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Tēnā koe Roger

**Request for information**

Thank you for your Official Information Act 1982 (OIA) request of 10 September 2022, in which you asked the following questions:

*1a) Who recommended to Police that charges be laid against the 'Counterspin Media' cranks for posting a link to a website that allowed users who made the choice to access that website to play a video that was- days after the original post was made- classified as objectionable by the Office of Film and Literature Classification?*

*1b) Who recommended to Police that charges be laid against the 'Counterspin Media' cranks for posting a document that makes broadly similar claims to said video, which OFLC has confirmed is not, itself, classified as objectionable?*

*1c) Please provide all communications made within Police and with Crown Solicitors and other agencies, prior to laying these charges.*

This part of your request is withheld pursuant the following sections of the OIA:

- 6(c) - the making available of the information is likely to prejudice the maintenance of the law including the prevention, investigation and detection of offences and the right to a fair trial.
- 9(2)(a) – to protect the privacy of natural persons
- 9(2)(h) – to maintain legal professional privilege

*2a) The Films, Videos, and Publications Classification Act 1993 provides a very clear definition of the meaning of 'distribute' in the context of the offenses with which the cranks have been charged. It is very obvious that the act only covers the actual electronic transmission of objectionable publications, whether on its own (publishing/hosting objectionable publications yourself on your own website) or as part of a wider set of material (publishing/hosting a website which includes offensive material as a subset of the content of a webpage or embedded on such). Please provide any documents, inclusive but not limited to the 'Objectionable publications' part of the Police Manual, relevant to how Police reinterpret the Act in the context of publications on the World Wide Web.*

*2b) Do Police consider linking (providing an internet location that a user might choose to visit) to content that has been classified as objectionable to constitute 'distributing' objectionable publications?*

**Police National Headquarters**

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2c) Do Police consider linking to web pages that include embedded links to content that has been classified as objectionable to constitute 'distributing' objectionable publications?

2d) Do Police consider linking to web pages that link to content that has been classified as objectionable to constitute 'distributing' objectionable publications?

2e) Do Police consider linking to web pages that include embedded links to content that is classified as objectionable after the links are originally posted to constitute 'distributing' objectionable publications?

Please find attached a copy of the Police Instructions chapter on objectionable publications. Some information has been withheld from this chapter in reliance upon section 6(c) of the OIA, as the making available of the information would be likely to prejudice the maintenance of the law.

Section 122 of the Films, Videos and Publications Classification Act sets out the meaning of distribute in sections 123 to 132 of that Act. A copy of this section is publicly available at: <https://www.legislation.govt.nz/act/public/1993/0094/latest/DLM314126.html>

Please note that an agency is not obliged to form an opinion or create information to answer an official information request. In particular, the Act is not a mechanism that can be used to force agencies to engage in debate or generate justifications or explanations in relation to a matter of interest to the requester.

You have the right to ask the Ombudsman to review my decision if you are not satisfied with the response to your request. Information about how to make a complaint is available at: [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz)

Yours sincerely

*T Keene*

**T Keene**  
**Information Request Team – Central Region**

**E** [xx.xxxxxxx@xxxxxx.xxxx.xx](mailto:xx.xxxxxxx@xxxxxx.xxxx.xx)

## **Objectionable publications**

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## Policy statement and principles

### What

Research overseas and in New Zealand is showing a growing link between online offences of possessing and trading objectionable publications and contact offending against children. Those who are seriously active online in this manner are displaying 'preferential offender actions' and their offending and likelihood of progression to physical/contact offending must be treated as serious and investigated accordingly.

It must be remembered that in most situations, someone's child must be abused or exploited for these objectionable publications to be created.

The Department of Internal Affairs' Censorship Compliance Unit has primary responsibility for offences under the [Films, Videos, and Publications Classification Act 1993](#) (FVPC Act). Police also have the responsibility for enforcing the legislation as Police constables are also 'Inspectors of Publications'

### Why

Key functions of the Police are law enforcement, preventing crime and victimisation and the maintenance of public safety. To achieve these goals, Police have a responsibility to investigate, reduce and resolve crime(s) relating to objectionable publication offences.

### How

Police will ensure that:

- they work pro-actively alongside the Department of Internal Affairs and New Zealand Customs Service to investigate objectionable publication related offences, and to enhance the Police prevention first and victim focused strategies
- investigators work closely with its specialist OCEANZ and Digital Forensic Unit to maximise the success of prosecutions for serious objectionable publication related offences
- when prosecuting, appropriate charges and publications/ evidence based on seriousness are selected to support those charges
- all relevant staff are suitably trained and aware of their responsibilities when exercising any powers under the [Films, Videos, and Publications Classification Act 1993](#) and Search and Surveillance Act 2012
- for staff safety any discretionary action taken is in accordance with the [Health and Safety at Work Act 2015](#), and Police safety and wellcheck policies.

## Summary

### Purpose of this chapter

This Police Manual chapter:

- details key provisions in the [Films, Videos, and Publications Classification Act 1993](#)
- outlines Police [powers](#) when acting as Inspectors of Publications under the FVPCA
- outlines the elements of [key offences under the FVPC Act](#) and what you need to prove
- outlines the new offence of [indecent communication with a young person](#), in s124A of the Crimes Act, and how prosecutions should be considered
- provides guidance for Police when:
  - applying for and executing [search warrants](#) under the FVPC Act and the Search and Surveillance Act, particularly in relation to the electronic nature of a lot of the evidence, and
  - undertaking [investigations](#) relating to objectionable publications
- provides guidance on selecting appropriate charges and [selecting publications/ evidence based on seriousness](#) to support those charges
- details the [approvals required](#) before prosecutions can be commenced
- outlines restrictions relating to the 'Clean Slate Scheme' on the [sharing of information](#) with other agencies.

### Statutory references

All references to the "Act" or sections of the Act are to the [Films, Videos, and Publications Classification Act 1993](#) (FVPC Act) unless otherwise specified.

### Role of OCEANZ Operations

[OCEANZ](#) provides operational advice, leadership, support and guidance to police staff, other agencies and jurisdictions, in relation to investigations into online child exploitation. Contact via email ([oceanz@police.govt.nz](mailto:oceanz@police.govt.nz)) the officer in charge of the OCEANZ team at [PNHQ](#) for information about online covert child exploitation Police operations. For information about any other types of covert operations or using covert identities, contact the Manager: Covert Operations Group (NCIG) at PNHQ - [cog@police.govt.nz](mailto:cog@police.govt.nz).

### Related information

For further information refer to these Police Manual chapters:

- Search: [Part 2 - Search warrants](#)
- Search: [Part 5 - Carrying out search powers with or without warrants](#)
- [Privacy and official information](#) - for information on the disclosure of personal and official information, and the 'clean slate scheme'
- '[Hate crimes and hate incidents investigations](#)' chapter for information about recognising, recording and dealing appropriately with **hate crime**, **hate incidents** and **hate speech** within the context of scene attendance, investigations, applying proportionality and using discretion.

### Health and safety duties

#### Maximising safety and minimising risk

Maximising safety and eliminating or minimising risk at work is the responsibility of all Police employees and persons engaged by Police to provide a service including contractors and their employees, trainees, interns and volunteers. It is delivered through meeting the obligations under the [Health and Safety at Work Act 2015](#) and Police safety policies.

A key enabler is the application of the [TENR-Operational threat assessment](#) in the workplace.

The expectation of the Commissioner and the Act is that persons in the workplace will take reasonable care to ensure that their acts or omissions do not adversely affect the health and safety of other persons, comply as far as they are reasonably able to with any reasonable instruction that is given in order to comply with the [Health and Safety at Work Act 2015](#) or regulations under that Act. They will co-operate with any reasonable policy or procedure relating to health or safety at the workplace that has been notified to them and take immediate action to stop any perceived or potential breach of the Act or if impractical, immediately report the matter to a



supervisor.

Health and safety should be an everyday conversation.

Relevant Police instructions include:

- Hazard management
- Health and safety
- Health, safety and wellbeing
- this 'Objectionable publications' chapter in relation to safe investigations and execution of search warrants.

## Definitions

### Definitions in this chapter

This table lists definitions of terms relevant to this chapter as defined in section 2 Films, Videos, and Publications Classifications Act 1993.

Term	Meaning
<b>Book</b>	Means any book, magazine, or periodical, whether in manuscript or final form, but does not include a newspaper published at intervals of less than one month.
<b>Distributes</b>	To deliver, give or offer the publication or to provide access to the publication. ( <a href="#">s122</a> )
<b>Exhibit to the public (in relation to a film)</b>  <b>Public exhibition</b>	Means to screen or arrange or organise the screening of, or to assist any other person to screen or arrange or organise the screening of, the film: <ul style="list-style-type: none"> <li>- to the public, or any section of the public, or</li> <li>- to any group or class of persons otherwise than in a private residence,</li> </ul> whether or not a charge is made for admission to the premises in which the exhibition is held. It does not include the broadcasting of the film. ('Public exhibition' has a corresponding meaning).
<b>Film</b>	Means a cinematograph film, a video recording, and any other material record of visual moving images that is capable of being used for the subsequent display of those images.  It includes any part of a film, and any copy or part of a copy of the whole or any part of a film.
<b>Inspector</b>	An Inspector of Publications holding office under section <a href="#">103</a> (1) or (2) of the FVPCA and includes a Police employee who is a constable.
<b>Makes available for gain</b>	Means not only in physical form, but also by way of electronic transmission (facsimile), electronic mail or similar means.  <i>(Dept of Internal Affairs v O'Connell (unreported, District Court Dunedin, 12 March 1998)</i>
<b>Objectionable</b>	"Objectionable" is defined in section 3 of the Act. See <a href="#">What is objectionable?</a> in this chapter for details.
<b>Possession</b>	There is no definition of possession in the FVPC Act. See <a href="#">Possession related offences</a> for guidance on how to consider 'possession'.
<b>Publication</b>	Means: <ul style="list-style-type: none"> <li>- any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide</li> <li>- any print or writing</li> <li>- any paper or other thing: <ul style="list-style-type: none"> <li>- that has been printed or impressed upon it, or otherwise shown upon it, any word, statement, sign or representation, or</li> <li>- on which is recorded or stored any information that, by the use of any computer or other electronic device, is capable of being reproduced or shown as any word, statement, sign, or representation.</li> </ul> </li> </ul>

<b>Term</b>	<b>Meaning</b>	
<b>Restricted publication</b>	<p>Means a publication that is classified as not objectionable provided that:</p> <ul style="list-style-type: none"> <li>- its availability is restricted to persons who have attained a specified age, or</li> <li>- its availability is restricted to specified persons or classes of persons, or</li> <li>- it is used for one or more specified purposes.</li> </ul> <p>(ss2 &amp; 23(2)(c))</p>	
<b>Supply</b>	Means to sell, or deliver by way of hire, or offer for sale or hire.	
<b>Supply to the public (in relation to a film)</b>	Means supply by way of sale, hire, exchange or loan, in the course of any business, and	
<b>Public supply</b>	<p><b>includes...</b></p> <p>sale, hire, exchange, or loan by any:</p> <ul style="list-style-type: none"> <li>- public library, or</li> <li>- club or association, (public or private, incorporated or unincorporated) that as part of its activities, makes films available to its members.</li> </ul>	<p><b>does not include...</b></p> <p>any supply of any film to any person who makes, distributes or supplies films, unless that person intends to supply that film to the public or, in the case of a club or association, to which the previous paragraph applies, to its members.</p> <p>'Public supply' has a corresponding meaning.</p>

## What is objectionable?

### Offensive defined

For the purposes of the FVPCA, a publication:

is objectionable under section 3(1) FVPCA if it...	is deemed to be objectionable under section 3(2) FVPCA if it...
<p>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.</p> <p>(A publication <b>deals with a matter such as sex</b> if it is or contains one or more visual images of one or more children or young persons who are nude or partially nude and the visual images alone or together with any other contents of the publication, are reasonably capable of being regarded as sexual in nature (s3(1A)).</p>	<p>promotes or supports, or tends to promote and support:</p> <ul style="list-style-type: none"> <li>- the exploitation of children, or young persons, or both, for sexual purposes</li> <li>- the use of violence or coercion to compel any person to participate in, or submit to, sexual content</li> <li>- sexual conduct with or upon the body of a dead person</li> <li>- uses of urine or excrement in association with degrading or dehumanising conduct or sexual conduct</li> <li>- bestiality, or</li> <li>- acts of torture or the infliction of extreme violence or extreme cruelty.</li> </ul>

### Key factors to consider when determining if publication is objectionable

When determining if a publication (other than a publication to which subsection (2) applies) is objectionable or should 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:

- describes, depicts or otherwise deals with:
  - acts of torture, the infliction of serious physical harm, or acts of significant cruelty
  - sexual violence or sexual coercion, or violence or coercion in association with sexual conduct
  - other sexual or physical conduct of a degrading or dehumanising or demeaning nature
  - sexual conduct with or by children, or young person, or both
  - physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain
- exploits the nudity of children, or young persons, or both
- degrades or dehumanises or demeans any person
- promotes or encourages criminal acts or acts of terrorism
- represents (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.

(s3(3))

### Other factors to consider

These matters must also be considered when determining if a publication (other than a publication to which subsection (2) applies) is objectionable or should be given a classification other than objectionable:

- the dominant effect of the publication as a whole

- the impact of the medium in which the publication is presented
- 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
- the persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available
- the purpose for which the publication is intended to be used
- any other relevant circumstances relating to the intended or likely use of the publication.

(s3(4))

# Offences under the FVPC Act

## Overview

Offences under the [Films, Videos, and Publications Classifications Act 1993](#) (FVPC Act) are split between those relating to:

- [objectionable publications](#)
- restricted publications (publications that have already been classified).

The more serious objectionable publication offences are of the most interest to Police. They consist of:

- [possession-related offences](#) escalating in seriousness:
  - possession of objectionable publications
  - possession with knowledge
  - possession for the purpose of supply, distribution, display or exhibition
- other offences to, in relation to objectionable publications, make, copy, [supply and distribute](#), import into New Zealand, exhibit for payment or gain, and to exhibit objectionable material to a person under the age of 18 years.

(See also the related offence [of indecent communication with a young person](#) under the age of 16 years, in [s124A](#) of the Crimes Act).

As with the possession offences, each of these other offences can be laid as either a Category 1 or a Category 3 offence, depending on whether the prosecution can prove that the defendant knew or had reasonable cause to believe that publication was objectionable. If the prosecution will not be able to prove the knowledge element, then the fine only Category 1 version of the offence must be selected.

A guide to categories of offences can be found in section [6](#) of the Criminal Procedure Act 2011.

## Offensive publication offences

This table lists offences relating to objectionable publications.

Offence and section of FVPCA	Category
Makes, copies, imports, possesses objectionable publication for distribution and supply <a href="#">s123(1)</a>	Category 1 offence.
<b>Knowingly</b> makes, copies etc an objectionable publication <a href="#">s124(1)</a>	Category 3 offence.
Supplies, distributes, displays a publication that would be objectionable due to age of person <a href="#">s126(1)(b)</a>	Category 2 offence.
Exhibits/displays objectionable publication to person under 18 <a href="#">s127(1)*</a> or (4)#	*Category 1 offence. #Category 3 offence
Exhibits/displays objectionable publication in a public place <a href="#">s129(1)</a>	Category 1 offence.
Distributes an objectionable publication in a public place knowing it is objectionable <a href="#">s129(3)</a>	Category 2 offence.
Possession of objectionable publication <a href="#">s131(1)</a>	Category 1 offence.
Possession with knowledge that publication is objectionable <a href="#">s131A(1)</a>	Category 3 offence.

## Restricted publications and other offences

This table lists offences relating to restricted publications and other offences.

Offence and section of FVPCA	Category
Supplies/distributes a restricted publication s <a href="#">125</a> (1)	Category 1 offence.
<b>Knowingly</b> supplies/distributes a restricted publication s <a href="#">126</a> (1)(a)	Category 2 offence.
Contravention of serial publication order or interim restriction order s <a href="#">133</a>	Category 1 offence.
Obstructs an Inspector s <a href="#">134</a>	Category 1 offence.

## Possession related offences"

### What is 'possession'?

There is no definition of possession in the FVPC Act. Possession will always be an issue determined on the facts in each case and guidance on what constitutes possession comes from case law.

Possession generally requires the prosecution to prove four essential elements - that the defendant:

- had actual or potential physical control (can be a shared control)
- knew what it was that they controlled. They do not need to know precisely what image was in their possession - it is sufficient to prove they knew they were receiving objectionable items of some kind or another
- had the intention to exercise control, and
- had possession voluntarily.

Under section [131\(2A\)](#) of the Act a person can have possession of an electronic publication even though their actual or potential physical control is not, or does not include, them intentionally or knowingly using a computer or other electronic device to save the publication (or a copy of it).

Section 131(2A) is for the avoidance of doubt, and to ensure that offenders with particular technical expertise do not escape liability by viewing objectionable publications without also saving them. It also helps to future proof the offences against unforeseen new technologies.

### Escalating seriousness of possession offences

There are three levels of possession offence under the FVPC:

- [Possession of objectionable publications](#)
- [Possession with knowledge](#)
- [Possession for the purpose of supply, distribution, display or exhibition](#)

### Possession - s131 (fine only)

Possession under of objectionable publications under [s131](#) of the Act is a strict liability, fine only, Category 1 offence. All that is required to prove the elements of this charge, is that the defendant possessed without lawful authority, an objectionable publication.

Knowledge that the publication is objectionable is not an element of this charge: simply proving possession without lawful authority will suffice.

**s.6(c) OIA**

### Possession with knowledge - s131A (10 years imprisonable)

Charges under section [131A](#) require you to:

- prove the defendant had possession of an objectionable publication without lawful excuse, and
- establish that they knew or had reasonable cause to believe that the publication was objectionable.

This offence has a penalty of a period of imprisonment of 10 years and is a Category 3 offence in accordance with the categories set out in the Criminal Procedure Act 2011.

Before filing charges under s131A you must be satisfied that the publications depicting objectionable material are such that it can be established that the defendant knew or had reasonable cause to believe that the material was objectionable. (See [Selection of evidence based on seriousness](#)).

This is the most common charge selected for Police prosecutions but the additional element of 'knowledge' must be able to be proven.





# Supply and distribution offences

## Definitions

Term	Means...
Supply	To sell, or deliver by way of hire, or offer for sale or hire. ( <a href="#">s2</a> )
Distribute	To deliver, give or offer the publication or to provide access to the publication. ( <a href="#">s122</a> )  In addition, the prosecution must also prove that the person knew in general terms what the publication contains and must intend or know that they are distributing it.

## Supply and distribution more serious than possession

Convictions for supply or distribution of objectionable material and possession for the purposes of supply or distribution with knowledge that they are objectionable have a higher penalty when compared with possession offences, indicating that Parliament considered these to be more serious offences than possession.

**s.6(c) OIA**  
[Redacted text block]

## Proving supply and distribution offences

In relation to distribution, you must prove that the defendant:

- delivered, offered, gave or provided access to objectionable material, knowing what the files contained,  
**and**
- intended to share it.

**s.6(c) OIA**  
[Redacted text block]

## Indecent communication with a young person

### Intention of the s124A Crimes Act indecent communication offence

The new offence of indecent communication with a young person under the age of 16 years, in [s124A](#) of the Crimes Act, aims to address a gap in the law. That gap is between objectionable publications offences, which only apply if the offender makes a record of a communication with a young person, and the sexual grooming offence, which only applies if the offender intentionally meets (or travels with the intention of meeting) the young person, or arranges for or persuades the young person to travel with the intention of meeting him or her.

Indecent communication with a young person can occur in a variety of media (including text or picture messaging, Internet chat, and telephone).

The intent of Parliament which is mirrored by Police is that this offence is designed to capture the behaviour of predatory adult sex offenders.

It was never intended to create criminal liability for what is often seen as typical risk taking teenage behaviour. However, every investigation is unique and a decision as to whether to charge with this offence should be made looking at the circumstances surrounding the particular investigation with reference to the [Solicitor General's Guidelines on prosecution](#).

### Penalty

A person of or over the age of 16 years is liable to imprisonment for a term not exceeding 3 years if they intentionally expose a person under the age of 16 years to indecent material (whether written, spoken, visual or otherwise, alone or in combination) in communicating in any manner, directly or indirectly, with the young person.

### 'Young person' includes a constable

References to 'a person under 16 years of age', or to the 'young person' in [s124A](#), include a constable (as defined in s 2(1) of the Crimes Act) who pretends to be a person under the age of 16 years (the fictitious young person) if the person charged with an offence against new s 124A(1), when communicating with the fictitious young person and exposing the fictitious young person to indecent material, believed that the fictitious young person was a person under the age of 16 years.

### Purpose of exposure to indecent material

It is not necessary for the prosecution to prove that the intentional exposure was for any identified purpose (e.g. to obtain sexual gratification, or to alarm, distress, or humiliate the young person), but any identified purpose of that exposure may be considered in determining whether the material is indecent.

### Meaning of 'indecent'

Section [124A](#) does not specify a legal test for when material is 'indecent' but may be informed by other enactments with tests of 'indecent' including:

- the Summary Offences Act 1981 s 4(1)(c)(ii) and (3) - in or within view of a public place, addressing 'indecent' words to a person)
- the Telecommunications Act 2001:
  - s 112 - in using a telephone device, using 'indecent' language or making an 'indecent' suggestion, with the intention of offending), and
  - s 113 - 'indecent' telephone calls for pecuniary gain.

### Case law

The term 'indecent' is also used elsewhere in the Crimes Act and its meaning has been considered by the courts on many occasions:

- 'Indecent' is not a low standard. The courts have held that for an act to be indecent it "must be something which will warrant the sanction of the law, not some trifling or unimportant episode" [*R v Dunn* [1973] 2 NZLR 481 (CA) at 482].
- Indecency must be judged in light of time, place and circumstances [*R v Dunn* at 484].
- Whether something is indecent "is an objective question to be answered by what the jury assesses to be the standards of right-thinking members of the community" [*R v Anna* [2008] NZCA 534 at [56]].

## Dictionary definitions of 'indecent'

Dictionary	Indecent defined as...
Oxford English Dictionary	"Not conforming with generally accepted standards of behaviour, especially in relation to sexual matters", or "Not appropriate or fitting".
Cambridge English Dictionary	"Morally offensive, especially in a sexual way", or "Not suitable or correct for a situation".

## Statutory defence

It is a defence to a charge under [s124A\(1\)](#) if the person charged proves that:

- before communicating with the young person and exposing the young person to the indecent material, they had taken reasonable steps to find out whether the young person was of or over the age of 16 years; and
- at the time of communicating with the young person and exposing them to the indecent material, they believed on reasonable grounds that the young person was of or over the age of 16 years.

It is not a defence to a charge under [s124A\(1\)](#) that the person charged did not know that the material to which the charge relates was indecent, unless the person charged also proves that:

- they had no reasonable opportunity of knowing it; and
- that in the circumstances their ignorance was excusable.

## Prosecution of inconsequential offences

Police have discretion not to prosecute where the offence is considered to be so [inconsequential](#) that there is no public interest in a prosecution. The [Solicitor-General's Prosecution Guidelines](#) states that the factors to be considered when determining whether the public interest requires a prosecution include "the seriousness or, conversely, the triviality of the alleged offence; that is, whether the conduct really warrants the intervention of the criminal law".

While communication may, in some circumstances, be considered inconsequential, a prosecution may be warranted if such actions are repetitive or frequent, and other interventions or warnings to the offender have not stopped such actions.

## Definition of 'inconsequential'

The Shorter Oxford English Dictionary defines 'inconsequent' as "of no consequence". The Concise Oxford Dictionary defines 'inconsequential' as 'unimportant'.

## Determining if a communication is indecent or inconsequential

Factors to take into account in determining whether a communication was [indecent](#) or [inconsequential](#) in the circumstances may include:

Factor	Consider this...
Young person's age	What amounts to indecent communication might be different for a toddler or a prepubescent child, and different again for a fifteen year old receiving it, in terms of their development and level of maturity.
Offender's age	<p>The development and maturity of a 16 year old may be different to an adult in middle age, and may impact on:</p> <ul style="list-style-type: none"> <li>- whether the communication was indecent in terms of the effect on the young person</li> <li>- the offender's intention in communicating in such a manner, and</li> <li>- whether they should have known such communication was inappropriate.</li> </ul>
Age difference between the young person and the offender at the time of the incident	<p>A large age gap may indicate a position of vulnerability and trust on the part of the young person, and that common sense should have informed the offender that their behaviour was not acceptable.</p> <p>A small age difference might suggest the communication was between members of a peer group and reflective of teenage risk-taking behaviour.</p>
Relationship between the person over and under 16	Friends or young people in a romantic relationship might be expected to engage in communication that is more colourful than that between strangers, or where the adult is in a position of authority or providing a service to the young person.
Nature of the indecent communication	<p>Would be objectionable if a record made is violent in nature or expressive of grooming type behaviour?</p> <p>Did it cause hurt or distress to the young person?</p>
Whether the nature and circumstances of the communication could reasonably be described as predatory in nature.	<p>A predatory nature is most likely to arise where there is imbalance in power between the victim and the offender which most obviously can be evidenced by the age difference between the parties when the offender is an adult and the victim is a child or young person under 16 years of age.</p> <p>This can be contrasted with consensual conduct between young people who are close in age and where there is no other particular imbalance in the relationship and no other public interest factors that would weigh in favour of prosecution.</p>

### Further advice

Consult Prosecution Services, [OCEANZ](#), or Legal Services if you require any advice about the application of section [124A](#) to any particular circumstances.

## Warrantless powers

### Introduction

Every Police constable is an Inspector of Publications and may exercise the powers of an inspector contained in sections [106](#) to [108](#).

These powers are to:

- enter for the purpose of [ensuring compliance](#)
- [seize](#) films, publications, posters relating to restricted publications and objectionable publications.

### Entering to ensure compliance

You have the power to ...	to ensure that ...
enter any premises (except a private residence) in which: <ul style="list-style-type: none"> <li>- films are offered for public supply, or</li> <li>- publications are publicly displayed, or</li> <li>- film is being, or you have reason to believe is being, exhibited to the public.</li> </ul>	<ul style="list-style-type: none"> <li>- the provisions of the Act relating to labelling, and</li> <li>- any conditions imposed under section 27 (relating to the display of restricted publications)</li> </ul> are being complied with. <p><b>Note:</b> If the premises are closed to the public, you can only enter the premises if you are accompanied by, or are entering with the knowledge of, the owner or occupier, or their representative, agent or employee.</p> ( <a href="#">s 106</a> )

When exercising the powers under section 106...

You can...	You cannot...
<ul style="list-style-type: none"> <li>- require the production of any document relating to labelling or the classification of any film, or the classification of any restricted publication, that is issued under or required by the Act, and</li> <li>- inspect, copy, or take extracts from it, and</li> <li>- demand any information that you may reasonably require for the inspection.</li> </ul> ( <a href="#">s 106(4)</a> )	require anyone to answer any questions if the answer would or could tend to incriminate them.  ( <a href="#">s 106(5)</a> )

### Powers of seizure

This table outlines a constable's powers of seizure under the Act.

If you ...	you can...
<p>discover a person offering for public supply, or exhibiting to the public, any film that is subject to the provisions of section 6 (which relates to labelling), and</p> <ul style="list-style-type: none"> <li>- such supply or exhibition contravenes s120(1)(b),(2)(b) or (3), or</li> <li>- you believe, on reasonable grounds, that no label has been issued for it under the Act</li> </ul>	<p>seize the film, and any container in or on which it is kept or offered for public supply, and deliver them to the Secretary for Internal Affairs (s107(1)).</p>
<p>discover a person publicly displaying a publication and you believe, on reasonable grounds, that:</p> <ul style="list-style-type: none"> <li>- it is a restricted publication or, by virtue of a serial publication order, is to be treated as a restricted publication, <b>and</b></li> <li>- the display contravenes section 130 or section 133 of the Act</li> </ul>	<p>seize the publication and deliver it to the Secretary for Internal Affairs (s107(2)).</p>
<p>discover a person publicly displaying any:</p> <ul style="list-style-type: none"> <li>- advertising poster or film poster relating to a restricted publication, or</li> <li>- a publication that, by virtue of a Serial Publication Order, is to be treated as a restricted publication;</li> </ul> <p>and</p> <ul style="list-style-type: none"> <li>- you believe on reasonable grounds that the display contravenes section 130 or section 133 of the Act</li> </ul>	<p>seize the poster and deliver it to the Secretary of Internal Affairs (s107(3)).</p>
<p>discover any publication in the course of carrying out your lawful duties, that you believe, on reasonable grounds, to be objectionable</p>	<p>seize the publication.</p> <p>You cannot seize any publication legitimately in a person's possession under s131(4) or (5) i.e. for the purpose of and in connection with a person's official duty or where the defendant can prove a defence, e.g. of delivering the objectionable publication to a Police officer.</p> <p>(s 108)</p>

**Note:** If you exercise any of these seizure powers you must follow the "Notice and inventory requirements after search and seizure" in the [Carrying out search powers with or without warrants](#) chapter.

### Warrantless entry and search of places to find and avoid loss of evidential material

See [details of this power](#) in the 'Search warrant applications' topic.

## Search warrant applications

### FVPC Act search warrants

Avoid applying for a search warrant under section 6 of the Search and Surveillance Act 2012 when the grounds for the warrant relate to offences under the FVPC Act. The FVPC Act has its own search warrant provisions in sections [109](#), [109A](#) and [109B](#) and if a search is to be conducted specifically for objectionable publications, a search warrant should be sought pursuant to the search warrant provisions contained in s109 and 109A.

However, if the search warrant for objectionable material is issued under s6 of the Search and Surveillance Act 2012 it will still be valid but the preference is that FVPC Act warrants will be used to search for and seize "things" that are offences under the FVPC Act.

### Making search warrant applications

Use these applications and warrant forms (available on Police Forms (I-Z)>Search and Surveillance>Search warrants>Films, video, publications) when making your application:

- FVP1 - Application for Search Warrant (s109)
- FVP2 - Search warrant (s109)
- FVP3 - Application for Search Warrant (s109A)
- FVP4 - Search warrant (s109A)
- FVP5 - Application for Search Warrant (s109B)
- FVP6 - Search warrant (s109B)

For further guidance on making applications, see the [Search warrants](#) Police Manual chapter.

### Search warrants (not for sections 126 & 131A)

You can apply to any issuing officer for a search warrant to enter, search and seize under section [109](#) of the Act.

The issuing officer must be satisfied that there are reasonable grounds for believing that there is, in or on any place or thing:

- any objectionable publication that there are reasonable grounds to believe is being kept for purposes that contravene section [123](#), [124](#), [127](#) or [129](#) of the FVPCA, or
- any thing that there are reasonable grounds to believe:
  - will be evidence of such an offence, or
  - is intended to be used to commit such an offence.

([s109](#))

### Search warrants for offences against sections 126 & 131A

You can apply to a District Court Judge under section [109A](#) for a search warrant for offences against section [126](#) and [131A](#).

The judge must be satisfied that there are reasonable grounds for believing that there is in or on any place or thing:

- a publication that there are reasonable grounds to believe is being dealt with against section 126 (offences involving knowledge in relation to restricted publications) or
- any thing that there are reasonable grounds to believe will be evidence of the commission of an offence against section 126, or
- an objectionable publication that there are reasonable grounds to believe is being so dealt with as to constitute an offence against section 131A (offences relating to possession of objectionable publications and involving knowledge), or
- any thing that there are reasonable grounds to believe will be evidence of the commission of an offence against section 131A, and
- that in all the circumstances it is reasonable to do so.

([s109A](#)).

### Applications when no District Court Judge is available

You can apply to an issuing officer for a search warrant under section 109B if you:



- have made all reasonable efforts to obtain a warrant under section 109A but no District Court Judge is available to deal with an application under that section; and
- are satisfied that delaying a search until a warrant under section 109A could be obtained would create a real risk that the purpose of that search would be frustrated; and
- have reasonable grounds for believing that there is in or on any place or thing-
  - a publication that there are reasonable grounds to believe is being so dealt with as to constitute an offence against section 126 (offences involving knowledge in relation to restricted publications); or
  - any thing that there are reasonable grounds to believe will be evidence of the commission of an offence against section 126; or
  - an objectionable publication that there are reasonable grounds to believe is being so dealt with as to constitute an offence against section 131A (offences relating to possession of objectionable publications and involving knowledge); or
  - any thing that there are reasonable grounds to believe will be evidence of the commission of an offence against section 131A.

(s109B)

## Entry and search of places to find and avoid loss of evidential material

You may enter and search a place without a warrant if you have reasonable grounds to:

- **suspect** an offence under s124 of the FVPC Act (these are **serious** offences punishable by 14 years imprisonment or more) is being, or is about to be committed, **and**
- **believe** that:
  - evidential material relating to the offence is in a place, and
  - if entry is delayed in order to obtain a search warrant, the evidential material will be destroyed, concealed, altered or damaged.

(s15 Search and Surveillance Act)

## FVPC Act limitations with stopping vehicles to exercise search powers

There are no warranted or warrantless powers to search vehicles under the Films, Videos, and Publications Classification Act 1993.

If your investigation requires the search of a vehicle, consider obtaining a search warrant under section 6 of the Search and Surveillance Act 2012. If obtaining a warrant is impracticable before evidential material may be concealed, altered, damaged or destroyed, consider exercising a warrantless power to stop and search a vehicle under the Search and Surveillance Act 2012.

For more information see:

- [Warrantless powers to search places, vehicles and things](#) for powers to search vehicles
- [Road blocks and stopping vehicles for search purposes](#).

## Production orders

If you can apply for a [search warrant](#) in relation to an offence under the FVPC Act, you may also apply to an issuing officer for a production order under section 71 of the Search and Surveillance Act 2012 requiring a person or organisation to produce documents as evidential material of the offence.

**Note** that production orders are used in these investigations to obtain course of business documents that relate to the investigation - e.g. a production order may be served on an Internet Service Provider (ISP) to obtain subscriber information linked to a suspect's internet account. The order is not used to actually obtain objectionable publications.

For more information about production orders, including applying for and executing orders, see the [Production orders](#) Police Manual chapter.

## Executing the warrant

The provisions of Part 4 of the Search and Surveillance Act 2012 (except for sections 118 and 119) apply to the execution of search warrants issued under section 109, 109A or 109B of the FVPC Act.

(s110)

See [Executing search warrants](#) in this chapter for more information about executing search warrants relating to the FVPC Act and the application of Part 4 of the Search and Surveillance Act.

## Proving offences

This table outlines the main ingredients to be proven to establish offences under the Films, Videos, and Publications Classification Act 1993.

Offence	You must prove the suspect's identity and that they ...	Defences
Making, copying etc objectionable publication (s <a href="#">123</a> )	<ul style="list-style-type: none"> <li>- made an objectionable publication, or</li> <li>- made a copy of an objectionable publication for the purposes of supply, distribution, display or exhibition to any other person, or</li> <li>- supplied or had in their possession for the purpose of supply, an objectionable publication, or</li> <li>- for the purpose of supply to any other person distributed, displayed, advertised or exhibited an objectionable publication, or</li> <li>- in expectation of payment or otherwise for gain, or by way of advertisement, distributed, displayed, exhibited or otherwise made an objectionable publication available to any other person, or</li> <li>- delivered an objectionable publication to any other person intending that it should be dealt with by them or any other person in such a manner as to constitute an offence against section 123, 124, 127 or 139 of the Act.</li> </ul>	It is not a defence that the suspect did not know, or had no reasonable cause to believe, that the publication was objectionable.
Offences under s23 <b>with knowledge</b> (s <a href="#">124</a> )	Offences under s123 (see above) committed <b>with knowledge</b> that the publication was objectionable	
Supplying a restricted publication (s <a href="#">125</a> )	<ul style="list-style-type: none"> <li>- supplied, distributed, exhibited, displayed or otherwise dealt with a restricted publication other than in accordance with the classification assigned to it under this Act, or</li> <li>- delivered any restricted publication to any person intending that it should be dealt with by them or any other person in such manner as to constitute an offence against this section.</li> </ul>	It is not a defence that the suspect did not know, or had no reasonable cause to believe, that the publication was restricted.
Supplying to a person under 18 (s <a href="#">126</a> )	supplied, distributed, exhibited or displayed to any person under the age of 18 years any publication: <ul style="list-style-type: none"> <li>- that is objectionable if made available to a person of the age of the person to whom it was so supplied, distributed, exhibited or displayed, or</li> <li>- that the person so supplying, distributing, exhibiting or displaying it knows is likely to be classified under this Act as objectionable if made available to a person of the age of the other person.</li> </ul>	
Exhibiting to a person under 18 (s <a href="#">127</a> )	exhibited or displayed an objectionable publication to a person under the age of 18 years	It is not a defence that the suspect did not know, or had no reasonable cause to believe, that the publication was objectionable.
Exhibiting in a public place (s <a href="#">129</a> )	<ul style="list-style-type: none"> <li>- exhibited or displayed an objectionable publication in or within view of a public place, or</li> <li>- distributed an objectionable publication to any person in a public place, knowing or having reasonable cause to believe that it was objectionable.</li> </ul>	It is not a defence that the suspect did not know, or had no reasonable cause to believe, that the publication was objectionable.

Offence	You must prove the suspect's identity and that they ...	Defences
<p>Possessing an objectionable publication (s <a href="#">131</a>)</p>	<p>without lawful authority or excuse, had an objectionable publication in their possession.</p> <p>(Certain people are exempt from the provisions of section 131. They are listed in section 131(4)).</p> <p>If the offence is one of possessing an objectionable publication involving knowledge (s 131A), you must prove:</p> <ul style="list-style-type: none"> <li>- the elements that constitute an offence against section 131(1), <b>and</b></li> <li>- that the suspect knew or had reasonable cause to believe that the publication was objectionable.</li> </ul>	<p>It is <b>not</b> a defence that the suspect did not know, or had no reasonable cause to believe that the publication was objectionable.</p> <p>It is a defence if they can prove they had possession of the publication, in good faith for the purpose of:</p> <ul style="list-style-type: none"> <li>- (or with the intention of) delivering it into the possession of a person lawfully entitled to have it</li> <li>- any proceedings under the Act or other enactment relating to publication</li> <li>- giving legal advice relating to the publication or making representations in relation to any proceedings, or</li> <li>- complying with decisions or orders made relating to the publication</li> <li>- delivering it to the National Librarian in accordance with Part 4 of the National Library of New Zealand (Te Puna Matauranga o Act 2003).</li> </ul>

## Selection of evidence based on seriousness

### Characterising evidence

The seriousness of the offending is a matter that will be taken into account at sentencing. The sentencing Judge can only make decisions based on the publications that are presented for prosecution and therefore the sentence will only reflect seriousness of the selection of images presented for prosecution.

While the volume of objectionable material and other factors may also aggravate or mitigate the seriousness of the offending in each particular case, it is important to consider how you will characterise the seriousness of the material in each case when deciding which images to recommend for prosecution.

Ultimately you should select the number and nature of charges that adequately reflect the criminality of the defendant's conduct as disclosed by the evidence that will be able to be adduced at trial. You should ensure that the most serious images are considered as a base for prosecution but keep in mind that you should also fairly represent the totality of the offending with the charges that are filed.

### Hierarchy of seriousness of offending

The New Zealand Court of Appeal in [R v Zhu \[2007\] NZCA 470](#) endorsed the following hierarchy of seriousness used in the United Kingdom by reference to five levels of depicted activity:

- images depicting erotic posing with no sexual activity
- sexual activity between children or solo masturbation
- non-penetrative sexual activity between adults and children
- penetrative sexual activity between children and adults
- sadism or bestiality.

However, because the [Zhu](#) decision was endorsed but not adopted as a guideline judgment by the Court of Appeal, the courts in New Zealand can also consider other submissions regarding the seriousness of the offending or culpability of a defendant based on other evidence Police have about a defendant's conduct which might be more relevant in some cases.

### Other evidence illustrating seriousness of offending

Other evidence, if it is available to you, that can assist you in determining and assisting the prosecutor to illustrate to the sentencing judge the seriousness of the offending can include the following:

- the size of the collection
- the nature of the sexual act depicted or described in the objectionable publication
- the diversity of the material (e.g. different types of publications such as still images, movies and text files)
- whether the activities of an offender indicate a passive viewing, or more active engagement such as might be the case with text files
- the frequency with which the publications are accessed
- the extent to which the collection is categorised and organised
- the use of search terms indicating a particular interest in certain types of objectionable material
- membership of on-line chat groups/forums with an interest in the objectionable material
- frequency of searches which can include automatic searches or 'scanning' of the internet, and
- use of erasing software, or evidence of storage of material in the 'cloud'.

### More sentencing factors for consideration

In addition, the High Court in New Zealand, in the case of *Stewart v Department of Internal Affairs*, refers to a United States Sentencing Commission report to Congress on Child Pornography offences which provides some additional sentencing factors for consideration as follows:

- The content of an offender's child pornography collection and the nature of an offender's collecting behaviour (in terms of volume, the types of sexual conduct depicted in the images, the age of the victims depicted, and the extent to which an offender has organised, maintained and protected their collection over time, including through the use of sophisticated technologies).

- The degree of an offender's involvement with other offenders - in particular, in an internet 'community' devoted to child pornography and child sexual exploitation.
- Whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offending.

These are all additional ways in which as an investigator you can consider categorising the seriousness of the offending so that the sentencing Judge will have an accurate picture of the seriousness and totality of the offending in the circumstances.

The number of images generally prevents you from laying charges in relation to all the images so the way in which you select images for prosecution is important because it will impact on the end sentence.

## **Child exploitation material (CEM)**

**This is an automatic aggravating feature at sentencing and presumption of imprisonment for repeat offenders.**

### **Aggravating features at sentencing**

Section [132A](#) of the FVPC Act provides that in sentencing the offender, the Court must take into account, as an aggravating feature, the extent to which any publication that is the subject of the offence is objectionable because it does any or all of the following:

- promotes or supports, or tends to support, the exploitation of children, or young persons, or both for sexual purposes
- describes, depicts, or otherwise deals with sexual conduct with or by children, or young persons, or both
- exploits the nudity of children, or young persons, or both.

If the matter you are investigating involves child exploitation material, it will be useful to include reference to this section in the summary of facts to ensure that this section is referred to at sentencing.

### **Presumption of imprisonment for specified offences**

Section [132B](#) of the FVPC Act contains a presumption of imprisonment which applies only to an offender who:

- has been convicted of and is to be sentenced in respect of a specified publications offence committed after the commencement of section 132B (the repeat offence), and
- before the repeat offence was committed and the conviction for it was entered, had both committed and been convicted of 1 or more specified publications offences committed before or after that commencement.

A specified publications offence ([s132B\(2\)](#)) is one against a provision specified in section [132A\(1\)\(a\)](#) to (e) if the publication does (to any extent) any or all of the following things (specified in [s132A\(2\)\(a\)](#) to (c)):

- promotes or supports, or tends to promote or support, the exploitation of children or young persons for sexual purposes
- describes, depicts, or otherwise deals with sexual conduct with or by children or young persons, or
- exploits the nudity of children or young persons.

In deciding whether a publication is objectionable because it does any or all of those things, the court must have regard to the reasons in relevant Classification Office or Board decisions, and to relevant Classification Office reports to the court ([s132B\(3\)](#)).

The offender must be sentenced for the repeat offence to a sentence of imprisonment ([s132B\(4\)](#)) unless the court considers that the offender should not be so sentenced, having regard to:

- the particular circumstances of the repeat offence, and
- the particular circumstances of the offender (including, without limitation, his or her age if he or she is under 20 years of age).

## Charges and representative charges

Even though you may have thousands of publications (images/videos/text), you cannot charge in respect of them all.

### Representative charges

If the offending occurred after 1 July 2013, where multiple offences of the same type are alleged to have been committed in similar circumstances, s20 of the Criminal Procedure Act 2011 (CP Act) formally provides for representative charges but only if the prosecutor is unable to particularise the charges or if it would be unduly difficult to separate the charges.

However, representative charges may not be appropriate in all cases. Preference should still be given to individual charges when these can be clearly identified and meet the [Solicitor-General's prosecution guidelines](#).

If you wish to file representative charges, individual publications must be selected that will form 'representative charges' of broad categories or groups of publications (having the same characteristics) that you have identified in the collection.

Therefore when filing charges representatively you should select one publication and file a charging document in respect of that one publication which will be representative of all the publications you have identified as having the same or similar characteristics in that particular collection.

### Representative charges - charging document

You must record on the charging document that the charge is representative and when filing representative charges it is mandatory under s17(4) of the CP Act to include particulars. Particulars are defined in s17(6)(a) and (b) of the CP Act as being, but not limited to, values, amounts and quantities that are relevant.

### Particulars

In relation to representative charges under the FVPC Act, particulars will most often be the number of other publications having the same characteristics as the one you have selected to be representative of that group, and a brief description of the nature and characteristics of that group. Particulars could also be the number of publications of the same type; for example, the number of video files with sound or still images or the location where the publications were stored or located for example on a hard drive or a memory stick or at different addresses.

See 'Preparing charging documents' in the [Criminal Procedure - Commencement of proceedings](#) chapter for further information on representative charges under the Criminal Procedure Act 2013.

### Charging options

Therefore you have three options and which one you choose should be assessed on a case by case basis:

- |   |  |
|---|--|
| 1 | You select individual publications on which to base charges by selecting a sample of 20-30 publications that are clearly objectionable and file a charging document for each one, or |
| 2 | File representative charges in relation to the collection that you have had analysed, or   |
| 3 | A combination of both.   |

A sample of 20-30 charges was commonly how charges were organised prior to the CP Act coming into force and depending on the circumstances in each case this may remain the best way to formulate the charges.

In determining the totality of charges to proceed with the selection of charges should seek to reflect the seriousness and the extent of the offending. It should also provide the court with adequate sentencing powers, and enable the case to be dealt with fairly and expeditiously according to law.

## Time limitation periods and penalties under the FVPC Act

### Offending that occurred after 1 July 2013

This table sets out the time limits for charges under the FVPC Act once the Criminal Procedure Act came into effect, and penalties:

Description of offence	Penalty	FVPC Act time limit
<b>Category 1 and 2 offences -</b>		
<p>s <a href="#">131</a>(1)</p> <p>Strict liability</p> <p>Possession <b>without knowledge</b> or reasonable cause to believe that the publication was objectionable.</p>	\$2000 fine	2 years
<p>s <a href="#">123</a>(1)</p> <p>Strict liability</p> <p>Making, copying, importing, supplying, distribution and possession for the purposes of supply <b>without knowledge</b> or reasonable cause to believe that the publication was objectionable.</p>	\$10,000 fine	2 years
<p>s <a href="#">127</a>(1)</p> <p>Strict liability</p> <p>Exhibiting or displaying objectionable material to person under age of 18 years <b>without knowledge</b> or reasonable cause to believe that the publication was objectionable.</p>	\$10,000 fine	2 years
<b>Category 3 offences</b>		
<p>s <a href="#">124</a>(1)</p> <p>Offences under s123 committed <b>with knowledge or having reasonable cause to believe</b> that the publication was objectionable (makes, copies, imports, supplies or distributes)</p>	14 years imprisonment	No time limit
<p>s <a href="#">127</a>(4)</p> <p>Offences under s127 committed <b>with knowledge or having reasonable cause to believe</b> that the publication was objectionable (exhibiting or displaying objectionable material to person under age of 18 years)</p>	10 years imprisonment	No time limit
<p>s <a href="#">131A</a>(1)</p> <p>Offence under s131 of possession of objectionable <b>with knowledge or having reasonable cause to believe</b> that the publication was objectionable.</p>	10 years imprisonment or a fine not exceeding \$50,000	No time limit
<b>All other offences under the FVPC Act</b>		2 years after the date on which the offence was committed

**Note:** None of the time limits in the Criminal Procedure Act 2011 apply to FVPC Act. For all charges under the FVPC Act, except for those under ss [124](#)(1), [127](#)(4) and [131A](#)(1), there is a 2 year limitation period. This applies even for fine only strict liability offences which would otherwise have a 6-12 month time limitation period under the Criminal Procedure Act 2011.

**Offending that occurred before 1 July 2013**



If the offending occurred before the Criminal Procedure Act 2011 came into force on 1 July 2013, the old time limit for taking all FVPC Act prosecutions, of 2 years from "the time when the matter of the information arose" in s143 of the FVPC Act (now repealed) still applies.

## Investigations

### Liaising with others

When commencing an investigation, contact the OCEANZ (Online Child Exploitation Across NZ) team at PNHQ - email [oceanz@police.govt.nz](mailto:oceanz@police.govt.nz). They will liaise with the DFU of the Department of Internal Affairs or Customs to ensure investigations are co-ordinated and there is no duplication of effort.

The investigation may require joint discussion between agencies and continual analysis of the information. Any of the agencies may take the lead role during the investigations depending on the circumstances and the best chances of success.

The intelligence on child exploitation material held by each of the agencies, when viewed in isolation, is often innocuous. However, when the intelligence is combined, it may uncover some very deviant and disturbing practices.

### Effect of Clean Slate Scheme on joint investigations

When carrying out joint investigations with agencies such as Customs and the Department of Internal Affairs, the [Criminal Records \(Clean Slate\) Act 2004](#) creates different rules, depending on the organisation, governing the release of a suspect's criminal record or information about it.

You must take care before disclosing information about a suspect's criminal record to other agencies during joint investigations.

### Disclosing criminal record information to Customs

Because Customs is a 'law enforcement agency' as defined in section 4 of the Criminal Records (Clean Slate) Act 2004, the exception in section 19(3)(a)(i) of that Act applies. This allows Police to disclose an eligible individual's criminal record or information about it to a law enforcement agency if it is necessary for the exercise of that agency's prevention, detection, investigation, or prosecution functions.

Therefore Police may disclose the criminal record of a suspect, or information about it, to Customs when this exception applies, even if the suspect would otherwise be eligible to have their criminal record concealed.

### Disclosing criminal record information to Department of Internal Affairs

The Department of Internal Affairs is not included in the definition of 'law enforcement agency' in the Criminal Records (Clean Slate) Act 2004. This means that Police must comply with that Act when sharing criminal records and information about criminal records with Department of Internal Affairs' personnel.

As a general rule, a suspect's criminal records or information about that record (such as prisoner photos or notings) may not be disclosed to the Department of Internal Affairs.

If you believe that the joint investigation would be significantly enhanced by including a criminal record and information about it in joint briefings, you must first find out whether the suspect is an '[eligible individual](#)' under the Criminal Records (Clean Slate) Act 2004.

### Eligibility status

To find out the suspect's eligibility status:

- contact the designated district representative who has access to the [NIA](#) Clean Slate Query function.
- ask that person to carry out a clean slate eligibility check.

If the check shows...	then...
The suspect <b>is not</b> an eligible individual	You may disclose the criminal record and information about it to Department of Internal Affairs' personnel (but only if disclosure is also authorised under the Privacy Act 2020).
The suspect <b>is</b> an eligible individual	The person is deemed to have no criminal convictions and you must not disclose their criminal record or any information about it to Department of Internal Affairs' personnel.

For further information on the Clean Slate Scheme and the Privacy Act 2020, see [Privacy and official information](#) in the Police Manual



## Executing search warrants

### Search and Surveillance Act applies to search warrant execution

The provisions of Part 4 of the Search and Surveillance Act 2012 (S&S Act) (except for sections 118 and 119 (see below)) apply to the execution of search warrants issued under section 109, 109A or 109B of the FVPC Act. (See [Search warrant applications](#) for information on how to apply and the grounds for applying).

([s110](#))

This means that all the rules governing search and seizure that apply to warrants issued under s6 of the S&S Act, also apply when you are applying for and executing warrants issued under s109 or 109A of the FVPC Act. This includes the obligations on police (announcing intention to enter, identifying self, providing a copy of the warrant, giving notice (see below) of what is seized etc) as well as the powers and authorisations that police have when searching for and seizing items under warrant. (See [Carrying out search powers with or without warrants](#)).

### Notice requirements

The obligations in [s131](#)(4) or (5) of the S&S Act to provide a notice to the occupier of the place, recording among other things, the fact that items were seized and listing the items that were seized, will also apply to searches carried out under warrants issued pursuant to the FVPC Act.

### Exceptions - s 118 and 119 S&S Act do not apply to FVPC Act searches

The only exception to the application of Part 4 of the S&S Act to searches conducted pursuant to warrants issued under the FVPC Act is that s118 (powers of detention incidental to powers to search places and vehicles) and s119 (powers of search by person who has power of arrest) of the S&S Act do not apply to searches pursuant to warrants issued under s109 or 109A of the FVPC Act.

This means in the course of carrying out a FVPC Act search of a place or a vehicle you:

- cannot detain a person for the purposes of determining whether there is a connection between a person at the place or in the vehicle and the object of the search, and
- if you are exercising a power of arrest in the course of a search you cannot search any other person found at that place or who arrives at that place for evidential material or for dangerous items that pose a threat to safety.

### More information

See the [Carrying out search powers with or without warrants](#) chapter for information about executing search warrants, including:

- your powers incidental to search
- entry, announcement and identification requirements
- accessing and seizing computer material
- notice and inventory requirements after search or seizure.

### Searches conducted under s198 Summary Proceedings Act 1957

If a search warrant for objectionable material was executed before the commencement of the Search and Surveillance Act 2012 on 1 October 2012, it is important to check whether the search warrant was issued under [s198](#) of the Summary Proceedings Act 1957. If so, seek advice from your supervisor, legal section or OCEANZ because search warrants for objectionable material obtained under s198 of the Summary Proceedings Act create issues regarding admissibility of evidence.

### Initial actions

Electronic evidence is delicate, easily altered, damaged or destroyed by improper handling or examination. Like all other evidence, it must be handled carefully and in a manner that protects its evidential integrity. Where possible, take an Electronic Crime Laboratory Officer or member of your local DFU with you to provide an onsite preview and preserve electronic evidence.

When executing a search warrant it is vital that the search team has a plan. Upon entry:

- do not allow the suspect to gain access to the computer or power source
- control the suspect during the search.



the screen should reactivate.

## Obtaining further advice

Contact the [DFU](#) for advice **before** you take any further action if:

- there is material on the screen about which you are unsure
- the computer is networked or a business computer. Pulling the plug could severely damage the system and disrupt legitimate business leaving the Police open to official complaint and the possibility of civil action. (If possible, call the DFU before you execute the warrant or take a member of their team with you to provide an onsite preview and preserve evidence).

## Searching for and seizing computer material

See the [Carrying out search powers with or without warrants](#) chapter for more information about:

- carrying out search powers
- searching for and seizing computer materials
- remote access searches
- responsibilities on entry
- notice and inventory requirements after search and seizure.

## Requiring assistance to access computer systems

If you are exercising a search power in respect of any data held in a computer system or other data storage device, you may **require** a specified person to provide access information and other information or assistance that is reasonable and necessary to allow you to access the data. It is an imprisonable offence (under [s178](#)) for a person to fail to assist you when requested, without reasonable excuse.

### A specified person is:

- a user of a computer system or other data device or an Internet site who has relevant knowledge of that system, device or site
- a person who provides an Internet service or maintains an Internet site and who holds access information (s130(5)).


([s130](#) Search and Surveillance Act 2012)

## Procedures for securing evidence

Follow the procedures in the [Preservation and recovery of electronic evidence](#) Police Manual chapter for:

- locating and securing evidence
- packaging and submitting exhibits.

Remember:

-  Keyboards, the computer mouse, disks, CDs, and other components may have fingerprints or other physical evidence on them that should be preserved in the usual manner.
- Other electronic devices can contain valuable evidence associated with criminal activity. Unless an emergency exists, do not access the device. If you have to, note all actions associated with the manipulation of the device to document the chain of custody and ensure its admission in court.

## Questioning suspect

If a suspect or any other person is in attendance at the scene, question them to obtain information, such as the owners and/or users of the electronic devices found at the scene, passwords, usernames, encryption codes and their internet service provider (ISP.)

## Victim identification

It is important to liaise early with [OCEANZ](#) (email: [oceanz@police.govt.nz](mailto:oceanz@police.govt.nz)) so that any possible victim identification aspects of the investigation are covered. OCEANZ uses specialised victim identification software that can assist in identifying New Zealand and international victims. The information from this phase of an investigation can provide some direction around the objectionable publications that a suspect is charged with and subsequent victim impact reports that are prepared for the court.

## Prosecutions

### Authority to prosecute

When material is seized and analysed the investigator must:

- make a preliminary decision on whether any publications are considered objectionable, and if so
- seek approval from the District Manager: Criminal Investigations, a Detective Superintendent, or Manager: National Security Investigation Team before commencing any prosecution for an offence against the provisions of the Films Video and Publications Classification Act 1993. (Download an example of a written authorisation to prosecute):

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 [Authorisation to prosecute \(2018\).doc](#)

39.5 KB

### Previous prosecution regime required authority of the A-G

Under the previous prosecution regime a prosecution could not be commenced without the authority of the Attorney General and the Attorney-General had delegated that authority to Police District Commanders.

From 8 May 2015, the requirement for the Attorney General's consent to initiate a prosecution has been removed, and with it the District Commander's delegation. Now all prosecutions must be authorised by a Detective Superintendent, District Manager: Criminal Investigations or Manager: National Security Investigation Team.

### Importance of obtaining appropriate authorisation before commencing prosecutions

Objectionable publications prosecutions have a number of inherent difficulties. Complexities often arise around determining the publications that should form the basis of a prosecution (naturist type images, child modelling and age difficult images are often not deemed objectionable). Without a gate keeping process Police run the risk that they will commence a prosecution in relation to publications that are in fact not objectionable.

Within society there is significant stigma attached to being prosecuted in relation to child abuse material. Not only do Police run the risk of civil action for a wrongful prosecution but there could be long lasting negative impacts on the person charged.

Any prosecution in relation to objectionable publications must continue to be forwarded to the relevant District Manager: Criminal Investigations, a Detective Superintendent, or Manager: National Security Investigation Team for authorisation. This will ensure that a robust prosecution process is maintained.


[OCEANZ](#), Police Legal Services and the Office of the Chief Censor are able to provide advice around charging.

### Factors to be considered when making a decision to prosecute

When deciding whether to consent to a prosecution for offences against the Films Video and Publications Act 1993 the District Manager: Criminal Investigations, a Detective Superintendent, or Manager: National Security Investigation Team must consider all the circumstances of the case including:

- number and nature of the images which are to be the subject of the charges
- the circumstances of the possession
- the criminal history of the person/s involved
- sufficiency of evidence, and
- whether a prosecution is justified in terms of the public interest.

### Seeking consent to prosecute

Step	Action
1	Prepare a comprehensive <a href="#">file for assessment</a> by the District Manager: Criminal Investigations, a Detective Superintendent, or Manager: National Security Investigation Team.
2	<p>If consent is granted, the file (with the original of the District Manager: Criminal Investigations, a Detective Superintendent, or Manager: National Security Investigation Team's written consent) will be returned to the investigator for a charging document to be prepared.</p> <p>Download an example of a written authorisation to prosecute:</p> <p>-</p> <div style="border: 1px solid black; padding: 5px; display: inline-block;">  <a href="#">Authorisation to prosecute (2018).doc</a> <span style="float: right;">39.5 KB</span> </div>

## File contents for assessment

Include these items in the assessment file as far as is practicable.

Order	Item
1	An index to the file.
2	<p>A full summary of the file, including:</p> <ul style="list-style-type: none"> <li>- a chronological history of the investigation, with specific details of any search warrant executed</li> <li>- a summary of the number and nature of those publications which are contemplated as being the subject of charges (as a general rule there should be no more than 20 charges)</li> <li>- the circumstances of the possession (e.g. where found, format, whether hidden or protected by passwords, evidence of making or manipulation that would show knowledge)</li> <li>- any identifiable names, references or labels on images or publications which are to be the subject of charges (for instance, photos often have an individual jpg number).</li> </ul>
3	Copies of all publications which are to be the subject of charges, labelled and referenced in a schedule. Copies must be in a readily viewable format.
4	<p>Copies of further publications from the same seizure that might be 'objectionable', for comparison if necessary with the publications selected for charges.</p> <p>Charges are based on the worst of the publications, not a representative sample of the full range of images seized. (See <a href="#">Selection of evidence based on seriousness</a>).</p>
5	Copies of all material which may be disclosed to a suspect after charges are filed (e.g. search applications and warrants).
6	Any witness and complainant statements.
7	Any suspect statements/admissions, including copies of any video interview and typed transcripts (if available).
8	Any criminal history of the suspect/s, and any other current charges (particularly if related in some way to the proposed objectionable publications charges).
9	The wording of the specific objectionable publications charges in contemplation.
10	A draft caption summary in respect of the contemplated charges.

## Pleas

When the suspect is charged, they must decide whether to admit or deny that the material is objectionable or restricted.



If the defendant denies that the material is objectionable or restricted, the court must refer the matter to the [Classification Office](#), which has exclusive jurisdiction to determine the matter. Neither the court nor any other person has the right to decide whether the material is objectionable.

(s29)

A recent court decision, *Police v Timpson* [2017] NZDC 11352, made it clear that it is the responsibility of the Police to prove all elements of the case including the fundamental element that the publication is objectionable under the Act. In most cases this will not be an issue. To address any possible issues regarding questions around whether a publication is objectionable or not the officer in charge should:

1	As early as possible seek an admission from defence counsel pursuant to s 9 of the Evidence Act 2006 that the publication is objectionable and if an admission is not forthcoming -
2	refer the publication to the Office of Film & Literature Classification to make a classification of the publications that are in question. It is also possible to apply to the Court for an order referring the images for classification (s 29). Note that such applications need to be made <b>early in the proceedings</b> and before the Case Review Hearing.
<b>Consultation with the Police Prosecution Service should also take place early in this process.</b>	

### Classification Office determines if material is objectionable

Publications are submitted to the [Classification Office](#) for a decision on a publication's classification by either court order (when the defendant denies material is objectionable) or by Police pursuant to section 13 of the FVPCA 1993. As noted, the latter course should also follow a failure by the defence to admit that the publication is objectionable. The Classification Office assesses publications and determines whether they are objectionable or not or otherwise restricted. The office has classified a range of publications including films, videos, DVDs, computer files, CD ROMS, t-shirts, letters, newsletters and photographs.

### Procedure when submitting material for classification

Follow these steps when submitting material for classification.

Step	Action
1	<p>Send a <a href="#">section 13 submission form</a> with each publication, whether in electronic or paper form. Ensure contact details for the owner (or their lawyer) and for Police are included on the submission form.</p> <p>It is not necessary to prepare a report describing the publication and analysing whether it is objectionable or not; it is satisfactory to state that the publication is believed to be objectionable.</p>
2	<p>If you are submitting electronic files on a single disc, specify whether the disc is to be treated as a single publication or whether each file on the disc is to be treated as an individual publication.</p>
3	<p>Where multiple publications are submitted, attach a schedule to the submission form with a list of the j-peg files or some form of identifier for each publication.</p>
4	<p>The Classification Office:</p> <ul style="list-style-type: none"> <li>- contacts interested parties, such as the person from whom the publications have been seized and/or their lawyer</li> <li>- determines if the material is objectionable.</li> </ul> <p>Interested parties and the Secretary for Internal Affairs are given 14 working days to make submissions on the classification of the publication.</p> <p>(The time frame for classification can vary according to the Office's workload. It can take up to 3 months, as Court Order classifications take priority).</p>
5	<p>If the Classification Office determines that the material:</p> <ul style="list-style-type: none"> <li>- is not objectionable, the prosecution is dropped</li> <li>- is objectionable, the prosecution will proceed in the normal manner to case review and/or trial.</li> </ul>

## More information

For more information on prosecutions see the 'Guidelines for Prosecution under the Films Video and Publication Act 1993 (2015)':

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	<a href="#">Guidelines_for_Prosecution_under_the_Films_Video_and_Publication_Act_1993.pdf</a>	<b>1.43 MB</b>
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