the school. Again, this emphasises the importance of educating young people on not only keeping themselves safe online, but on the consequences of harmful digital communications.
- *Sports clubs* – Similar issues as that stated above – i.e. older members posting harmful communications and then facing the risk of prosecution.

Duplication of Harmful Digital Communications Act 2015 section 22

Section 22 of the Harmful Digital Communications Act 22 provides that:

> **22 Causing harm by posting digital communication**
>
> (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.

(3) A person who commits an offence against this section is liable on conviction to,—

(a) in the case of a natural person, imprisonment for a term not exceeding 2 years or a fine not exceeding $50,000:

(b) in the case of a body corporate, a fine not exceeding $200,000.

(4) In this section, victim means the individual who is the target of a posted digital communication.

We submit that this current offence is sufficient to capture harmful communications.

We also question the proposed maximum penalty of 7 years imprisonment when compared with similar offences (see section 124A of the Crimes Act 1961 (3 years) and section 22 of the Harmful Digital Communications Act 2015 (2 years or a fine not exceeding $50,000)). We fail to understand why this offence has such a high penalty compared to these other similar offences. Our presumption is because the “harm” under clause 126B is more severe than those other offences.

Other Matters

Age and Liability Issues

We are concerned that an individual over the age of 18 years old could escape criminal liability if they carried out the act as specified in either s 126A or s 126B if the victim is aged 16 or 17 years old at the time of the offending. Although still legally a minor, the victim would not be protected by this Bill, as they are not a young person for the purposes of ss 126A and 126B. However, if "harm" is "sexual harm" than we do understand the exclusion of 16- and 17-year-olds to be consistent with the age of consent.

Reasonable Steps Defence

We support the premise of the defences in clauses 126A(3) and 126B(3). The threshold for this defence is congruent with other formal defences provided in Part 7 of the Crimes Act 1961 and is therefore a reasonable standard to meet. As Dr Webb outlined in the First Reading, what is 'reasonable' is a shifting standard—so we again would like to stress the importance of educating our young people on the law change, their rights and responsibilities when engaging in online communication.[4]

[4] (20 October 2021) 755 NZPD (Crimes (Child Exploitation Offences) Amendment Bill - First Reading, Dr Duncan Webb).

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