



21 July 2023

Attorney-General

**Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill PCO
24501/1.5 – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/390**

1. We have considered whether the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill (“the Bill”) is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (“NZBORA”). A copy of the Bill is **enclosed**.
2. We have concluded that the Bill is consistent with NZBORA.

The Bill

3. The Bill increases the maximum penalty for sexual conduct with a child (under 12) from 14 years’ to 20 years’ imprisonment.¹ It also amends the offence of sexual violation (usually charged for adult rape or unlawful sexual connection) so that it does not apply if the complainant is under 12. This means that prosecutors will not have the option of charging sexual violation against children, the only charge available will be sexual conduct with a child (but the equal seriousness of that charge is reflected in the increase in penalty). The defence of consent and reasonable belief in consent, which is only available for sexual violation, will not apply in prosecutions of sexual conduct with children.
4. The Bill also changes the process by which complainants in sexual violence prosecutions can apply to the Court to remove the automatic suppression of their names.² Currently a complainant has to apply to the Court, and the Bill simply adds a reference to a process under the Criminal Procedure Rules 2012 which will presumably make it easier for complainants to make an application to the Court.

Consistency with NZBORA

5. The increase in the maximum sentence for sexual conduct with a child does not raise any NZBORA issues. Judicial discretion in sentencing ensures that the sentence imposed for a particular offence is appropriate and proportionate to

¹ Crimes Act 1961, s 132(1).

² Criminal Procedure Act 2011, ss 201 and 203.

the gravity of the offending and does not result in a breach of the offender's rights.³

6. The removal of the ability to charge sexual violation in cases involving children under 12 means that the defence of consent will not be available for serious sexual offending against children. This may engage the right to present a defence, protected by s 25(e) NZBORA,⁴ as the only defence available to sexual conduct with a child is that the conduct did not occur.⁵ We do not think this is an issue because the defendant still has a defence to the charge of sexual conduct with a child (albeit a narrower one), and the scope of the defence for that charge and the defendant's ability to present it remains unchanged. Even if the changes did limit s 25(e), that limitation would be justified by the fact that children under 12 cannot consent to sexual connection in any respect and it is reasonable and justified to remove the ability to charge sexual violation and the accompanying consent defence on that basis.
7. The change in the process for complainants to apply to remove name suppression is difficult to assess as it is not clear what the procedure in the Criminal Procedure Rules 2012 will be and how it will change the status quo. However the policy intent is to make it easier for complainants to apply to the Court to remove automatic name suppression, and any provisions which allow name suppression to be lifted will enhance rather than limit freedom of expression, protected by s 14 of the NZBORA. The Court's supervision of the process will ensure the right to a fair trial remains protected.
8. In accordance with Crown Law's policies, this advice has been peer reviewed by Zoe Hamill.



Genevieve Taylor
Crown Counsel

~~Noted / Approved / Not Approved~~



Hon David Parker
Attorney-General

29/7/2023

Encl.

³ Such as the right to be free from disproportionately severe punishment, protected by s 9 NZBORA. See *Fitzgerald v R* [2021] 1 NZLR 551 (SC).

⁴ Paul Rishworth *The New Zealand Bill of Rights*, at 689 states "Section 25(e) should also impact any decision by Parliament to enact legislation limiting the defences that can be raised in a criminal case" and references the removal of the ability to raise an error in the result of the evidential breath test as a defence to a drink driving charge as engaging the right (s 64(4)(a) of the Land Transport Act 1998).

⁵ Consent is expressly excluded as a defence: Crimes Act 1961, s 132(5).