Crimes Amendment Bill (No 2)

Government Bill

As reported from the Law and Order Committee

Commentary

Recommendation

The Law and Order Committee has examined the Crimes Amendment Bill (No 2) and recommends by majority that it be passed with the amendments shown.

Layout of the commentary

Our commentary first addresses matters relating to the Crimes (Drug Rape) Amendment Bill. The remainder of the commentary focuses on our key recommendations relating to the Crimes Amendment Bill (No 2).

Majority recommendations are outlined first. Dissenting views from the National Party, New Zealand First Party, United Future Party and the Green Party are each located on a separate page at the end of the commentary.

Matters relating to the Crimes (Drug Rape) Amendment Bill

The Crimes (Drug Rape) Amendment Bill, a Member's bill in the name of Dianne Yates, proposes to:

- reform the law of consent (outlined in section 128A of the Crimes Act 1961) in light of an increase in the numbers of drug-assisted rapes, both in New Zealand and overseas
- create a new offence to address this problem.

These two proposals seek to address a number of specific fact situations that accompany the increasing occurrence of drug-assisted rape, including situations where, because of the nature of the drug that has been administered to the victim by the perpetrator, the victim may be conscious but unaware they are being sexually attacked, or may be prevented from resisting unwanted sexual activity despite being aware they are being sexually attacked. We heard persuasive submissions supporting these proposals.

Matters better addressed by the Crimes Amendment Bill (No 2)

Given the similarity of the subject matter in this Member's bill and the Crimes Amendment Bill (No 2) we resolved to consider the two bills together. During our joint consideration of both bills it became very clear that the proposals raised by the Crimes (Drug Rape) Amendment Bill were better addressed in provisions of the Crimes Amendment Bill (No 2). Accordingly, the request by Dianne Yates that we not proceed with her bill, but instead take into account her proposals when considering the relevant provisions of the Crimes Amendment Bill (No 2), was agreed to.

Our views on the proposal to create a new offence to address the problem of drug-assisted rape are located in this commentary under the heading "Offence proposed by Crimes (Drug Rape) Amendment Bill unnecessary". Our views on the proposal to reform the law of consent to take account of situations of drug-assisted rape are located under the heading "Crimes (Drug Rape) Amendment Bill proposal on consent now catered for".

Background to the Crimes Amendment Bill (No 2)

The Crimes Amendment Bill (No 2), a Government bill, is the first overall review of sexual offences under Part VII of the Crimes Act. The bill aims to modernise the law relating to sexual offences by placing them in a contemporary context, and reflect recent changes in criminal behaviour as well as changes in social attitudes toward sexual matters.

Support for gender-neutral approach and sexual connection as basis of most offences

Two proposals of general application in the bill, which we fully support, are to ensure that sexual offences (except rape) apply on a gender-neutral basis (that is, committed by either males or females),

and to make sexual connection rather than sexual intercourse the basis of most sexual offences. We also support proposals to streamline the law to make it easier to understand and apply, improve coverage for vulnerable groups, and ensure that penalties for sexual offending are set at appropriate levels.

Only specific provisions addressed

The commentary focuses on our key recommendations, particularly those relating to provisions which deal with the following issues:

- Sexual conduct with a young person under 16.
- Sexual violation, particularly the offence of rape, and definitions of specific terms.
- Sexual conduct with a dependent family member.
- Sexual exploitation of a person under 18.
- Sexual exploitation of a person with a significant impairment.

Sexual conduct with a young person under 16

Currently section 134 of the Crimes Act (sexual intercourse or indecency with girl between 12 and 16) has a very narrow focus. Clause 7, new section 134, seeks to strengthen the offence so that it applies not just to sexual intercourse but to sexual connection in addition to indecency, make the offence gender-neutral, repeal prosecution time limits, and increase the penalty for sexual connection from 7 to 10 years' imprisonment.

Young person not to be charged when the other party is older than 16

We recommend an amendment to clause 7, new section 134(5), to allow a limited exception from prosecution as a party to an offence to apply to a person under 16, but only when the other party to the offence is over the age of 16 years. The amendment ensures, as far as possible, that the ability to prosecute older offenders is not compromised by exposing persons under 16 years to threatened or actual criminal prosecution. Without this limited exception a person under 16 years could be pressured into not pursuing a complaint by the risk of prosecution.

Similarity of age defence deleted

We recommend the deletion of clause 7, new section 134A(1). This provides a young person with a similarity of age defence to a charge of sexual conduct under section 134 if there is no more than 2 years age difference between the two parties, and the person charged can prove to the court that the other party consented. [1]

The intention of the provision was to convey the message that while prosecution and potential imprisonment are appropriate responses to predatory and exploitative sexual conduct against children and young persons, it is highly questionable whether these sanctions are an appropriate response to the difficult issue of consensual teenage sex.

In May this year, this provision received a lot of media and public attention. Concerns were raised that the intention of the provision was to lower the legal age of consent to sex from 16 to 12 years of age, thereby condoning under-age sex.

The Minister of Justice, the Hon Phil Goff, released a media statement stating that this was not the case. He also stated that the concerns being raised were the result of ill-informed media and political comment, which had misrepresented and misinterpreted the provision. [2]

In criminal law, the age of consent has always been the age at which a young person is considered to be capable of legally giving informed consent to sexual conduct with another person. The bill increases the penalties (from 7 to 10 years' imprisonment) for engaging in any sexual conduct with a person below that age, and, for the first time, by rendering females liable to prosecution for predatory conduct.

Subject to the rules in relation to the age of criminal responsibility, the consequence of deleting this provision remains that any boy or girl who engages in any form of consensual sexual conduct with a person between the ages of 12 and 16 will commit an offence and be liable to imprisonment for up to 10 years for sexual connection. As with most offences in the Act, the discretion not to charge will

[1] A young person means a person under the age of 16 years, as prescribed in clause 7, new section 134(6)(a).

[2] Hon Phil Goff, Minister of Justice, "Crimes Amendment Bill (No 2)", media statement, 26 May 2004.

remain with police in circumstances where there is clearly no predatory or exploitative conduct on the part of either party. [3] Of course, this does not rule out the possibility of another person (such as, the parents of the perceived victim) taking a private prosecution.

False and fraudulent representation added to grounds for negating defence

We recommend an amendment to clause 7, new section 134A. Given our recommendation above to delete the similarity of age defence from the bill, only one defence to a charge of sexual conduct with a person under 16 now remains. That defence has three elements that must be proven. First, that the person charged is able to prove that reasonable steps were taken to determine whether the young person concerned was over the age of 16. Second, that at the time of the sexual activity the person charged had a reasonable belief that the person was over 16. And third, that the other party consented.

The only factor that currently negates this defence is if the person charged obtained the other person's consent through a false and fraudulent representation of the nature and quality of the act concerned. This exception is not broad enough. We recommend broadening the grounds for negating this defence to include false and fraudulent representation as to the identity of the person charged. This reflects the common law position that mistaken identity negates consent.

"Younger than" defence repealed

We support the bill's repeal of the "younger than" defence. Under the current law this consent defence is available if the accused is younger than the complainant. This is an unjust approach. The repeal of the "younger than" defence sends an unequivocal message that any sexual conduct (not just sexual intercourse), with or between persons under 16 is a criminal offence.

Reasonable belief in age defence to apply regardless of age

We support the bill's extension of the "under 21" age limit for a reasonable belief in age defence. Under the current law this defence

[3] Police discretion is guided in a general way by the Solicitor-General's Prosecution Guidelines (1992). Over the past decade there have been 31 prosecutions in the Youth Court under section 134.

is available only if the accused is "under 21" at the time of the commission of the offence and reasonably believed the victim was 16 or older. Restricting the defence to persons aged under 21 is seen as unjust and arbitrary as it was enacted at a time when 21 was the age of majority. The extension of this defence now means it will be available to any accused person regardless of age.

The defence will require the accused to prove that he or she took reasonable steps to determine the age of the young person, and believed on reasonable grounds that the young person was 16 or older. It is expected that the wider the age gap and maturity difference between an accused person and the young person, in any particular case, the more onerous it will be for an older person to establish this defence. That is, what will be considered reasonable steps for an older person to take, and consequently their reasonable belief, will likely be more stringent than a person closer in age to the young person charged with the same offence. While not explicitly articulated in the new provision, this intent is consistent with the bill's aim to protect vulnerable young persons from exploitative and predatory adult sexual and or indecent behaviour.

Sexual violation, particularly the offence of rape, and definitions of specific terms

Sexual violation is the act of a male who rapes a female, or the act of a person who has unlawful sexual connection with another person. [4]

We considered a number of issues relating to this offence, including:

- whether the offence of rape should be retained as a distinct category of sexual violation
- the law of consent
- whether to change the words currently used in the law to define the act of rape
- whether to cater for persons who have undergone gender reassignment.

[4] Clause 3(1) of the bill defines sexual connection to mean: (a) connection effected by the introduction into the genitalia or anus of one person, otherwise than for genuine medical purposes, of: (i) a part of the body of another person; or (ii) an object held or manipulated by another person; or (b) connection between the mouth or tongue of one person and a part of another person's genitalia or anus; or (c) the continuation of connection of a kind described in paragraph (a) or paragraph (b).

Rape retained as a gender-based offence

The majority of us endorse the offence of rape being retained as a gender-based (male-on-female) form of sexual violation effected by penile penetration of a woman's genitalia. However, we acknowledge our recommendation on page 13 under the heading "Definition of 'genitalia' and 'penis' included, and 'sexual connection' clarified" extends the offence of rape to include persons who have undergone gender reassignment surgery.

The term "rape" carries powerful and specific connotations, and is commonly used to refer to an abhorrent sexual crime against women deserving of significant punishment. However, submissions contained quite diverse views on whether this distinction was still appropriate given that other forms of sexual violation (anal and oral penetration) could be considered just as traumatic as vaginal penetration, and that men can also be the victims of these types of sexual violations and suffer the same psychological and physical consequences.

Retaining rape as a distinct category of criminal offending has been the subject of considerable debate overseas for a number of years. Some overseas jurisdictions have abolished the offence in favour of a more inclusive gender-neutral crime, while others have retained the offence on the basis of its abhorrent nature, but extended its definition to include anal and or oral penetration with a penis or object, and take into account transsexual modifications. [5] The International Criminal Tribunal for Yugoslavia Appeals Chamber, in *Prosecutor v Kunarac* (2002), settled on a gender-neutral definition including penetration of the vagina, anus or mouth. This case also decided for the first time that rape can be an international crime against humanity.

We took the above considerations into account when looking at four options for dealing with the law relating to rape. We considered whether to:

[5] For example, in Canada where federal law is uniform across the country, the offence of rape was abolished in 1982. Canada instead created the gender-neutral crime of "sexual assault", which is broken down into a variety of categories with differing penalties reflecting the severity of individual circumstances. By contrast, in Australia, where criminal law falls within individual state jurisdiction, Western Australia and New South Wales have abolished the offence of rape, while Victoria, Tasmania, Queensland, and South Australia have all retained it, although Victoria's rape provisions have been expanded to include persons who have undergone gender reassignment surgery. Different again is the offence of rape in South Africa, where it is still a common law offence.

- retain the present distinction of rape as a gender-based offence
- abolish the distinction by including within the term "rape" all forms of sexual violation, making the offence gender-neutral
- abolish the distinction by deleting the word "rape" from the law thereby bringing everything under the term "sexual violation", and making the offence gender-neutral
- retain the distinctions but widen the term "rape" to include anal penetration, making the offence partially gender-neutral.

We heard compelling submissions, some of which supported retaining the status quo, while others supported extending rape to include other forms of sexual connection. We carefully considered these views and consulted widely with our colleagues. On balance, the majority of us consider that, at this time, retaining rape as a gender-based offence covering only penile penetration of the female genitalia, while providing for another offence of unlawful sexual connection so that specific recognition can be given to anal and oral penetration, is the most appropriate option. However, we accept that to retain the rape distinction constitutes a limited exception to the bill's gender-neutral objective. In reaching this view we wish to emphasise that the maximum penalty for sexual violation, whether by rape or unlawful sexual connection, is 20 years' imprisonment.

Offence proposed by Crimes (Drug Rape) Amendment Bill unnecessary

We do not support an amendment to insert a new offence to include situations where a person "wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person with the intent to commit sexual violation", as proposed by clause 5 of the Crimes (Drug Rape) Amendment Bill. This is not because we do not want the law to cater for this type of fact situation, but because offence provisions in existing statutes already cater for this.

Sections 191 and 197 of the Crimes Act 1961 and section 6 of the Misuse of Drugs Act 1975 can all be used to deal with the fact situations contemplated by the Crimes (Drug Rape) Amendment Bill. Section 191 of the Crimes Act is the closest provision to the proposal in clause 5 of that bill. This section states that it is an offence if someone stupefies or renders unconscious any person with intent to commit any crime. That offence is punishable by either 7 or 14 years' imprisonment. While that offence requires a victim to be

stupefied or rendered unconscious, section 6 of the Misuse of Drugs Act does not require that. The simple administration of any Class A, B or C drug is enough to commit that offence, albeit with varying levels of punishment: 14 years for Class A, 10 years for Class B, and 7 years for Class C.

Issues relating to consent

The current bill (Crimes Amendment Bill (No 2)) does not promote major changes to the law of consent. But seven submitters thought that it should and proposed amendments to address perceived problems with this area of the law.

No support for defining what amounts to consent

We do not support an amendment to define the term "consent" in statute, despite claims by some submitters that people need clearer messages about what constitutes consent to avoid misunderstandings, and support from the New Zealand Law Society for an amendment of this kind.

New Zealand's criminal law does not define consent in sexual offences in statute. Nor does this bill attempt to do so. This is because consent is defined (as meaning "full, voluntary, free and informed") by the common law, which has developed slowly over the years in defining and refining what does, and does not, amount to consent.

However, we are aware that other jurisdictions have inserted statutory definitions of consent into their legislation. For example, in Canada, consent means "the voluntary agreement of the complainant to engage in the sexual activity in question". In the United Kingdom, a person consents "if he agrees by choice, and has the freedom and capacity to make that choice". The Australian State of Victoria has defined consent to mean "free agreement".

In our view these jurisdictions have only substituted one difficult concept for another. Codifying or changing this difficult and elusive concept can only add further complexity to an already difficult concept, and a complicated area of the law. We also question whether defining consent in statute will assist the fact-finder in coming to grips with the fundamental issue of when a victim agrees, consents, or chooses to engage in sexual activity. This is evidenced by the fact that all three jurisdictions mentioned above have had to insert lengthy lists of what does not constitute consent alongside the statutory definition of consent.

Crimes (Drug Rape) Amendment Bill proposal on consent now catered for

We were moved by the submissions we received and heard that supported the proposal in clause 4 of the Crimes (Drug Rape) Amendment Bill, to add to the list of matters that do not amount to consent in sexual matters "the fact that a person is prevented from physically resisting by an intoxicating, anaesthetic, controlled or illegal substance, or hypnotic drug", to address the reported increasing occurrence of drug-assisted rape.

We agree with submitters that drug-assisted rape is an important issue that must be catered for and support moves already taken by the New Zealand Police (through television advertisements, pamphlets and posters), to warn people about the dangers of drug-assisted rape and what measures they need to take to safeguard against it.

We agree with Dianne Yates that clause 4 of her bill, which was prepared before this bill, has been superceded by clause 7, new section 128A(4) of this bill.

However, for other reasons, the amendments we recommend to clause 7, new section 128A, in general, (outlined immediately below) have resulted in wording changes to subsection (4). The amended rewording now provides that "a person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity".

Further clarification of matters that do not amount to consent

We recommend amendments to clause 7, new section 128A, to provide greater clarity about the circumstances that do not amount to consent in sexual matters. We recommend deleting the term "sexual connection" and replacing it with "sexual activity", which is to be defined by the insertion of a new subsection (9). This amendment will clarify that the matters listed should also be matters that do not constitute consent to an indecent assault. [6] We also recommend a consequential amendment to clause 7, new section 135, dealing with

[6] "Assault" is defined in the principal Act. "Indecent assault" is not, but case law has determined it is "an assault accompanied by circumstances of indecency". Clause 3, new section 2(1A) does not define "indecent assault" but makes it clear, particularly in the case of incidents involving children, that a person "does an indecent act" on another person whether he or she does something to the other person, or persuades or compels the other person to do something to him or her.

consent obtained fraudulently for what would otherwise be an indecent assault, to delete subsection (2), as matters covered there are now covered by the amendments to new section 128A.

We also recommend that the word "allow", which has been used in redrafting subsections (2), (6), and (7), be defined in new subsection (9) to include situations where the victim "acquiesces in, submits to, participates in, and undertakes" sexual activity. The definition aims to provide greater clarity so that even though the victim may exhibit these behaviours it will not constitute consent in certain circumstances.

Matters affecting persons with an intellectual, mental, or physical condition or impairment

We recommend further amendments to clause 7, new section 128A, specifically subsection (5) (matters that do not amount to consent in sexual matters), to ensure that the wording of the provision is in harmony with current attitudes and approaches in the area of disabilities, which include the idea that the term "condition" refers to the disability a person may have, while the term "impairment" refers to how the condition may manifest itself.

We agree with New Zealand CCS Inc that the policy intent behind the provision, which is to provide greater protection to a vulnerable group of people, is appropriate, but that the use of the word "severe", in describing the degree of a person's intellectual, mental, or physical condition or impairment, is inappropriate. We agree that the use of the word "severe" conveys a value judgement about disabilities. The amendments we recommend redrafts the provision to delete the word "severe" and replace it with the phrase "to such a nature and degree". The focus of the provision is now on the essential nature of the victim's condition or impairment, in that it requires the fact-finder to first determine the nature of the victim's condition or impairment, and then determine the degree to which that condition or impairment affected the victim's ability to consent or refuse consent to sexual activity.

We do not support two additional proposals made by New Zealand CCS Inc. The first is to include a statutory reference to "guidelines" that will define the ability of persons with an intellectual, mental, or physical condition or impairment to give consent. In our view, guidelines are not appropriate because all the elements of an offence should be fixed and articulated in statute. In any event, if a person's

condition is "so significant" that consent could never be forthcoming the guidelines would be redundant. The second proposal is to provide a defence for people with significant impairments against charges. This is not supported. The present law deals adequately with these circumstances.

No support for "reasonable grounds for belief in consent" requirement

We do not support an amendment to clause 7, new section 128, to include a requirement that the person charged should have to prove he or she had reasonable grounds for believing the victim consented by providing evidence of the steps taken to ascertain consent at the time of the offending.

The Women's Consultative Group of the New Zealand Law Society claimed this amendment is required as low conviction rates are the result of perpetrators more often than not being acquainted with the victims. The submitter claims this fact situation makes it difficult for juries to convict. The New Zealand Drug Rape Trust argued that the current law allows the accused to exploit the defence of honest belief on reasonable grounds owing to insobriety. The view of the Auckland Sexual Abuse HELP Foundation is that current consent provisions produce gendered understandings of consent that act as a disincentive to reporting offences to police. Changes in Canada, particularly the way consent laws are drafted in the Canadian Criminal Code (s 273.2), were used to support this proposal.

We do not support an amendment of this kind since to do so would constitute a major reform to our consent laws. It would also constitute a significant departure from the general rule that the Crown bears the burden of proof. Shifting the legal onus of proof from the prosecution to the defence, when the offence holds a maximum penalty of 20 years' imprisonment, without clear evidence of mischief in the law is highly undesirable. Finally, the Canadian experience showed that when laws relating to rape were changed in the 1980s and 1990s, although the reporting rate for sexual assaults increased, its impact on the rate of convictions was disappointing. This led to the conclusion in Canada that there needed to be a fundamental shift both in public attitudes towards sexual offending and law enforcement, rather than simply changing the law.

Definition of "genitalia" and "penis" included, and "sexual connection" clarified

We recommend three amendments to clause 3 (interpretation section) to include definitions of the terms "genitalia" and "penis", and to clarify the term "sexual connection".

Definitions of the terms "genitalia" and "penis" are included to ensure that persons with surgically constructed penis or genitalia are captured by the sexual violation provision both as perpetrators as well as victims. Under the current law, rape provisions do not apply to women and men who have undergone gender reassignment surgery. This is because a male perpetrator cannot, in law, rape a man who has surgically changed his gender from male to female, because the victim is still legally considered to be a male. The same is true for a man who was previously a female. He cannot, in law, rape a female, because he is, in law, considered still to be a female. This amendment will correct this anomaly. It is also consistent with law changes made in similar overseas jurisdictions. [7]

The amendment to the definition of "sexual connection" will further clarify when the act of sexual connection is completed. Clause 3, new subsection 2(1AA) has been redrafted to clarify that "introduction" into the genitalia or anus of one person of another person's body part, or an object held or manipulated by another person, need only be to "the slightest degree". This codifies the established position in common law, and is consistent with the requirements relating to rape.

Retention of current law position to define the act of rape

We recommend an amendment to clause 7, new section 128(2), to retain the current law position that describes the act of rape as the "penetration" of a person's genitalia by another person's penis. We do not endorse the drafting change proposed in the bill to describe the act of rape as the "introduction of his penis into her genitalia". We concur with the New Zealand Police Association, and the New Zealand Law Society, that the change proposed by the bill is unnecessary, as the term "penetration" has a well-settled meaning. Retention of this word will also avoid unnecessary litigation.

[7] For example, in the Australian states of New South Wales and Victoria, and in the United Kingdom.

Sexual conduct with a "dependent family member"

Currently, section 131 of the Act is very narrowly focused. The present offence (sexual intercourse with a girl under care or protection) only provides protection for girls under 20 years of age who are the step-daughter, foster-daughter, or ward of the male perpetrator, or living as a member of the male perpetrator's family and under his care and protection.

Clause 7, new section 131, of the bill widens the ambit of this offence to include victims and offenders on a gender-neutral basis, and covers all sexual conduct, not just intercourse. In doing so, it recognises that young people, regardless of their gender, need protection against any form of sexual exploitation by older family members who have a direct or quasi-parental role involving some power or authority over them.

In line with submissions, we have identified some problems with this provision, as well as clause 7, new section 131A, which is a corresponding provision that essentially defines who is a family member.

Amendments to address problems with knowledge, consent and use of power or authority requirements

We recommend amendments to clause 7, new section 131, to address problems with knowledge and consent requirements in the provision. We agree with submitters that the requirement for the prosecution to prove, beyond reasonable doubt, that an accused "knew" that the young person consented to the sexual activity because of the accused's use of power or authority, is too onerous. We recommend deleting the knowledge requirement from the offence provision. We also agree with submitters that the requirement for the prosecution to prove beyond a reasonable doubt that the complainant consented to the sexual activity is inappropriate. A child or young person can never be said to have consented to sexual activity, particularly if the accused misused a position of trust to gain sexual contact. Accordingly, we recommend deleting the consent requirement from the offence provision.

We also recommend amendments to clause 7, new section 131, to address problems with the power or authority requirements contained in the provision. The New Zealand Police Association argues that this requirement is inappropriate, as it is not uncommon for a child or young person to participate in sexual offending against them

without either being expressly or implicitly told, or otherwise compelled, to do so. We heard that in many cases young persons simply participate in sexual offending because they believe they have to, otherwise consequences might follow, even if the older family member did not intend those consequences.

We agree that it is far more appropriate that the prosecution is only required to prove that the young person participated "within" a relationship of power or authority, and not because there was a "use" of power or authority by the older family member. Otherwise there is a real danger that the accused could successfully argue that where a child or young person acquiesced, without words or conduct on the part of the older person, that there was no "use" of power or authority. If this were the case, any prosecution would have to fail. This outcome is unacceptable. Instead, the very fact of the family relationship, which by its very nature is one of power or authority, should be sufficient to impose criminal sanctions against those who, given their position within the family, extract sexual participation from another younger family member. An amendment to remove the requirement for the family member charged with the offence to have used power or authority is wholly in keeping with the general policy objective of the bill, which is to improve the law relating to children and young persons by ensuring that this vulnerable group of people are better protected from predatory and exploitative sexual activity.

In addition, we recommend three further amendments to clarify that:

- the sexual activity occurred
- consent is no defence to a charge
- the offence covers young persons under 18 who are in one of the defined relationships outlined in new section 131A (discussed below).

Amendments to clarify which family members will be caught by the offence provision

We recommend amendments to clause 7, new section 131A, to refine the categories of family members to provide greater clarity around which family members will be caught by the offence provision. This amendment expands the family relationships outlined in the bill, and also includes those family relationships outlined in the incest provision (clause 7, new section 130). Importantly, it places family members into three easily identifiable categories: the immediate family, the extended family, and a person (who could at first be

a stranger) who is living as a family member. Categorisation clarifies the role the family member must have in a child or young person's life before they can be caught by the offence provision. With each move away from the immediate family nexus a more stringent requirement of power or authority, and a role in the care or upbringing of the young person or child (identified in the provision, and hereafter as the "dependent family member"), must be met. [8]

For example, in the first category, (amended new section 131A(1)(a)) apart from siblings, all of the relationships are one generation above the dependant family member. Given the social expectation that immediate family members will have a general regard for the welfare of dependent family members, there is a requirement for these family members to have power or authority over the dependent family member before being caught by the offence provision.

In the second category (amended new section 131A(1)(b)), a family member is considered to be someone who belongs to the same family, whanau or culturally recognised group as the dependent family member. [9] The responsibilities of people in this category are one step removed from those belonging to a person in the immediate family. This means there is a more stringent requirement for family members in this category to have a significant role in the care or upbringing of the dependent family member before being caught by the offence provision.

In the last category (amended new section 131A(1)(c)), given it is twice removed from the immediate family nexus, the responsibility or care requirement is further strengthened so that the prosecution must prove that a person who is essentially a "non-family" family member had power or authority, as well as a significant role in the care or upbringing of the dependent family member before being caught by the offence provision. It is not intended that shared living arrangements, such as those entered into by flatmates, will be captured by this provision. It is intended to apply to situations, for example, where a young person boards with a person not caught by subsections (a) and (b). But, before the offence provision is applicable, the relationship between the dependent family member and the non-family, family member must be akin to a family situation.

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[8] It is helpful to note that within the first category of family there is a subcategory of closer family (sometimes referred to as the nuclear family), which is captured by the separate offence of incest under clause 7, new section 130.

[9] "Whanau" is not defined in the bill, as it is already adequately defined in case law and other legislation.

Sexual exploitation of persons under 18

Clause 6, new section 98AA, seeks to insert into the Act a number of new offences relating to the exploitation of persons under 18 for sexual purposes, the removal of body parts, or forced labour. The 18- year-old threshold is intended to reflect the position under international treaties, which treat persons under this age as children. The provision is to have extra-territorial effect because it seeks to facilitate New Zealand's compliance with the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography. [10]

We recommend a number of amendments to new section 98AA, including an amendment to clarify that a young person under 18 years cannot be charged as a party to the offence. These amendments are intended to fine-tune the provision, but do not substantially alter its intent.

Amendments to ensure consistency with the rest of the bill

To ensure the provision is consistent with the drafting in other provisions, we recommend deleting the term "sexual organs" and replacing it with "genitalia". The insertion of an honest-belief-in-age defence is also recommended, as this will provide consistency with other similar defences in the bill.

Amendments to clarify what constitutes sexual exploitation

While we acknowledge submitters' concerns about the difficulty in identifying the range of situations that may constitute sexual exploitation, it is important to note that the list of acts specified in the provision as constituting sexual exploitation are taken from the Protocol, and are not intended to be a definition, or exhaustive. Other acts are likely to be accepted by the courts as sexual exploitation. To address submitters' concerns that the provision may be too wide, we recommend three amendments to specify that the following acts do not constitute sexual exploitation. The first is bona fide artistic or cultural performances or displays, whose primary purpose is not the performance of sex acts or exposure of the young person's genitalia, anus or breasts. Those who engage under 18-year-old strippers will still be included. The remaining two exceptions are for the taking or transmission of a depiction of a person's genitalia, anus or breasts

[10] Extra-territoriality is articulated by specifying the provision under sections 7A(1) and 7B of the Act.

for medical or health education, or related information or advertising purposes.

Submissions that are not supported

We do not support an amendment to differentiate 16-year-old victims from those who are 18, since the age of the victim is a fundamental element of the offence. Instead, this will be a matter that comes under the Sentencing Act 2002, because that legislation provides the courts with a framework for taking into account varying levels of culpability. Neither do we support an amendment to the penalty provision (14 years' imprisonment), despite the inconsistency between this offence and that in section 23 of the Prostitution Reform Act 2003 (7 years' imprisonment). The penalty in this provision parallels the penalty for dealing with slaves in section 98 of the Act. It may be that the penalties under the Prostitution Reform Act should be reconsidered, but this is a matter that is not within our purview. The Prostitution Reform Act is being monitored. Future reform may consider these differences.

Sexual exploitation of a person with a significant impairment

We recommend the following amendments to clause 7, new section 138, which deals with the offence of sexual exploitation of a person with a significant impairment, which is defined as an "intellectual, mental, or physical condition or impairment".

Consent requirement deleted from offence provision

We recommend amendments to subsections (3) and (5) to delete the consent requirement from the offence provisions. Currently, the provisions include a requirement for the Crown to prove (beyond reasonable doubt) that the complainant did not have the capacity to give consent. Deleting the consent requirement means the Crown will only be required to prove that the accused had sexual connection with, or did an indecent act with a person with an impairment by taking advantage of their impairment. This will achieve the desired policy objective of protecting persons with significant impairments, without placing additional evidentiary burdens on the Crown.

Clarification of the term "significant impairment"

We recommend the amendment of subsection (6) to include in the definition of "significant impairment" an impairment that affects a person to such an extent that it significantly impairs his or her capacity to "understand the nature of sexual conduct". The offence may now apply when it affects any of the cognitive abilities (to understand, foresee or communicate) specified in subsection (6) so that an offence may have occurred. [11]

Drafting error in penalty provision corrected

We recommend the correction of a drafting error in new section 138(4), which prescribes the penalty for the offence of an indecent act on a person with a significant impairment, to specify a maximum penalty of 5 years' imprisonment, not 10 years' imprisonment as stated in the bill as introduced. The amendment will make the penalty consistent with other indecent act offences in the bill.

[11] This offence is a back-up offence to a charge under new section 128 (sexual violation) where the consent issue is not clear.

National Party view

The National Party recommends that this bill should be referred back to this select committee for further consideration.

There has been insufficient public involvement in, and discussion of, many of the bill's proposals. Major changes are being made to the rules around sexual conduct with minimal public consultation.

The bill proposes significant changes affecting consent and sexual activity involving minors, family members and people with particular disabilities.

While the broad purpose of the bill is meritorious, we believe the committee has not had sufficient time to properly consider the bill. The committee should seek further comment from legal practitioners on the majority's proposed amendments to the bill.

The National Party fears that because of this insufficient consideration the bill may lead to serious unintended consequences and risk disturbing settled case law and legal concepts. These could be avoided if the committee spent more time on this bill.

We welcome the Government's decision to drop the controversial "similar age" defence for under-age sexual activity, noting the earlier advice from officials on 19 March 2004 that this defence would have "effectively decriminalise[d] some underage sexual conduct".

Some examples of our concerns are:

- The bill proposes penalties for sexual conduct with a dependent family member under the age of 18. The equivalent existing provision is, however, age 20.

This means it will no longer be an offence for a foster parent to have sexual conduct with their 18-year-old foster child for whom they may have cared for many years. It would be more appropriate in our view to maintain the prohibition until age 20 to allow sufficient time to lapse and the dependence relationship to wane.

- One person is a dependent family member of another person "if they are members of the same family, whanau or other culturally recognised family group ... that has a responsibility for ... his or her care or upbringing". This could lead Judges to a much wider –- unintended – view of dependent family members when one considers differing cultural perspectives on the role of the wider family in child rearing.
- Currently it is a crime to have sexual intercourse with a woman or girl who is "severely subnormal". In seeking to

modernise this provision, the bill risks creating confusion and uncertainty.

The Law Society in particular warned of a "forensic lottery" as juries are "confronted with arcane evidence from opposed camps of experts" attempting to argue concepts like understanding the nature and consequence of sexual conduct. We do not believe the proposed amendments will do anything to remedy this. Indeed, official advice to the committee suggests leaving it to the courts to address this problem.

- The bill proposes a far-reaching "reasonable belief defence" for sexual conduct for all people over 12. If a person believed the other person was 16 or over, that the person had taken steps to ascertain the age of the other, and the conduct was consensual, then a defence will apply. Currently a similar provision exists only for an accused under 21.

At present a 45-year-old man has no defence in law for sexual conduct with a 15-year-old girl. Under the bill's proposals he will have a defence in law provided he reasonably believed she was 16 or older and, say for example, checked her (false?) identification.

No committee consideration was given to any alternatives for addressing the "genuine mistake" situation the Government wants to fix, such as a mitigating factor at sentencing. Nor has there been sufficient discussion in the public about the merits or otherwise of the effect this far-reaching proposal will have on protecting young people from predatory behaviour.

- Whereas "consent" has a settled meaning in common law, the bill deems certain conduct as not amounting to consent. Concern was raised by submitters as to the lack of precision of some of these subsections. For example, submissions noted that certain types of drugs associated with "drug-rape" can lead to a person appearing completely in control and rational that they may consent to sex in situations where they would normally withhold consent.

The definitions of what is not consent risk causing more confusion than clarity.

New Zealand First Party view

Whilst the aim and intent of this bill is meritorious, New Zealand First believes that the vast majority of the concerns expressed in the minority views of the National, Green and United Future parties are valid and as such New Zealand First is disappointed that the Government did not accept the need for wider community and legal consultation. We are specifically disappointed that despite the bill purporting gender neutrality the definition of rape remains unchanged.

New Zealand First regrets the Government's failure to recognise the abhorrence that men in particular, and society in general, have of male-on-male sexual attacks that result in non-consensual bodily penetration. We believe that wider community consultation would have seen a change in the definition of rape.

United Future Party view

The United Future Party has examined this bill, and while supporting its purpose and intent, considers a number of its provisions to be problematic.

- Most particularly, the aims to modernise the law in support for a gender-neutral approach has not been achieved with respect to the sexual offence of rape. The current offence in relation to section 128 of the Crimes Act 1961 (clause 7) – rape is unamended. As a result of this decision rape remains a discrete form of sexual violation which only a male is capable of committing against a female by penile penetration of the female genitalia only. This option is not compatible with overarching gender neutrality underpinning the bill and United Future's own policy. Given that the bill does at least address gender equivalence in terms of penalties applied for comparable offences, it is regrettable that widening the definition of rape was not supported. United Future will continue to advocate for an alternative option consistent with gender neutrality.
- United Future also takes exception to the definition of "family member" (section 131A(1)(a)(iv)) which provides for an offence of "sexual conduct with those under 18 where consent is given because of use of power or authority". The terms considered in the section include "members of the same family, whanau or other culturally recognised family group", with specific reference to the responsibility for, or significant role in, the care and upbringing of the victim.

  There is neither a definition of what is meant by "whanau" nor any ring fencing of what constitutes a "culturally recognised group". The key qualification for those captured by the proposed section is not simply that they could be considered to fall within the "culturally recognised family group" but that they also have "responsibility for, or significant role in the care and upbringing of the other". The focus must clearly be identified in terms of a relationship of power or authority being exploited. The inclusion of the various extended family groups in the proposed section should guard against the possibility that someone who because of their cultural norms does have a "responsibility for, or significant role in the care and upbringing of the other" and will be held to account if he or she therefore exploits that position of

power or authority, and is not able to escape the intention of the law.

It is unclear if, for example, flatmates, boarders or others not "living as" dependent family members are specifically excluded from the parameters of the offence. Similarly, an exchange student brought into the family as a family member where the host family is expected to provide and care for the young person as parents, would almost certainly be covered. However a foreign student paying board may not be covered depending on the arrangement and understanding entered into. The bill remains unclear as to how to determine one yet not the other.

United Future considers that if our criminal justice system must apportion a sanction to reflect (under this provision), the degree of responsibility commensurate with recognition for the significant role in the care and upbringing of the victim, then the barometer of that measure should be better defined. In principle the bill, as it stands, could apply differently depending upon the standard of relationship decided upon in court in terms of the qualitative nature of the relationship.

- United Future laments the important omission of this bill to include "sexual grooming" as a specific offence. Sexual grooming is a particularly insidious strategy employed to create an environment with a child that will allow for sexual advances later in life – often beyond criminal reach. The Sexual Offences Act 2003 (United Kingdom) contains a specific provision against such "sexual grooming" and should have been a blueprint for this bill to address.
- While United Future applauds the attempt to consolidate a defence to charges under new section 134 including the taking of "reasonable steps" to ascertain the age of a young person to be over 16; however, 134A(3) which demands the level of proof pursuant to such a defence, is inadequately defined. Furthermore, the consent of a young person concerned being obtained by false and fraudulent representation is too wide, and could capture unintended consequential situations.
- The committee extended the fraudulent misrepresentation offence to cover "fraudulent representation as to identity" – that is, if the older person lies about who they are or disguises themselves in order to gain consent to sexual activity. This

> change is supported by United Future and means that, notwithstanding steps taken to establish reasonable belief in age, perpetrators can nevertheless be guilty of the offence because they themselves have fraudulently misrepresented something in order to gain consent. United Future does however concede that this provision could be defined better to bring greater clarity.

While United Future is generally supportive of the intent of the Crimes Amendment Bill (No 2), there are a number of concerns which we feel require further amendment. Nevertheless, enfolding the Crimes (Drug Rape) Amendment Bill, in the name of Dianne Yates, is to be supported since this bill supersedes to a greater extent the issues raised by the latter.

United Future supports returning the bill to the House as amended. However we reserve our position in terms of the subsequent committee of the whole to move further amendments.

Green Party view

The Green Party supports the overall intent and purpose of this bill, but disagrees with the retention of "rape" as an offence differentiated by gender and other matters.

This decision is inconsistent with three of the Government's stated aims of the bill, which are to ensure that the law relating to sexual offences:

- reflects changes in social attitudes
- is streamlined, as much as possible
- provides for all victims of sexual abuse regardless of their sex, or the sex of the offender. [12]

The Green Party believes that the definition of rape, as retained in this bill is:

- outdated in terms of society's perceptions of what constitutes rape
- is not gender-neutral
- does not respect how many victims' feel about the reality of what has happened to them
- is out of step with the latest definition used by the International Criminal Tribunal of Yugoslavia (whose definition itself was the result of a broad review of rape law across jurisdictions).

We would prefer to see a definition that would subsume all forms of sexual violation (as currently defined in section 128 of the Crimes Act), within a single definition of rape. The effect of this would be that all forms of sexual violation would be rape, including:

- acts on men, as well as on women (currently only women can be raped)
- acts by women, as well as men (currently only men can rape)
- acts which include anal and oral penetration, and penetration with objects (currently rape is only penile penetration of the vagina).

In line with other amendments contained in this bill, the Green Party would have preferred Parliament to use this opportunity to update, streamline and render gender-neutral the law of rape.

[12] See page 2 of the explanatory note to the bill.

Appendix

Committee process

The Crimes Amendment Bill (No 2) was referred to the committee on 2 March 2004. The closing date for submissions was 14 April 2004. We received and considered 26 submissions from interested groups and individuals. We heard 19 submissions. Total consideration took 21 hours and 36 minutes of which hearings of evidence took 4 hours and 43 minutes.

We received advice from the Ministry of Justice.

Committee membership

Martin Gallagher, Chairperson (Labour Party)

Marc Alexander, Deputy Chairperson (United Future)

Georgina Beyer (Labour Party)

Brian Connell (National Party)

Ann Hartley (Labour Party)

Ron Mark (New Zealand First Party)

Mahara Okeroa (Labour Party)

Hon Tony Ryall (National Party)

Sue Bradford (Green Party) was a member of the committee for consideration of this bill (and the Crimes (Drug Rape) Amendment Bill), but without voting rights.

Dianne Yates was a replacement member of the committee for consideration of both bills.

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (majority) Subject to this Act,	Text struck out by a majority
New (majority) Subject to this Act,	Text inserted by a majority
〈*Subject to this Act,*〉	Words struck out by a majority
〈Subject to this Act,〉	Words inserted by a majority

Hon Phil Goff

Crimes Amendment Bill (No 2)

Government Bill

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Schedule 1
Consequential amendments

Schedule 2
Consequential repeals

The Parliament of New Zealand enacts as follows:

1 Title

(1) This Act is the Crimes Amendment Act (No 2) 2003.

(2) In this Act, the Crimes Act 1961[1] is called "the principal Act".

[1] 1961 No 43

2 Commencement

(1) **Sections 6 and 8** come into force on a date appointed by the Governor-General by Order in Council.

(2) So much of **Schedule 1** as relates to the Extradition Act 1999 or the Mutual Assistance in Criminal Matters Act 1992 comes into force on a date appointed by the Governor-General by Order in Council.

(3) The rest of this Act comes into force on the day after the date on which it receives the Royal assent.

Part 1
Amendments to principal Act

3 Interpretation

(1) Section 2(1) of the principal Act is amended by inserting, in their appropriate alphabetical order, the following definitions:

"**for a material benefit**, in relation to doing a thing, means—

"(a) after having obtained a material benefit for doing the thing; or

"(b) intending to obtain a material benefit for doing the thing

New (majority)

"**genitalia** includes a surgically constructed or reconstructed organ analogous to naturally occurring male or female genitalia (whether the person concerned is male, female, or of indeterminate sex)

"**penis** includes a surgically constructed or reconstructed organ analogous to a naturally occurring penis (whether the person concerned is male, female, or of indeterminate sex)

"**sexual connection** means—

"(a) connection effected by the introduction into the genitalia or anus of one person, otherwise than for genuine medical purposes, of—

"(i) a part of the body of another person; or

"(ii) an object held or manipulated by another person; or

"(b) connection between the mouth or tongue of one person and a part of another person's genitalia or anus; or

"(c) the continuation of connection of a kind described in **paragraph (a) or paragraph (b)**".

(2) Section 2 of the principal Act is amended by inserting, after subsection (1), the following ⟨*subsection*⟩ ⟨subsections⟩:

New (majority)

"(1AA) For the purposes of **paragraph (a)** of the definition in subsection (1) of **sexual connection**, introduction to the slightest degree is enough to effect a connection.

"(1A) For the purposes of this Act, one person does an indecent act on another person whether he or she—

"(a) does an indecent act with or on the other person; or

"(b) induces or permits the other person to do an indecent act with or on him or her."

(3) Section 98B of the principal Act is consequentially ⟨*repealed*⟩ ⟨amended⟩ by repealing the definition of **for a material benefit**.

4 Extraterritorial jurisdiction in respect of certain offences with transnational aspects

Section 7A(1) of the principal Act is amended—

(a) by inserting, before the expression "section 98A", the expression "**section 98AA**,";and

(b) by omitting the expression "section 257A", and substituting the expression "section 243".

5 Attorney-General's consent when jurisdiction claimed under section 7A

Section 7B of the principal Act is amended—

(a) by inserting in subsection (1) and subsection (2), before the expression "section 98A", the expression "**section 98AA**,";and

(b) by omitting from subsection (1) and subsection (2) the expression "section 257A", and substituting in each case the expression "section 243".

6 New section 98AA inserted

The principal Act is amended by inserting, after section 98, the following section:

"98AA **Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour**

"(1) Every one is liable to imprisonment for a term not exceeding 14 years who—

"(a) sells, buys, transfers, barters, rents, hires, or in any other way enters into a dealing involving a person under the age of 18 years for the purpose of—

"(i) the sexual exploitation of the person; or

"(ii) the removal of body parts from the person; or

"(iii) the engagement of the person in forced labour; or

"(b) engages a person under the age of 18 years in forced labour; or

"(c) permits a person under the age of 18 years to be engaged in forced labour; or

"(d) detains, confines, imprisons, or carries away a person under the age of 18 years for the purpose of—

"(i) the sexual exploitation of the person; or

"(ii) the removal of body parts from the person; or

"(iii) the engagement of the person in forced labour; or

"(e) removes, receives, transports, imports, or brings into any place a person under the age of 18 years for the purpose of—

"(i) the sexual exploitation of the person; or

"(ii) the removal of body parts from the person for a material benefit; or

"(iii) the engagement of the person in forced labour; or

"(f) induces a person under the age of 18 years to sell, rent, or give himself or herself for the purpose of—

"(i) the sexual exploitation of the person; or

"(ii) the removal of body parts from the person for a material benefit; or

"(iii) the engagement of the person in forced labour; or

"(g) induces a person to sell, rent, or give another person (being a person who is under the age of 18 years and who is dependent on him or her or in his or her charge) for the purpose of—

"(i) the sexual exploitation of the other person; or

"(ii) the removal of body parts from the other person; or

"(iii) the engagement of the other person in forced labour; or

"(h) builds, fits out, sells, buys, transfers, rents, hires, uses, provides with personnel, navigates, or serves on board a ship, aircraft, or other vehicle for the purpose of doing an act stated in any of **paragraphs (a) to (g)**; or

"(i) agrees or offers to do an act stated in any of **paragraphs (a) to (h)**.

New (majority)

"(1A) It is a defence to a charge under this section if the person charged proves that he or she believed on reasonable grounds that the person under the age of 18 years concerned was of or over the age of 18 years.

Struck out (majority)

"(2) For the purposes of **subsection (1)**, **sexual exploitation**, in relation to a person, includes—

"(a) the taking by any means, or transmission by any means, of still or moving images of the person engaged in explicit sexual activities (whether real or simulated); and

"(b) the taking by any means or transmission by any means, for a material benefit, of still or moving images of the person's sexual organs, anus, or breasts; and

"(c) the person's participation in a performance or display that—

"(i) is undertaken for a material benefit; and

"(ii) involves the exposure of the person's sexual organs, anus, or breasts.

New (majority)

"(2) For the purposes of **subsection (1)**, **sexual exploitation**, in relation to a person, includes the following acts:

"(a) the taking by any means, or transmission by any means, of still or moving images of the person engaged in explicit sexual activities (whether real or simulated):

New (majority)

"(b) the taking by any means or transmission by any means, for a material benefit, of still or moving images of the person's genitalia, anus, or breasts (not being an act described in **subsection (2A) or subsection (2B)**):

"(c) the person's participation in a performance or display (not being an act described in **subsection (2A)**) that—

"(i) is undertaken for a material benefit; and

"(ii) involves the exposure of the person's genitalia, anus, or breasts:

"(d) the person's undertaking of an activity (for example, employment in a restaurant) that—

"(i) is undertaken for a material benefit; and

"(ii) involves the exposure of the person's genitalia, anus, or breasts.

"(2A) For the purposes of **paragraphs (b) and (c) of subsection (2)**, **sexual exploitation**, in relation to a person, does not include the recording or transmission of an artistic or cultural performance or display honestly undertaken primarily for purposes other than the exposure of body parts for the sexual gratification of viewers.

"(2B) For the purposes of **subsection (2)(b)**, **sexual exploitation**, in relation to a person, does not include the taking or transmission of images of the person's genitalia, anus, or breasts for the purpose of depicting a medical condition, or a surgical or medical technique, for the instruction or information of health professionals.

"(2C) For the purposes of **subsection (2)(b)**, **sexual exploitation**, in relation to a person, does not include the taking or transmission of images of the person's genitalia, anus, or breasts if the images are honestly intended—

"(a) to provide medical or health education; or

"(b) to provide information relating to medical or health matters; or

"(c) to advertise a product, instrument, or service intended to be used for medical or health purposes.

"(2D) The person under the age of 18 years in respect of whom an offence against this section was committed cannot be charged as a party to the offence.

"(3) This section does not limit or affect the generality of section 98."

7 New sections 127 to 138 substituted

The principal Act is amended by repealing sections 127 to 142, and substituting the following sections:

"127 **No presumption because of age**

There is no presumption of law that 〈*a male is, because of his age, incapable of penetrating the genitalia or anus of another person with his penis*〉 〈a person is incapable of sexual connection because of his or her age.〉

Struck out (majority)

"128 **Sexual violation**

"(1) Sexual violation is—

"(a) the act of a male who rapes a female; or

"(b) the act of a person who has unlawful sexual connection with another person.

"(2) One person rapes another person if—

"(a) he is male and the other person is female; and

"(b) he has sexual connection with her, effected by the introduction of his penis into her genitalia,—

"(i) without her consent to the connection; and

"(ii) without believing on reasonable grounds that she consents to the connection.

"(3) One person has unlawful sexual connection with another person if he or she has sexual connection with the other person—

"(a) without the other person's consent to the connection; and

"(b) without believing on reasonable grounds that the other person consents to the connection.

"(4) One person may be convicted of the sexual violation of another person at a time when they were married to each other.

New (majority)

"128 **Sexual violation defined**

"(1) Sexual violation is the act of a person who—

"(a) rapes another person; or

"(b) has unlawful sexual connection with another person.

"(2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—

"(a) without person B's consent to the connection; and

"(b) without believing on reasonable grounds that person B consents to the connection.

"(3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B—

"(a) without person B's consent to the connection; and

"(b) without believing on reasonable grounds that person B consents to the connection.

"(4) One person may be convicted of the sexual violation of another person at a time when they were married to each other.

Struck out (majority)

"128A **Allowing or agreeing to sexual connection does not amount to consent in some circumstances**

"(1) A person does not consent to sexual connection just because he or she does not protest or offer physical resistance to the connection.

"(2) A person does not consent to sexual connection if he or she allows the connection because of—

"(a) force applied to him or her or some other person; or

"(b) the threat (express or implied) of the application of force to him or her or some other person; or

"(c) the fear of the application of force to him or her or some other person.

"(3) A person does not consent to sexual connection if the connection occurs while he or she is asleep or unconscious.

Struck out (majority)

"(4) A person does not consent to sexual connection if he or she submits to or acquiesces in sexual connection while so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to sexual connection.

"(5) A person does not consent to sexual connection if he or she submits to or acquiesces in sexual connection while affected by an intellectual, mental, or physical condition or impairment so severe that he or she cannot consent or refuse to consent to sexual connection.

"(6) One person does not consent to sexual connection with another person if he or she agrees to the connection because he or she is mistaken about who the other person is.

"(7) A person does not consent to an act of sexual connection if he or she agrees to the act because he or she is mistaken about its nature and quality.

"(8) This section does not limit the circumstances in which a person does not consent to sexual connection.

New (majority)

"128A **Allowing sexual activity does not amount to consent in some circumstances**

"(1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

"(2) A person does not consent to sexual activity if he or she allows the activity because of—

"(a) force applied to him or her or some other person; or

"(b) the threat (express or implied) of the application of force to him or her or some other person; or

"(c) the fear of the application of force to him or her or some other person.

"(3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

"(4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

New (majority)

"(5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

"(6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

"(7) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.

"(8) This section does not limit the circumstances in which a person does not consent to sexual activity.

"(9) For the purposes of this section,—

"**allows** includes acquiesces in, submits to, participates in, and undertakes

"**sexual activity**, in relation to a person, means—

"(a) sexual connection with the person; or

"(b) the doing on the person of an indecent act that, without the person's consent, would be an indecent assault of the person.

"128B 〈***Penalty for sexual***〉 〈**Sexual**〉 **violation**

"(1) Every one who commits sexual violation is liable to imprisonment for a term not exceeding 20 years.

"(2) A person convicted of sexual violation must be sentenced to imprisonment unless, having regard to the matters stated in **subsection (3)**, the court thinks that the person should not be sentenced to imprisonment.

"(3) The matters are—

"(a) the particular circumstances of the person convicted; and

"(b) the particular circumstances of the offence, including the nature of the conduct constituting it.

"129 **Attempted sexual violation and assault with intent to commit sexual violation**

"(1) Every one who attempts to commit sexual violation is liable to imprisonment for a term not exceeding 10 years.

"(2) Every one who assaults another person with intent to commit sexual violation ⟨of the other person⟩ is liable to imprisonment for a term not exceeding 10 years.

"129A **Sexual conduct with consent induced by certain threats**

"(1) Every one who has sexual connection with another person knowing that the other person has been induced to consent to the connection by threat is liable to imprisonment for a term not exceeding 14 years.

"(2) Every one who does an indecent act on another person knowing that the other person has been induced to consent to the act by threat is liable to imprisonment for a term not exceeding 5 years.

"(3) For the purposes of **subsection (1)**, a person who has sexual connection with another person knows that the other person has been induced to consent to the sexual connection by threat if (and only if) he or she knows that the other person has been induced to consent to the sexual connection by an express or implied threat of a kind described in **subsection (5)**.

"(4) For the purposes of **subsection (2)**,—

"(a) a person who does an indecent act on another person knows that the other person has been induced to consent to the act by threat if (and only if) he or she knows that the other person has been induced to consent to the act by an express or implied threat of a kind described in **subsection (5)**; and

"(b) a person is induced to consent to an indecent act whether—

"(i) he or she is induced to consent to the doing of an indecent act with or on him or her; or

"(ii) he or she is induced to consent to do an indecent act himself or herself.

"(5) The kinds of threat referred to in **subsections (3) and (4)(a)** are—

"(a) a threat that the person making the threat or some other person will commit an offence that—

"(i) is punishable by imprisonment; but

"(ii) does not involve the actual or threatened application of force to any person; and

"(b) a threat that the person making the threat or some other person will make an accusation or disclosure (whether true or false) about misconduct by any person (whether living or dead) that is likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made; and

"(c) a threat that the person making the threat will make improper use, to the detriment of the person consenting, of a power or authority arising out of—

"(i) an occupational or vocational position held by the person making the threat; or

"(ii) a commercial relationship existing between the person making the threat and the person consenting.

"130 **Incest**

"(1) Sexual connection is incest if—

"(a) it is between 2 people whose relationship is that of parent and child, siblings, half-siblings, or grandparent and grandchild; and

"(b) the person charged knows of the relationship.

"(2) Every one of or over the age of 16 years who commits incest is liable to imprisonment for a term not exceeding 10 years.

Struck out (majority)

"131 **Sexual conduct with family member under 18 where consent given because of use of power or authority**

"(1) Every one is liable to imprisonment for a term not exceeding 7 years who has sexual connection with a family member under the age of 18 years—

"(a) with the family member's consent; but

"(b) knowing that the family member consented to the connection because of his or her use of a power or authority arising out of the relationship between them.

"(2) Every one is liable to imprisonment for a term not exceeding 7 years who attempts to have sexual connection with a family member under the age of 18 years—

"(a) with the family member's consent; but

Struck out (majority)

"(b) knowing that the family member consented to the attempt because of his or her use of a power or authority arising out of the relationship between them.

"(3) Every one is liable to imprisonment for a term not exceeding 3 years who does an indecent act on a family member under the age of 18 years—

"(a) with the family member's consent; but

"(b) knowing that the family member consented to the act because of his or her use of a power or authority arising out of the relationship between them.

"(4) The family member under the age of 18 years in respect of whom an offence against this section was committed cannot be charged as a party to the offence.

New (majority)

"131 **Sexual conduct with dependent family member**

"(1) Every one is liable to imprisonment for a term not exceeding 7 years who has sexual connection with a dependent family member under the age of 18 years.

"(2) Every one is liable to imprisonment for a term not exceeding 7 years who attempts to have sexual connection with a dependent family member under the age of 18 years.

"(3) Every one is liable to imprisonment for a term not exceeding 3 years who does an indecent act on a dependent family member under the age of 18 years.

"(4) The dependent family member cannot be charged as a party to the offence.

"(5) It is not a defence to a charge under this section that the dependent family member consented.

Struck out (majority)

"131A **Family member defined**

"(1) For the purposes of **section 131**, one person is a **family member** in relation to another person—

"(a) if they are living together in the same household; or

Struck out (majority)

"(b) if—

"(i) one of them is a parent, step-parent, foster parent, guardian, sibling, half-sibling, step-sibling, uncle, or aunt of the other; or

"(ii) one of them is a parent, step-parent, or foster parent of a parent, step-parent, foster parent, or guardian, of the other; or

"(iii) one of them is the partner of a person described in **subparagraph (i) or subparagraph (ii)**; or

"(iv) they are members of the same family, whanau, or other culturally recognised family group, and one of them has a responsibility for, or significant role in the care or upbringing of, the other.

"(2) In **subsection (1)(b)**,—

"**aunt**, in relation to a person, includes a half-sister of one of the person's parents

"**guardian** means guardian by virtue of the Guardianship Act 1969 or the Children, Young Persons, and Their Families Act 1989

"**partner**, in relation to a person, means a person who—

"(a) is married to the person; or

"(b) lives with the person as a couple

"**uncle**, in relation to a person, includes a half-brother of one of the person's parents.

New (majority)

"131A **Dependent family member defined**

"(1) For the purposes of **section 131**, one person is a **dependent family member** of another person—

"(a) if the other person has power or authority over him or her, and is—

"(i) his or her parent, step-parent, foster parent, guardian, uncle, or aunt; or

"(ii) a parent, step-parent, or foster parent of a person described in **subparagraph (i)**; or

"(iii) his or her sibling, half-sibling, or step-sibling; or

New (majority)

"(iv) the partner of a person described in **subparagraph (i) or subparagraph (ii) or subparagraph (iii)**; or

"(b) if they are members of the same family, whanau, or other culturally recognised family group, and the other person—

"(i) is not a person referred to in **paragraph (a)**; but

"(ii) has a responsibility for, or significant role in, his or her care or upbringing; or

"(c) if he or she is living with the other person as a member of the other person's family, and the other person is not a person referred to in **paragraph (a)**, but has—

"(i) power or authority over him or her; and

"(ii) a responsibility for, or significant role in, his or her care or upbringing.

"(2) In **subsection (1)**,—

"**aunt**, in relation to a person, includes a half-sister of one of the person's parents

"**foster parent** includes a former foster parent

"**guardian**—

"(a) means guardian by virtue of the Guardianship Act 1968 or the Children, Young Persons, and Their Families Act 1989; and

"(b) includes a former guardian

"**partner**, in relation to a person, means a person who—

"(a) is married to the person; or

"(b) lives with the person as a couple

"**step-parent** includes a former step-parent

"**uncle**, in relation to a person, includes a half-brother of one of the person's parents.

"132 **Sexual conduct with child under 12**

"(1) Every one who has sexual connection with a child is liable to imprisonment for a term not exceeding 14 years.

"(2) Every one who attempts to have sexual connection with a child is liable to imprisonment for a term not exceeding 10 years.

"(3) Every one who does an indecent act on a child is liable to imprisonment for a term not exceeding 10 years.

"(4) It is not a defence to a charge under this section that the person charged believed that the child was of or over the age of 12 years.

"(5) It is not a defence to a charge under this section that the child consented.

"(6) In this section,—

"(a) **child** means a person under the age of 12 years; and

"(b) doing an indecent act on a child includes indecently assaulting the child.

"134 **Sexual conduct with young person under 16**

"(1) Every one who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.

"(2) Every one who attempts to have sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.

"(3) Every one who does an indecent act on a young person is liable to imprisonment for a term not exceeding 7 years.

"(4) No person can be convicted of a charge under this section if he or she was married to the young person concerned at the time of the sexual connection or indecent act concerned.

"(5) The young person in respect of whom an offence against this section was committed cannot be charged as a party to the offence 〈if the person who committed the offence was of or over the age of 16 years when the offence was committed〉.

"(6) In this section,—

"(a) **young person** means a person under the age of 16 years; and

"(b) doing an indecent act on a young person includes indecently assaulting the young person.

Struck out (majority)

"134A **Defences to charge under section 134**

"(1) It is a defence to a charge under **section 134** if the person charged proves that—

"(a) he or she is—

Struck out (majority)

"(i) of or under the age of the young person concerned; or

"(ii) older than the young person by no more than 2 years; and

"(b) the young person consented.

"(2) It is a defence to a charge under **section 134** if the person charged proves that,—

"(a) before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years; and

"(b) at the time of the act concerned, he or she believed on reasonable grounds that the young person concerned was of or over the age of 16 years; and

"(c) the young person consented.

"(3) Proof of the facts referred to in **subsection (1) or subsection (2)** is not a defence to a charge under **section 134** if it is proved that the consent of the young person concerned was obtained by a false and fraudulent representation as to the nature and quality of the act concerned.

"(4) **Subsection (3)** overrides **subsections (1) and (2)**.

"(5) Except to the extent provided in **subsections (1) and (2)**, it is not a defence to a charge under **section 134** that the young person concerned consented.

"(6) Except to the extent provided in **subsection (2)**, it is not a defence to a charge under **section 134** that the person charged believed that the young person concerned was of or over the age of 16 years.

"(7) In this section, **young person** means a person under the age of 16 years.

New (majority)

"134A **Defences to charge under section 134**

"(1) It is a defence to a charge under **section 134** if the person charged proves that,—

New (majority)

"(a) before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years; and

"(b) at the time of the act concerned, he or she believed on reasonable grounds that the young person concerned was of or over the age of 16 years; and

"(c) the young person consented.

"(2) Proof of the facts referred to in **subsection (1)** is not a defence to a charge under **section 134** if it is proved that the consent of the young person concerned was obtained by a false and fraudulent representation as to—

"(a) the nature and quality of the act concerned; or

"(b) the identity of the person who (as the case may be) had sexual connection with him or her or did an indecent act on him or her.

"(3) **Subsection (2)** overrides **subsection (1)**.

"(4) Except to the extent provided in **subsection (1)**,—

"(a) it is not a defence to a charge under **section 134** that the young person concerned consented; and

"(b) it is not a defence to a charge under **section 134** that the person charged believed that the young person concerned was of or over the age of 16 years.

"135 **Indecent assault**

Every one is liable to imprisonment for a term not exceeding 7 years who indecently assaults another person.

Struck out (majority)

"(2) Every one is liable to imprisonment for a term not exceeding 7 years if—

"(a) he or she does with or on another person, with the other person's consent, an act that, but for that consent, would be an indecent assault; but

"(b) the consent is obtained by a false and fraudulent representation as to the nature and quality of the act.

Struck out (majority)

"137 **Inducing sexual connection under pretence of marriage**
Every one who has sexual connection with another person with consent obtained by falsely representing that they are married to each other is liable to imprisonment for a term not exceeding 7 years.

"138 **Sexual exploitation of person with significant impairment**

"(1) Every one is liable to imprisonment for a term not exceeding 10 years who has exploitative sexual connection with a person with a significant impairment.

"(2) Every one is liable to imprisonment for a term not exceeding 10 years who attempts to have exploitative sexual connection with a person with a significant impairment.

"(3) For the purposes of **subsections (1) and (2)**, a person has exploitative sexual connection with a person with a significant impairment (the **impaired person**) if ⟨he or she⟩—

Struck out (majority)

"(a) he or she knows that the impaired person is a person with a significant impairment; and

"(b) having obtained the impaired person's consent to the connection by taking advantage of the impairment, he or she has sexual connection with the person.

New (majority)

"(a) has sexual connection with the impaired person knowing that the impaired person is a person with a significant impairment; and

"(b) has obtained the impaired person's acquiescence in, submission to, participation in, or undertaking of the connection by taking advantage of the impairment.

"(4) Every one is liable to imprisonment for a term not exceeding ⟨*10*⟩ ⟨5⟩ years who exploitatively does an indecent act on a person with a significant impairment.

"(5) For the purposes of **subsection (4)**, a person exploitatively does an indecent act on a person with a significant impairment (the **impaired person**) if 〈he or she〉—

Struck out (majority)

"(a) he or she knows that the impaired person is a person with a significant impairment; and

"(b) having obtained the impaired person's consent to the doing of the act on the impaired person by taking advantage of the impairment, does an indecent act on the person.

New (majority)

"(a) does an indecent act on the impaired person knowing that the impaired person is a person with a significant impairment; and

"(b) has obtained the impaired person's acquiescence in, submission to, participation in, or undertaking of the doing of the act by taking advantage of the impairment.

"(6) For the purposes of this section, a **significant impairment** is an intellectual, mental, or physical condition or impairment (or a combination of 2 or more intellectual, mental, or physical conditions or impairments) that affects a person to such an extent that it significantly impairs the person's capacity—

New (majority)

"(aa) to understand the nature of sexual conduct; or

"(a) to understand the nature of decisions about sexual conduct; or

"(b) to foresee the consequences of decisions about sexual conduct; or

"(c) to communicate decisions about sexual conduct."

8 New section 144A substituted

The principal Act is amended by repealing section 144A, and substituting the following section:

"144A **Sexual conduct with children and young people outside New Zealand**

"(1) Every one commits an offence who, being a New Zealand citizen or ordinarily resident in New Zealand,—

"(a) does outside New Zealand, with or on a child under the age of 12 years, an act to which **subsection (2)** applies; or

"(b) does outside New Zealand, with or on a person under the age of 16 years, an act to which **subsection (3)** applies; or

"(c) does outside New Zealand, with or on a person under the age of 18 years, an act to which **subsection (4)** applies.

"(2) This subsection applies to an act that, if done in New Zealand, would be an offence against—

"(a) **section 132(1)** (sexual connection with a child under 12); or

"(b) **section 132(2)** (attempted sexual connection with a child under 12); or

"(c) **section 132(3)** (doing an indecent act on a child under 12).

"(3) This subsection applies to an act that, if done in New Zealand, would be an offence against—

"(a) **section 134(1)** of this Act (sexual connection with a young person); or

"(b) **section 134(2)** of this Act (attempted sexual connection with a young person); or

"(c) **section 134(3)** of this Act (doing an indecent act on a young person).

Struck out (majority)

"(4) This subsection applies to an act that, if done in New Zealand, would be an offence against—

"(a) section 20 of the Prostitution Reform Act 2003 (assisting a person under 18 years in providing commercial sexual services); or

"(b) section 21 of the Prostitution Reform Act 2003 (receiving earnings from commercial sexual services provided by a person under 18 years); or

"(c) section 22(1) of the Prostitution Reform Act 2003 (entering into a contract or other arrangement for the

Struck out (majority)

provision of commercial sexual services by a person under 18 years); or

"(d) section 22(2) of the Prostitution Reform Act 2003 (receiving commercial sexual services from a person under 18 years).

New (majority)

"(4) This subsection applies to an act that, if done in New Zealand, would be an offence against section 23(1) of the Prostitution Reform Act 2003 (breach of prohibitions on use in prostitution of persons under 18 years).

"(5) A person who commits an offence against this section in respect of a provision specified in any of **subsections (2) to (4)** is liable to the penalty to which he or she would be liable if convicted of an offence against the provision.

"(6) Every limiting provision that applied to a provision specified in any of **subsections (2) to (4)** when an offence against this section in respect of the provision specified is alleged to have been committed applies also to—

"(a) the commencement of proceedings for the offence; and

"(b) a charge under this section in respect of the provision specified.

"(7) In this section, **limiting provision**, in relation to a provision specified in any of **subsections (2) to (4)**, means a provision of this Act or the Prostitution Reform Act 2003 that states (in relation to the provision specified only, or more generally)—

"(a) circumstances that constitute a defence to a charge under the provision specified; or

"(b) circumstances that do not constitute a defence to a charge under the provision specified; or

"(c) circumstances in which the person on or with whom an offence against the provision specified is committed may not be charged with an offence against that provision."

Struck out (majority)

9 New section 208 substituted

The principal Act is amended by repealing section 208, and substituting the following section:

"208 **Abduction for purposes of marriage or sexual connection**

Every one is liable to imprisonment for a term not exceeding 14 years who takes away or detains any person, whether married or not, without his or her consent or with his or her consent obtained by fraud or duress, with intent—

"(a) to marry him or her or to have sexual connection with him or her; or

"(b) to cause him or her to be married to or to have sexual connection with some other person."

10 Abduction of child under 16

Section 210(1) of the principal Act is amended by omitting the words "intercourse with any child being a girl", and substituting the words "connection with any child".

New (majority)

9 New sections 208 to 210A substituted

The principal Act is amended by repealing sections 208 to 210, and substituting the following sections:

"208 **Abduction for purposes of marriage or sexual connection**

Every one is liable to imprisonment for a term not exceeding 14 years who unlawfully takes away or detains a person without his or her consent or with his or her consent obtained by fraud or duress,—

"(a) with intent to marry him or her; or

"(b) with intent to have sexual connection with him or her; or

"(c) with intent to cause him or her to be married to or to have sexual connection with some other person.

Compare: 1908 No 32, s 226

New (majority)

"209 **Kidnapping**

Every one is liable to imprisonment for a term not exceeding 14 years who unlawfully takes away or detains a person without his or her consent or with his or her consent obtained by fraud or duress,—

"(a) with intent to hold him or her for ransom or to service; or

"(b) with intent to cause him or her to be confined or imprisoned; or

"(c) with intent to cause him or her to be sent or taken out of New Zealand.

Compare: Criminal Code (1954), s 233 (Canada)

"209A **Young person under 16 cannot consent to being taken away or detained**

For the purposes of **sections 208 and 209**, a person under the age of 16 years cannot consent to being taken away or detained.

"210 **Abduction of young person under 16**

"(1) Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive a parent or guardian or other person having the lawful care or charge of a young person of the possession of the young person, unlawfully takes or entices away or detains the young person.

"(2) Every one is liable to imprisonment for a term not exceeding 7 years who receives a young person, knowing that he or she has been unlawfully taken or enticed away or detained with intent to deprive a parent or guardian or other person having the lawful care or charge of him or her of the possession of him or her.

"(3) For the purposes of **subsections (1) and (2)**,—

"(a) it is immaterial whether the young person consents, or is taken or goes or is received at his or her own suggestion; and

"(b) it is immaterial whether the offender believes the young person to be of or over the age of 16.

New (majority)

"(4) In this section **young person** means a person under the age of 16 years.

Compare: 1908 No 32, ss 229, 230; 1941 No 10, part Schedule; 1952 No 42, s 3

"210A **People claiming in good faith right to possession of young person under 16**

A person who claims in good faith a right to the possession of a young person under the age of 16 years cannot be convicted of an offence against **section 209 or section 210** because he or she gets possession of the young person."

Part 2
Amendments, repeals, and transitional matters

11 Consequential amendments

The enactments specified in **Schedule 1** are amended in the manner indicated in that schedule.

12 Consequential repeals

The enactments specified in **Schedule 2** are repealed.

13 Acts done before commencement of amending provisions

(1) Every provision of the principal Act amended or repealed by a section of this Act applies to an act or omission occurring before the commencement of ⟨*that*⟩ ⟨the⟩ section as if the section had not been enacted.

(2) Every enactment amended or repealed by **section 11 or section 12** applies to an act or omission occurring before the commencement of those sections as if those sections had not been enacted.

(3) **Subsections (1) and (2)** are subject to **section 14**.

14 Availability of new defences

To the extent (if any) that, with or without modification, a provision of the principal Act substituted by a section of this Act replaces or corresponds to a provision of the principal Act repealed by that section, there are available to a person charged after the commencement of that section with an

offence against the repealed provision, so far as they are applicable,—

(a) all defences available to a person charged with an offence against the repealed provision; and

(b) with any necessary modifications, all defences available to a person charged with an offence against the substituted provision.

Schedule 1
Consequential amendments

s 11

Criminal Investigations (Blood Samples) Act 1995

(1995 No 55)

Omit from Part A of the Schedule the items relating to sections 128 to 142 of the Crimes Act 1961 and substitute:

Struck out (majority)

128	Sexual violation
129(1)	Attempted sexual violation
129(2)	Assault with intent to commit sexual violation
129A(1)	Inducing sexual connection by threat
129A(2)	Inducing indecent act by threat
130	Incest
131(1)	Sexual connection with family member under 18 where consent given because of use of power as authority
131(2)	Attempted sexual connection with family member under 18 where consent given because of use of power as authority
131(3)	Indecent act with family member under 18 where consent given because of use of power as authority
132(1)	Sexual connection with child under 12
132(2)	Attempted sexual connection with child under 12
132(3)	Indecent act on child under 12
134(1)	Sexual connection with young person under 16
134(2)	Attempted sexual connection with young person under 16
134(3)	Indecent act on young person under 16
135(1)	Indecent assault
135(2)	Indecent act with consent obtained by false or fraudulent representation
138(1)	Exploitative sexual connection with person with significant impairment
138(2)	Attempted exploitative sexual connection with person with significant impairment
138(4)	Exploitative indecent act with person with significant impairment

New (majority)

Sexual violation	128B(1)
Attempted sexual violation	129(1)
Assault with intent to commit sexual violation	129(2)
Inducing sexual connection by threat	129A(1)
Inducing indecent act by threat	129A(2)
Incest	130(2)
Sexual connection with dependent family member	131(1)
Attempted sexual connection with dependent family member	131(2)
Indecent act with dependent family member	131(3)

Criminal Investigations (Blood Samples) Act 1995 (1995 No 55)—continued

New (majority)

Sexual connection with child under 12	132(1)
Attempted sexual connection with child under 12	132(2)
Indecent act on child under 12	132(3)
Sexual connection with young person under 16	134(1)
Attempted sexual connection with young person under 16	134(2)
Indecent act on young person under 16	134(3)
Indecent assault	135
Exploitative sexual connection with person with significant impairment	138(1)
Attempted exploitative sexual connection with person with significant impairment	138(2)
Exploitative indecent act with person with significant impairment	138(4)

Omit from Part A of the Schedule the items relating to sections 208 to 210 of the Crimes Act 1961 and substitute:

Abduction for purposes of marriage or sexual connection	208
Kidnapping	209
Abduction of young person under 16	210

District Courts Act 1947 (1947 No 16)

Insert in section 28A, after the words "this Act", the words "(including any offence against section 128 of the Crimes Act 1961 arising out of an act or omission occurring before 1 February 1986)".

Omit from Part I of Schedule 1A the item relating to section 142 of the Crimes Act 1961.

Omit from Part II of Schedule 1A the ⟨*item*⟩ ⟨items⟩ relating to sections ⟨128 to⟩ 132(1) of the Crimes Act 1961 and substitute:

New (majority)

128B	Sexual violation
129(1)	Attempted sexual violation
129(2)	Assault with intent to commit sexual violation

132(1)	Sexual connection with child under 12
132(2)	Attempted sexual connection with child under 12
132(3)	Indecent act on child under 12

District Courts Act 1947 (1947 No 16)—continued

New (majority)

Omit from Part II of Schedule 1A the item relating to section 208 of the Crimes Act 1961 and substitute:

208	Abduction for purposes of marriage or sexual connection

Extradition Act 1999 (1999 No 55)

New (majority)

Omit from section 101A(2)(g) the expression "section 101B", and substitute the words "sections 101B and **101C**".

Insert, after section 101B:

"101C **Certain offences involving 〈*child pornography*〉 〈trading in children〉 or child prostitution deemed to be included in extradition treaties**

"(1) For the purposes of this Act and any Order in Council in force under section 15 or section 104,—

"(a) every offence against **section 98AA** of the Crimes Act 1961 is deemed to be an offence described in any extradition treaty concluded before the commencement of **section 〈*6*〉 〈11〉 of the Crimes Amendment Act (No 2) 2003** and for the time being in force between New Zealand and any foreign country that is a party to the protocol referred to in **subsection (5)**; and

"(b) every offence against **section 144A** of the Crimes Act 1961 is deemed to be an offence described in any extradition treaty concluded before the commencement of **section 〈*8*〉 〈11〉 of the Crimes Amendment Act (No 2) 2003** and for the time being in force between New Zealand and any foreign country that is a party to the protocol referred to in **subsection (5)**; and

New (majority)

"(c) every offence against section 23(1) of the Prostitution Reform Act 2003 is deemed to be an offence described in any extradition treaty concluded before the

Extradition Act 1999 (1999 No 55)—continued

New (majority)

commencement of **section 11 of the Crimes Amendment Act (No 2) 2003** and for the time being in force between New Zealand and any foreign country that is a party to the protocol referred to in **subsection (5)**.

"(2) A person whose surrender is sought from New Zealand in respect of an act that amounts to an offence deemed by **subsection (1)** to be an offence described in an extradition treaty is liable to be surrendered in accordance with this Act and the applicable extradition treaty, whether the act occurred before or after the ⟨*relevant commencement referred to in* ***subsection (1)***⟩ ⟨commencement of **section 11 of the Crimes Amendment Act (No 2) 2003**⟩.

"(3) **Subsection (2)** does not apply in respect of an act that, had it occurred within the jurisdiction of New Zealand, would not, at the time that it occurred, have constituted an offence under New Zealand law.

"(4) A certificate given and signed by the Minister of Foreign Affairs and Trade that a foreign country is a party to the protocol referred to in **subsection (5)** is, in the absence of proof to the contrary, sufficient evidence of that fact.

"(5) The protocol to which this section applies is the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography ⟨adopted by the General Assembly of the United Nations at New York on 25 May 2000⟩.

Struck out (majority)

"(6) For the purposes of this section **foreign country** includes a territory—

"(a) for whose international relations the Government of a foreign country is responsible; and

"(b) to which the extradition treaty and the Optional protocol extend.

Extradition Act 1999 (1999 No 55)—continued

New (majority)

"(6) For the purposes of this section, a foreign country includes a territory if—

"(a) the foreign country's government is responsible for the territory's international relations; and

"(b) an extradition treaty is in force between New Zealand and the foreign country; and

"(c) the the protocol referred to in **subsection (5)** extends to the territory."

Injury Prevention, Rehabilitation, and Compensation Act 2001 (2001 No 49)

Omit from Schedule 3 the items relating to sections 128 to 142 of the Crimes Act 1961 and substitute:

Struck out (majority)

128	Sexual violation
129(1)	Attempted sexual violation
129(2)	Assault with intent to commit sexual violation
129A(1)	Inducing sexual connection by threat
129A(2)	Inducing indecent act by threat
130	Incest
131(1)	Sexual connection with family member under 18 where consent given because of use of power as authority
131(2)	Attempted sexual connection with family member under 18 where consent given because of use of power as authority
131(3)	Indecent act with family member under 18 where consent given because of use of power as authority
132(1)	Sexual connection with child under 12
132(2)	Attempted sexual connection with child under 12
132(3)	Indecent act on child under 12
134(1)	Sexual connection with young person under 16
134(2)	Attempted sexual connection with young person under 16
134(3)	Indecent act on young person under 16
135(1)	Indecent assault
135(2)	Indecent act with consent obtained by false or fraudulent representation
138(1)	Exploitative sexual connection with person with significant impairment
138(2)	Attempted exploitative sexual connection with person with significant impairment
138(4)	Exploitative indecent act with person with significant impairment

Injury Prevention, Rehabilitation, and Compensation Act 2001 (2001 No 49)—continued

New (majority)

128B(1)	Sexual violation
129(1)	Attempted sexual violation
129(2)	Assault with intent to commit sexual violation
129A(1)	Inducing sexual connection by threat
129A(2)	Inducing indecent act by threat
130	Incest
131(1)	Sexual connection with dependent family member
131(2)	Attempted sexual connection with dependent family member
131(3)	Indecent act with dependent family member

Mutual Assistance in Criminal Matters Act 1992 (1992 No 48)
Insert in the Schedule, in its appropriate numerical order:

23	Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography	An offence against any of the following sections of the Crimes Act 1961 section — subject matter 98AA — Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour 144A — Sexual conduct with children and young people outside New Zealand

Summary Proceedings Act 1957 (1957 No 87)
Omit from Part I of the First Schedule the items relating to sections 130 to 142 of the Crimes Act 1961 and substitute:

Struck out (majority)

130	Incest
131(1)	Sexual connection with family member under 18 where consent given because of use of power as authority
131(2)	Attempted sexual connection with family member under 18 where consent given because of use of power as authority
131(3)	Indecent act with family member under 18 where consent given because of use of power as authority
132(2)	Attempted sexual connection with child under 12
132(3)	Indecent act on child under 12

Summary Proceedings Act 1957 (1957 No 87)—continued

Struck out (majority)

134(1)	Sexual connection with young person under 16
134(2)	Attempted sexual connection with young person under 16
134(3)	Indecent act on young person under 16
135(1)	Indecent assault
135(2)	Indecent act with consent obtained by false or fraudulent representation
138(1)	Exploitative sexual connection with person with significant impairment
138(2)	Attempted exploitative sexual connection with person with significant impairment
138(4)	Exploitative indecent act with person with significant impairment

New (majority)

130(2)	Incest
131(1)	Sexual connection with dependent family member
131(2)	Attempted sexual connection with dependent family member
131(3)	Indecent act with dependent family member
132(2)	Attempted sexual connection with child under 12
132(3)	Indecent act on child under 12
134(1)	Sexual connection with young person under 16
134(2)	Attempted sexual connection with young person under 16
134(3)	Indecent act on young person under 16
135(1)	Indecent assault
138(1)	Exploitative sexual connection with person with significant impairment

s 12

Schedule 2
Consequential repeals

Age of Majority Act 1980 (1970 No 137)
So much of the Schedule as relates to the principal Act.

Crimes Amendment Act 1969 (1969 No 82)

Crimes Amendment Act (No 3) 1985 (1985 No 60)
Section 2.

Crimes Amendment Act (No 4) 1986 (1986 No 82)

Crimes Amendment Act (No 3) 1993 (1993 No 62)

Crimes Amendment Act 1994 (1994 No 27)
Section 2.

Homosexual Law Reform Act 1986 (1986 No 33)
Sections 3 to 5.

Status of Children Act 1969 (1969 No 18)
So much of the Schedule as relates to the principal Act.

Legislative history

9 December 2003	Introduction (Bill 104–1)
2 March 2004	First reading and referral to Law and Order Committee

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