



Report of the

ATTORNEY-GENERAL

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

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

1. I have considered whether the Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill (the Bill) a Member's Bill in the name of Greg O'Connor MP 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 that the Bill appears to be inconsistent with the right to benefit of a lesser penalty where penalties change affirmed in s 25(g) of the Bill of Rights Act. I have also identified a risk that the Bill may be interpreted as having a retroactive application, and if so, would likely be inconsistent with the freedom from double jeopardy affirmed in 26(2) of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 269, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill amends the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the principal Act) to require registered sex offenders to provide additional information to Police before travelling overseas.
5. Clause 4 inserts s 21(4)(d), (e) and (f) into the principal Act, creating a requirement for registered sex offenders, travelling outside of New Zealand and remaining in a country for more than 48 hours, to report to Police, within 48 hours of their intended travel:
 - 5.1 the addresses of all places they are intending to stay;
 - 5.2 the dates of their intended travel to and from that country;
 - 5.3 whether they are intending to reside in that country; and
 - 5.4 the passport details of each valid passport they hold.
6. These requirements will apply to people who commit qualifying offences and become registrable offenders after the commencement of the Bill, and (in accordance with the provisions of the principal Act) to those with historic offences committed prior to October 2016 who are convicted and sentenced after commencement of the Bill.

Legislative history and previous section 7 reports

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

7. In 2015, the then Attorney-General presented a report to the House of Representatives under s 7 of the Bill of Rights Act on the principal Act (the s 7 Report). The s 7 Report concluded the principal Act appeared to be inconsistent with the Bill of Rights Act in two ways. First, the principal Act appeared inconsistent with

the freedom from disproportionately severe treatment or punishment affirmed by s 9 of the Bill of Rights Act arising from the inability of registered offenders to seek review of their reporting obligations. Second, the principal Act appeared inconsistent with the freedom from double jeopardy affirmed by s 26(2) of the Bill of Rights Act as it applied to convicted sex offenders retroactively.

8. The Attorney-General's conclusion that the principal Act was inconsistent with s 26(2) of the Bill of Rights Act hinged on the determination that registration and reporting requirement constituted a punishment. The Attorney-General's reasoning for this determination was:¹
 - 8.1 the triggering event is a criminal conviction;
 - 8.2 those on the Register are referred to throughout the legislation as registrable "offenders";
 - 8.3 the consequences are in effect a subset of the sanctions which can be imposed on offenders following release on parole; and
 - 8.4 it is an offence to fail to comply with reporting obligations without reasonable excuse, punishable by up to one-year imprisonment.
9. The Supreme Court has recently confirmed that a registration order under the principal Act constitutes a punishment for the purpose of the Bill of Rights Act.²

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

10. In 2017 the Government enacted the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 (the Amendment Act 2017). The Amendment Act 2017 retroactively applied the registration requirements of the principle Act so that all registrable offenders were registered under the principle Act.
11. The then Attorney-General presented another report (the second s 7 Report) to the House of Representatives under s 7 of the Bill of Rights Act. The second s 7 Report concluded that the Amendment Act 2017 appeared to be inconsistent in two ways. First, the Amendment Act 2017 appeared inconsistent with the freedom from double jeopardy affirmed by s 26(2) of the Bill of Rights Act for the same reasons as principal Act. Second, the Amendment Act 2017 appeared inconsistent with the right to a lesser penalty where penalties change affirmed by s 25(g) of the Bill of Rights Act.

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

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

12. To reach the conclusion that the Amendment Act 2017 was inconsistent with s 25(g) of the Bill of Rights Act the Attorney-General determined that Amendment Act 2017 applied to a group of offenders who had been convicted of a qualifying offence before 14 October 2016 (when the principal Act was enacted) but who were sentenced on or after 14 October 2016. For these offenders their right to a lesser penalty where penalties change was limited in a way the Attorney-General considered could not demonstrably justified.

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

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

Section 25(g) – Right to benefit from a lesser penalty where penalties change

14. Section 25(g) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to benefit of the lesser penalty.
15. 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.
16. The principal Act contains sch 1 cl 5 which provides that registration and reporting requirements apply retroactively to persons who committed a qualifying offence before 14 October 2016 and are convicted and sentenced after 14 October 2016. Schedule 1 cl 12 goes on to override any other inconsistent law, including the Bill of Rights Act and the Sentencing Act 2002.
17. The Bill is proposing further changes to the penalty attached to qualifying offences in the principal Act. A person who committed a qualifying offence prior to 14 October 2016 but who is convicted and sentenced after the Bill is enacted will be a registrable offender by virtue of sch 1 cl 5. As they will become a registrable offender after the amendments made by this Bill are enacted, the additional reporting requirements will apply (prospectively) to them. As a result, persons who committed a qualifying offence prior to 14 October 2016 but who are convicted and sentenced after the Bill is enacted will be denied the right to benefit of a lesser penalty where penalties change affirmed by s 25(g) of the Bill of Rights Act.

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

18. 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 is approached as follows:³
- 18.1 does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - 18.2 if so, then:
 - 18.2.1 is the limit rationally connected with the objective?
 - 18.2.2 does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - 18.2.3 is the limit in due proportion to the importance of the objective?

Is the objective sufficiently important?

19. The purpose of the Bill is to allow Police and Customs networks to better protect children in countries the offenders travel to and supports identification of cases of sex tourism.
20. Allowing Police and Customs networks access to this information to address risks posed by registered sex offenders in other countries constitutes an important objective. I have noted previously that child victims of sexual offending are amongst the most vulnerable victims of crime, and the resultant harm is often very serious and enduring. I, therefore, consider that the objective of the Bill is sufficiently important.

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

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

Is the impairment on the right greater than reasonably necessary?

³ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [123].

24. In the second and third s 7 Reports, the crux of both my predecessor's and my conclusion was that the provisions did not minimally impair the rights of offenders who did not have the benefit of a lesser penalty where penalties change. In the third s 7 Report I considered that the principal Act would impair rights less if it limited the duration of reporting requirements or included a review mechanism allowing for the de-registration or suspension of offenders' reporting requirements.
25. These options would still deny the right to benefit of a lesser penalty where penalties change affirmed by s 25(g) of the Bill of Rights Act, albeit to a less severe extent. But because they are not provided for by the Bill, I cannot consider these options, and the Bill cannot be considered to be minimally impairing on the right to benefit of a lesser penalty where penalties change.

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

26. My predecessor and I advised in both the second s 7 Report and third s 7 Report respectively that the right affirmed in s 25(g) is truly fundamental. Given the limited evidence as to the effectiveness of sex offender registers in improving public safety, and recognising the importance of the right conferred by s 25(g), I consider that the intrusion on that right is not in due proportion to the importance of the objective.
27. I therefore consider the limit on s 25(g) cannot be demonstrably justified under s 5 of the Bill of Rights Act.

Additional gap analogous to gap identified in D (SC 31/2019) v New Zealand Police

28. I also note that there are likely to be some offenders who committed a qualifying offence after 14 October 2016 and prior to enactment of the Bill, but who are sentenced after enactment of the Bill.
29. For these offenders the right to benefit of a lesser penalty where penalties change would be engaged prima facie.
30. I acknowledge the intention of the Bill may be to apply the additional requirements to these offenders. However, in the absence of an explicit limitation on the right in s 25(g) and s 6 of the Sentencing Act, the Bill should be interpreted consistently with the right to benefit from the lesser penalty in accordance with D (SC 31/2019) v New Zealand Police. This would mean that the new reporting requirements would not apply to these offenders.

Section 26(2) – Freedom from double jeopardy

31. 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.

32. 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.⁴
33. I have interpreted the Bill in line with s 12 of the Interpretation Act 2019 that no enactment shall have a retrospective effect. The Legislation Design and Advisory Committee (LDAC) Legislation Guidelines state that if retroactive application is intended it must be stated in the legislation. Without specific transitional provisions that provide for retrospective application, I have interpreted the Bill as applying only prospectively. That is, I consider that the additional reporting requirements will only apply to those who become registrable offenders after the Bill has been enacted.

If the Bill applies retroactively it is likely to be inconsistent

34. Clause 4 adds additional reporting requirements for registered sex offenders in addition to those already required by the principal Act.
35. For the reasons outlined in the s 7 Report and the Supreme Court decision,⁵ I consider additional reporting requirements to constitute a punishment for the purposes of s 26(2) of the Bill of Rights Act.
36. If existing registered sex offenders were subject to the cl 4 reporting requirements retroactively this would *prima facie* engage s 26(2) of the Bill of Rights Act.
37. For the same reasons outlined in the first, second and third s 7 Reports, as well as those described in the sections above, namely the impairment is greater than necessary to sufficiently achieve the objective and the limit is not in due proportion to the importance of objective I would not consider cl 4 justified in a free and democratic society.

Conclusion

38. For the reasons stated above, I have concluded that the Bill appears to be inconsistent with s 25(g) of the Bill of Rights Act, and would be inconsistent with s 26(2) if it were applied retroactively and the inconsistency cannot be justified under s 5 of that Act.



Hon David Parker

⁴ *Police v Gilchrist* [1998] 16 CRNZ 55.

⁵ *D*, above n 2, at [55]-[59].

Attorney-General

8 November 2021