



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Child Protection (Child Sex Offender
Government Agency Registration) Amendment
Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 269 of the Standing Orders of the House of
Representatives

1. I have considered whether the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. I have concluded the Bill limits s 25(g) (right to benefit of a lesser penalty where penalties change) and s 26(2) (right to freedom from double jeopardy) and cannot be justified under s 5 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 269, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill amends the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the principal Act). The purpose of the principal Act was to establish a Child Sex Offender Register that will reduce sexual re-offending against child victims, and the risk posed by serious child sex offenders by (a) providing government agencies with the information needed to monitor child sex offenders in the community, including after the completion of the sentence; and (b) providing up-to-date information that assists the Police to more rapidly resolve cases of child sexual offending.
5. Section 10 of the principal Act provided for the establishment of a Child Sex Offender Register ('the register')
6. The principal Act defines a "registrable offender" as a person who is convicted of a qualifying offence and sentenced to imprisonment or convicted of a qualifying offence and sentenced to a non-custodial sentence and made subject to a registration order by the court. A person who is sentenced to a term of imprisonment for a qualifying offence is automatically placed on the register, whereas a person who is sentenced to a non-custodial sentence following a conviction for a qualifying offence, is placed on the register at the court's discretion. The person must be 18 years of age at the time of the commission of the offence. All registrable offenders are required to report a range of personal information to the register.
7. Registrable offenders sentenced to imprisonment are required to comply with reporting obligations for 8 years, 15 years, or life depending on the qualifying offence committed. Registrable offenders sentenced to a non-custodial sentence who are placed on the register by order of the court must comply with reporting obligations for 8 years regardless of the qualifying offence committed.
8. The Explanatory note states that the objective of the Bill is to improve the safety of children and young people in the community by improving the clarity of the principal Act, enhancing the standard and consistency of the practice of the Child Sex Offender Register staff, assisting registrable offenders to more easily comply with the principal Act, and requirements placed on them, and updating the principal Act to reflect evolving technology and address legislative gaps.

9. The Bill makes a number of amendments to reporting requirements.
10. The Bill expands the list of relevant personal information that a person must report, to now include:
 - 10.1 Their email address.
 - 10.2 Details of any education or training course they are attending or enrolled to attend.
 - 10.3 Their nationality.
 - 10.4 Name of each country of which they are a citizen.
 - 10.5 Details of each New Zealand refugee travel document or certificate of identity they hold.
 - 10.6 The details of any internet service, computer system or device, and any other storage device, they use or intend to use.
 - 10.7 The identifying details of any computer system or device they use that is capable of enabling another computer system or device to access the internet, such as a modem or router.
 - 10.8 Details of any username for an online account they use for a service used to obscure internet activity or direct network traffic.
11. The Bill also makes amendments to reporting requirements that already exist. For example, the Bill:
 - 11.1 requires registrable offenders to report that a child is going to be residing at the same address as them 48 hours before this occurs (rather than 72 hours after);
 - 11.2 clarifies that voluntary work must be reported;
 - 11.3 clarifies the definition of locality for registrable offenders with no permanent address or fixed abode in New Zealand;
 - 11.4 requires a registrable offender travelling of the country to report this information at least 7 days in advance (rather than 48 hours in advance);
 - 11.5 requires a registrable offender to report their return to New Zealand no more than 72 hours after re-entering, electronically or by telephone (rather than the current 10 day in-person requirement).
12. There are also other amendments to the principal Act, such as:
 - 12.1 enabling notices to be served to registrable offenders by electronic means (rather than just by post);

- 12.2 clarifying that where there is a successful appeal against registration that information must be removed from the Child Sex Offender Register;
 - 12.3 removing the requirement for an application for review to be made within 28 days of registration; and
 - 12.4 clarifying that a specified agency may disclose information about a registrable offender to another specified agency to address concerns that only information on the Child Sex Offender Register can be disclosed.
13. The Bill also adds the following seven offences to Schedule 2, which qualify a person for registration:
- 13.1 provision of sexual services by a person under the age of 18 years (sections 20, 21, 22(1) and 22(2) of the Prostitution Reform Act 2003);
 - 13.2 knowingly importing or exporting objectionable publications (section 390 of the Customs and Excise Act 2018);
 - 13.3 dealing in people under 18 years for sexual exploitation, removal of body parts, or engagement in forced labour where the person is under 16 years and subject to sexual exploitation (section 98AA of the Crimes Act 1961); and
 - 13.4 intentionally or recklessly makes an intimate visual recording of another person where the victim is under 16 years (section 216H of the Crimes Act 1961).
14. Schedule 1 of the Bill adds a new Part 3 to be inserted into Schedule 1 of the principal Act. Clause 18 of Part 3 provides that on or after commencement, the principal Act as amended by the Bill, will apply to specified registrable offenders.
15. Part 3 also makes provision for how the changed or additional reporting requirements are to apply (clauses 18, 19 and 21 to 26). For example, it provides that pre-existing registrable offenders must report to the Commissioner no more than 30 days after commencement of the amendment Act and must report relevant personal information that is now required to be reported.
16. Clause 18 states that clauses 18, 19, and 21 to 26 override any inconsistent other law, including ss 6(1) and 6(2) of the Sentencing Act 2002, ss 25(g) and 26(2) of NZBORA and the Supreme Court's decision in *D (SC 31/2019) v New Zealand Police*.
17. Clause 29 states that Schedule 2 (which lists the qualifying offences) as amended by the amendment Act does not apply to a qualifying offence, or a corresponding offence in a foreign jurisdiction, committed before commencement. Therefore, the seven new qualifying offences will apply prospectively, that is, an individual who commits one of those new qualifying offences will only be a registrable offender if the offence is committed after the commencement of the Amendment Act.

Legislative history and previous section 7 reports

18. There have been four section 7 reports presented by Attorneys-General on previous amendments to the principal Act, and on the principal Act itself.

Child Protection (Child Sex Offender Government Agency Registration) Act 2016

19. In 2015, the Attorney-General presented a report to the House of Representatives under s 7 of the Bill of Rights Act on the principal Act (the s 7 Report). The s 7 Report concluded the principal Act appeared to be inconsistent with the Bill of Rights Act in two ways. First, the principal Act appeared inconsistent with the freedom from disproportionately severe treatment or punishment affirmed by s 9 of the Bill of Rights Act arising from the inability of registered offenders to seek review of their reporting obligations. Second, the principal Act appeared inconsistent with the freedom from double jeopardy affirmed by s 26(2) of the Bill of Rights Act as it applied to convicted sex offenders retroactively.
20. The Attorney-General's conclusion that the principal Act was inconsistent with s 26(2) of the Bill of Rights Act hinged on the determination that the registration and reporting requirement constituted a punishment. The Attorney-General's reasoning for this determination was:¹
- 20.1 the triggering event is a criminal conviction;
 - 20.2 those on the register are referred to throughout the legislation as registrable "offenders";
 - 20.3 the consequences are in effect a subset of the sanctions which can be imposed on offenders following release on parole; and
 - 20.4 it is an offence to fail to comply with reporting obligations without reasonable excuse, punishable by up to one year imprisonment.
21. The Supreme Court has recently confirmed that a registration order under the principal Act constitutes a punishment for the purpose of the Bill of Rights Act.²

Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017

22. In 2017, the Government enacted the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 (the Amendment Act 2017). The Amendment Act 2017 retroactively applied the registration requirements of the principal Act so that all registrable offenders were registered under the principal Act.

¹ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

² *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2 at [59].

23. The Attorney-General presented another report (the second s 7 Report) to the House of Representatives under s 7 of the Bill of Rights Act. The second s 7 Report concluded that the Amendment Act 2017 appeared to be inconsistent in two ways. First, the Amendment Act 2017 appeared inconsistent with the freedom from double jeopardy affirmed by s 26(2) of the Bill of Rights Act for the same reasons as the principal Act. Second, the Amendment Act 2017 appeared inconsistent with the right to a lesser penalty where penalties change affirmed by s 25(g) of the Bill of Rights Act.
24. To reach the conclusion that the Amendment Act 2017 was inconsistent with s 25(g) of the Bill of Rights Act the Attorney-General determined that Amendment Act 2017 applied to a group of offenders who had been convicted of a qualifying offence before 14 October 2016 (when the principal Act was enacted) but who were sentenced on or after 14 October 2016. For these offenders their right to a lesser penalty where penalties change was limited in a way the Attorney-General considered could not be demonstrably justified.

Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021

25. In March 2021, the Attorney-General presented a third report (the third s 7 Report) to the House of Representatives under s 7 of the Bill of Rights Act and Standing Order 265 on the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021 (the Amendment Act 2021). The Amendment Act 2021 was enacted in response to the Supreme Court's decision in *D v NZ Police*, which held that there were gaps in the principal Act's retroactive application. The amendment clarified that the principal Act did apply retroactively to particular groups of offenders. The third s 7 Report concluded that the Amendment Act 2021 appeared to be inconsistent with the Bill of Rights Act in the same way as the Amendment Act 2017 and for the same reasons.

Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Act 2024

26. In November 2021, the Attorney-General presented a fourth report (the fourth s 7 Report) to the House of Representatives under s 7 of the Bill of Rights Act and Standing Order 265 on the Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill 2021. The Amendment Act was enacted in June 2024 to create a requirement for registered sex offenders, travelling outside of New Zealand and remaining in a country for more than 48 hours, to report certain information to Police, within 48 hours of their intended travel.
27. This was to apply retrospectively to those who committed offences prior to commencement of the Bill but were convicted and sentenced following enactment. The fourth s 7 Report concluded that the Amendment Bill 2021 appeared to be inconsistent with the Bill of Rights Act in the same way as the Amendment Act 2017 and for the same reasons.

Consistency of the Bill with the Bill of Rights Act

Section 26(2) – Freedom from Double Jeopardy

28. Section 26(2) of the Bill of Rights Act affirms that no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again. The right recognises that there must be finality to proceedings. Once a person has been finally acquitted, pardoned, or convicted and sentenced, they should be able to move on.³
29. The Bill amends certain reporting requirements and in our view makes these more onerous and inserts additional reporting requirements which are to apply with retrospective effect – Schedule 1, Part 3 of the Bill confirms that the additional reporting requirements apply to pre-existing registrable offenders and that this is the case despite any other inconsistent law. I consider that the additional reporting requirements constitute a punishment for the purposes of s 26(2) of the Bill of Rights Act.
30. The retrospective application of the reporting requirements to pre-existing registrable offenders therefore prima facie engages section 26(2) of the Bill of Rights Act, as it constitutes a subsequent, additional punishment to that which was given at the time of sentencing, for those who have already been sentenced.

Is the limitation justified and proportionate under section 5 of the Bill of Rights Act?

31. Where a provision appears to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:⁴
 - a) does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b) if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

³ *Police v Gilchrist* [1998] 16 CRNZ 55.

⁴ *Hansen v R* [2007] NZSC 7 at [123].

Is the objective sufficiently important?

32. The objective of the Bill is “to improve the safety of children and young people in our community.” This aligns with the purpose of the principal Act, which is to establish a Register that “will reduce sexual reoffending against child victims, and the risk posed by serious child sex offenders. The provision of the additional information supports these objectives.
33. The previous Attorney-General noted that child victims of sexual offending are amongst the most vulnerable victims of crime, and the resultant harm is often very serious and enduring. I, therefore, consider that the objective of the Bill is sufficiently important.

Is there a rational connection between the limit and the objective?

34. As noted in the s 7 report on the principal Act, there is limited evidence from other jurisdictions about the effectiveness of sex offending registers and the associated reporting requirements. The lack of evidence supporting a reduced risk to public safety, however, should be weighed against the severe harm caused to the child victims if reoffending occurs.
35. In balancing the weak evidence and the risk for severe harm to victims, I therefore consider there is a rational connection between the limitations and the objective.

Does the limit impair the freedom greater than reasonably necessary?

36. In Police’s view, the amendments should apply retrospectively in order to effectively protect children from the risks posed by individuals subject to registration orders. Police note that if the amended/additional reporting requirements do not apply with retrospective effect, then there would be two separate groups of registered offenders, subject to different reporting requirements. In Police’s view, having two separate groups could result in Registry staff being unable to identify and manage risks presented by one group to the same extent as the other. This could leave children and young people at increased risk and may impact the level of trust placed in the Register, as public expectation will be that all registered offenders are subject to the same requirements.
37. I do not consider that having registrable offenders with different reporting requirements is a compelling argument. It is not uncommon for Police to have to manage individuals with different reporting requirements, for example, in respect of individuals subject to varying bail conditions. In a similar context, the Department of Corrections are responsible for managing offenders in the community, who are subject to different conditions.
38. In the second and third s 7 Reports, the crux of both conclusions was that the provisions did not minimally impair the rights of offenders who did not have the benefit of a lesser penalty where penalties change. In the third s 7 Report, the previous Attorney-General considered that the principal Act would impair rights less if it limited the duration of reporting requirements or included a review

mechanism allowing for the de-registration or suspension of offenders' reporting requirements.

39. These options would still deny the right to benefit of a lesser penalty where penalties change affirmed by s 26(2) of the Bill of Rights Act, albeit to a less severe extent.
40. For these reasons, I consider that the Bill limits section 26(2) more than reasonably necessary to achieve the objective.

Is the limit in due proportion to the importance of the objective?

41. Given the limited evidence as to the effectiveness of sex offender registers in improving public safety, and recognising the importance of the right recognised by s 26(2), I consider that the intrusion on that right is not in due proportion to the importance of the objective.
42. I therefore consider the limit on s 26(2) cannot be demonstrably justified under s 5 of the Bill of Rights Act.

Section 25(g) – Right to a Lesser Penalty

43. Section 25(g) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to benefit of the lesser penalty.
44. The right to a lesser penalty when the penalty has changed between the commission of the offence and sentencing affirms the principle that statutes should not have a retrospective effect to the disadvantage of the offender.
45. Winkelmann CJ and O'Regan J in Supreme Court judgment in *D v Police*, observed that the right conferred by section 25(g) of the Bill of Rights Act (and section 6 of the Sentencing Act) is a “truly fundamental one”.
46. In *D*, the Supreme Court confirmed that a registration order under the Act constitutes a punishment for the purpose of the Bill of Rights Act.⁵ In reaching that conclusion the Court noted the following factors: The Court noted that the trigger for registration is a criminal conviction, an individual subject to an order is called a “registrable offender”, the appeal provisions in the Criminal Procedure Act 2011 are imported for appeals against registration orders, and failure to comply with reporting obligations without reasonable excuse is an offence, punishable by up to one year's imprisonment.
47. The Bill amends certain reporting requirements and in our view makes these more onerous and inserts additional reporting requirements. If a registration order (and

⁵ *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2 at [59].

the associated reporting obligations) is considered a penalty, then it follows that the reporting requirements inserted by the Bill are also a penalty. Although the additional reporting requirements may not seem particularly onerous when view alone, the requirements should be viewed as a whole. For the reasons outlined by the Supreme Court in D and in the s 7 Report on the principal Act, I consider the amended/additional reporting requirements constitute a penalty for the purposes of s 25(g) of the Bill of Rights Act.

48. The principal Act contains Sch 1, cl 5 which provides that registration and reporting requirements apply retroactively to persons who committed a qualifying offence before 14 October 2016 and are convicted and sentenced after 14 October 2016. Schedule 1, cl 12 goes on to expressly override any other inconsistent law, including the Bill of Rights Act and the Sentencing Act 2002.
49. The Bill is proposing further changes to the penalty attached to qualifying offences in the principal Act. A person who committed a qualifying offence prior to 14 October 2016 but who is convicted and sentenced after the Bill is enacted will be a registrable offender by virtue of Sch 1, cl 5. As they will become a registrable offender after the amendments made by this Bill are enacted, the additional reporting requirements will apply (prospectively) to them. As a result, persons who committed a qualifying offence prior to 14 October 2016 but who are convicted and sentenced after the Bill is enacted will be denied the right to benefit of a lesser penalty where penalties change affirmed by s 25(g) of the Bill of Rights Act.
50. The right affirmed in s 25(g) is truly fundamental. For the same reasons outlined in respect of s 26(2), particularly the lack of evidence for the efficacy of the register and that the limit is not in due proportion to the importance of objective, I consider the limit on s 25(g) cannot be demonstrably justified under s 5 of the Bill of Rights Act.

Conclusion

51. For the reasons set out above, I have concluded that the Bill appears to be inconsistent with the right to benefit of a lesser penalty where penalties change, affirmed in s 25(g) of the Bill of Rights Act, and the right to freedom from double jeopardy, affirmed in s 26(2) of the Bill of Rights Act.



Hon Judith Collins

Attorney-General

17 September 2024