



Report of the

ATTORNEY-GENERAL

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

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 265 of the Standing Orders of the
House of Representatives

1. I have considered whether the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. I have concluded the Bill appears to be inconsistent with s 26(2) (double jeopardy) and s 25(g) (right to lesser penalty where penalties change) and cannot be justified under s 5 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill amends the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 ('the principal Act'). The purpose of the principal Act was to establish a Child Sex Offender Register ('the register') to reduce sexual reoffending against child victims, and the risk posed by serious child sex offenders.
5. The principal Act defines a "registrable offender" as a person who is convicted of a qualifying offence and sentenced to imprisonment, or sentenced to a non-custodial sentence and ordered to be placed on the register at the discretion of the court. The person must be 18 years of age at the time of the commission of the offence. All registrable offenders are required to report a range of personal information to the register.
6. Registrable offenders sentenced to imprisonment are required to comply with reporting obligations for eight years, 15 years, or life depending on the qualifying offence committed. Registrable offenders sentenced to a non-custodial sentence who are placed on the register at the discretion of the court will be required to comply with reporting obligations for eight years regardless of the qualifying offence committed.
7. The Bill replaces Schedule 1 of the principal Act to restate, clarify and extend the retrospective application of the principal Act.
8. Specifically, the Bill seeks to ensure that the principal Act applies retrospectively to persons who:
 - 8.1 are serving short-term sentences of imprisonment (two years or less) and who, at 14 October 2016, had reached their Statutory Release Date ('SRD'), but not their Sentence Expiry Date ('SED'), and were still subject to release conditions
 - 8.2 had reached their SED before 14 October 2016 but were still subject to release conditions at that date, and
 - 8.3 had been convicted of a qualifying offence before 14 October 2016 and who are sentenced on or after 14 October 2016.
9. New cl 4 of Schedule 1 will also enable the Commissioner of Police to apply to the sentencing court for a registration order under s 9 of the principal Act in respect of

an offender sentenced between 14 October 2016 and 13 March 2017 to a non-custodial sentence in respect of a qualifying offence.

10. The Bill also makes minor amendments to clarify that a court's power to make a registration order turns on sentencing, not conviction.

Previous section 7 report

11. In 2015 I presented a report to the House under the Bill of Rights Act and Standing Order 265 on the Child Protection (Child Sex Offender Register) Bill ('the original Bill'), as the principal Act then was.¹ That report concluded the original Bill appeared to be inconsistent with s 9 of the Bill of Rights Act (disproportionately severe treatment or punishment) and s 26(2) (double jeopardy).
12. The inconsistency with s 9 was principally based on there being no possibility for review of the lifetime reporting obligations, and the report recommended that such an opportunity be provided.
13. This issue was considered and addressed through the inclusion, on the recommendation of the Social Services Select Committee, of s 38 of the principal Act which provides a right of review for offenders subject to lifetime reporting obligations.
14. The inconsistency with s 26(2) (double jeopardy) was principally based on the proposed retrospective application of the original Bill.
15. The Bill, in restating, clarifying and extending the retrospective application of the principal Act, raises the same issues in respect of s 26(2). I consider, moreover, the Bill also limits s 25(g) (right to lesser penalty when penalties changed) in respect of the retrospective application of the principal Act to persons convicted prior to 14 October 2016 but sentenced after that date.

Inconsistency with s 26(2) (double jeopardy)

16. Section 26(2) of the Bill of Rights Act affirms that no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.
17. The right recognises that there must be finality to proceedings. Once a person has been finally acquitted, pardoned, or convicted and sentenced, they should be able to move on.²
18. The Supreme Court of Canada recently considered the constitutionality of retrospective legislation analogous to the Bill.³ That inquiry engaged two subsidiary questions:⁴

¹ Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill.

² *Police v Gilchrist* [1998] 16 CRNZ 55.

³ *R v K.R.J.* [2016] SCC 31.

⁴ *Ibid* at [5].

- 18.1 do the legislative measures constitute a “punishment”, and if so
- 18.2 is the retrospective punishment a reasonable one that can be demonstrably justified in a free and democratic society?
19. For the reasons given in my previous report to the House, I consider that registration and the associated reporting obligations imposed on registrable offenders constitutes a “punishment” for the purposes of s 26(2) of the Bill of Rights Act.
20. For those impacted prospectively this punishment may be seen as part of the original sentence and therefore does not entail being punished ‘again’ for the same offence.
21. However, the registrable offenders to whom the retrospective application will apply did not face the prospect of registration at the time they were charged, tried, convicted or, in some circumstances, sentenced. The retrospective application of a requirement to register and be subject to reporting obligations means that persons already sentenced for their offending face an additional punishment for the same offence. This is a *prima facie* limitation on s 26(2) of the Bill of Rights Act.

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

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

Is the objective sufficiently important?

23. The purpose of the Bill is to ensure the retrospective provisions apply in accordance with the original policy intent, which was to enable Police to proactively address the immediate risks presented by offenders as they moved into the community. There is no question that addressing the risks of reoffending constitutes an important objective. Child victims of sexual abuse are, moreover, amongst the most vulnerable victims of crime, and the resultant harm is often very serious and long lasting.

⁵ *Hansen v R* at para. 123.

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

24. As I observed in my previous report to the House, there is limited evidence from other jurisdictions about the effectiveness of sex offender registers and the best practice for long term monitoring of high risk sex offenders in the community after their sentences end. The scarcity of evidence that child protection offender registers deliver significant benefits in terms of improved public safety has been noted in numerous studies.⁶
25. The lack of evidence for improved public safety should, however, be weighed against the severe harm caused to the victims of sexual offences against children. There is also some evidence from the literature to suggest that registers achieve reductions in reoffending.⁷
26. I therefore consider there is a sufficient rational connection between the limitation and the objective.

Is the impairment on the right greater than reasonably necessary?

27. My previous report noted that the scope of retrospective application was relatively narrow. The report also noted that the punishment imposed did not amount to an explicit deprivation of liberty.
28. Despite this, I did not consider the original Bill to minimally impair the rights of those offenders to whom it retrospectively applies. There was no provision, for example, to limit the period of registration or reporting obligations for those retrospectively affected, and no inclusion of a review mechanism allowing a case for de-registration or suspension of reporting obligations to be heard.
29. As noted above, s 38 of the principal Act was included, on the recommendation of the Social Services Select Committee, to provide a right of review for offenders subject to lifetime reporting obligations. A registrable offender subject to lifetime reporting obligations is eligible under this subsection if they:
 - 29.1 have been subject to lifetime reporting obligations for not less than 15 years
 - 29.2 are not on parole or subject to any post-sentence order (for example, a public protection order or an extended supervision order), and
 - 29.3 a District Court has not in the previous five years heard and declined an application under s 38 by the offender.
30. In my view, s 38 of the principal Act addressed the concerns raised in relation to the apparent inconsistency with s 9 of the Bill of Rights Act. Section 38, however, offers little or no effective relief for those persons impacted retrospectively.

⁶ See, for example: Terry Thomas, *The Registration and Monitoring of Sex Offenders: A Comparative Study* (Routledge, 2011), pg. 149; Amanda Y. Agan, 'Sex Offender Registries: Fear Without Function?' *Journal of Law and Economics*, Vol. 54, No. 1, 2011.

⁷ *Patterns of reconviction among offenders eligible for Multi-Agency Public Protection Arrangements (MAPPA)* ISBN: 978 1 84099 471 1.

31. Nothing in the principal Act or the Bill acknowledges or compensates for the particular prejudicial effect attendant to the additional punishment faced by persons retrospectively affected. It would still be possible to achieve the purpose of the Bill to a similar level by providing for a lesser period of reporting obligations for those retrospectively affected.
32. Likewise, the Bill could provide for a specific mechanism to allow the courts some supervision over the appropriateness of retrospective application to these persons. As drafted, it only does so for those sentenced to a non-custodial sentence between 16 October 2016 and 13 March 2017.
33. Judicial discretion over the imposition of retrospective conditions was a significant factor in the Supreme Court of Canada's majority decision in *R v K.R.J* that Canada's legislation impaired rights no more than reasonable necessary.⁸ The retrospective punishment considered in that case may only be imposed when a judge is satisfied that the specific offender poses a risk to children and that the punishment is a reasonable attempt to minimize that risk.⁹ For most persons affected by the Bill, no such assessment will take place.
34. Moreover, the revised retrospective application of the Bill is extremely broad, essentially attempting to capture all persons who were not, at 14 October 2016, completely free of the repercussions of a prior conviction for child sex offences.
35. I note the prejudicial effect of the Bill's broad retrospective application is most acute in relation to persons who had reached their SED, but were still subject to release conditions, at 14 October 2016. Indeed, as release conditions may only extend six months beyond a person's SED and given the proposed timing of the Bill, some affected persons will no longer be subject to those release conditions.
36. For these reasons, the Bill cannot be said to impair s 26(2) no more than reasonably necessary to achieve the objective.

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

37. My previous report concluded the risk of the double punishment becoming disproportionately severe meant it was not in due proportion to the importance of the objective. In my view, that finding holds for the current Bill also, notwithstanding the addition of s 38 to the principal Act. As above, I consider that while s 38 addressed the apparent inconsistency relating to s 9 it does not materially affect the proportionality of the apparent inconsistency with s 26(2).
38. The Legislation Advisory Committee Guidelines state that retrospective application may be appropriate where it is intended to address a matter that is essential to public safety.¹⁰ As above, I consider there is no doubt the purpose of the Bill, and the principal Act, is a sufficiently important objective to warrant some intrusion into the rights and freedoms affirmed in the Bill of Rights Act.

⁸ *R v K.R.J* at [70 – 76].

⁹ *Ibid* at [70].

¹⁰ Legislation Advisory Committee Guidelines (2014 Edition), Chapter 11, at para. 11.1.

39. On balance, however, I consider the degree to which the Bill and the principal Act intrude on the right not to be subjected to retrospective punishment outweighs the importance of the Bill's objective.
40. In addition to the reasons given in my previous report, I would emphasise the general principle that legislation should not be retrospective. The presumption plays an important role in safeguarding the rule of law,¹¹ which 'requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.'¹²
41. The principle against retrospective legislation is strongest in relation to legislation that imposes obligations or penalties, or takes away acquired rights, in this case, to prevent "a person from suffering the patent injustice of being punished twice for the same offence."¹³ The retrospective requirement to register and fulfil reporting obligations is undoubtedly contrary to this important principle.
42. I therefore consider the limit on s 26(2) of the Bill of Rights Act is not in due proportion to the importance of the objective.

Inconsistency with s 25(g) (right to lesser penalty where penalties changed)

43. Section 25(g) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
44. The right to a lesser penalty when the penalty has changed between the commission of the offence and sentencing affirms the principle that statutes should not have retrospective effect to the disadvantage of the offender.
45. As noted above, the Bill seeks to clarify that the principal Act applies to persons who had been convicted of a qualifying offence before 14 October 2016 but who were sentenced on or after 14 October 2016. Accordingly, I have considered whether the requirement to register and the attendant reporting obligations also constitutes a variation in the penalty for the purposes of s 25(g).
46. Section 25(g) applies only to penalties that are punitive in nature. British courts have observed that measures are more likely to constitute a penalty the more closely tied they are to the commission of an offence and the more they are intended to punish the offender rather than protect the public.¹⁴
47. The purpose of the principal Act is, as noted above, primarily aimed at protection of the public. While the intention of the principal Act may not be purely punitive, however, in New Zealand the imposition of significant restrictions on the liberty of an individual over a prolonged period of time has been held to be punitive and,

¹¹ *R v K.R.J* at [23].

¹² *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 (H.L.) at [638].

¹³ *Daniels v Thompson* [1998] 3 NZLR 22 (CA), per Thomas J (dissenting) at [57].

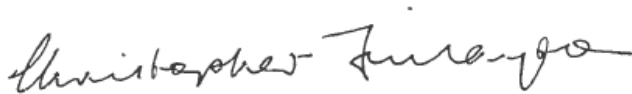
¹⁴ *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213 (EWCA).

therefore, a penalty.¹⁵ An order to register is also closely tied to the conviction and sentencing for relevant sexual offending against children.

48. I therefore consider that registration and associated reporting obligations are a “penalty” and that the Bill will limit s 25(g) of the Bill of Rights Act by retrospectively applying the principal Act to persons who were convicted, but not yet sentenced, prior to 14 October 2016. Further, for the reasons given above in relation to s 26(2), I consider the limit cannot be demonstrably justified under s 5 of that Act.
49. In addition to the reasons given above, I also note that s 25(g) is mirrored in s 6(1) of the Sentencing Act 2002. Section 6(2) of that Act provides that the right applies despite any other enactment or rule of law. That the right affirmed in s 25(g) is specifically and powerfully recognised elsewhere in legislation emphasises its importance and further suggests the intrusion on that right is not in due proportion to the importance of the objective.

Conclusion

50. For the above reasons, I conclude the Bill appears to be inconsistent with s 26(2) and s 25(g) of the Bill of Rights Act and that the inconsistencies cannot be justified under s 5 of that Act.



Hon Christopher Finlayson

Attorney-General

7 March 2017

¹⁵ See, for example, *Belcher v Chief Executive of the Department of Corrections* (2006) CA184/05 (CA).