

Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

5 December 2024

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill (**Bill**).
- 1.2 This submission has been prepared with input from the Law Society’s Human Rights and Privacy Committee.¹
- 1.3 The Law Society does not wish to be heard.

2 General comment

- 2.1 The Law Society supports effective and proportionate measures that promote the safety of children. However, the evidence supporting the effectiveness of child sex offender registers is limited and indicates that they may in fact have the perverse effect of increasing offenders’ propensity to re-offend by undermining their rehabilitation.
- 2.2 The Law Society opposes the retrospective elements of the Bill, noting it is inconsistent with rights and freedoms protected by the New Zealand Bill of Rights Act 1990 (**Bill of Rights**) in respects that have been set out by the Attorney-General in her section 7 Report.² In the view of the Law Society, it ought to be rare that a Government Bill is enacted despite containing provisions that the Attorney-General has, under section 7, reported to be inconsistent with the Bill of Rights Act. Such a report reflects the Senior Law Officer’s view that the new information and reporting requirements proposed in the Bill do not meet the standard of a “free and democratic society”. If Parliament enacts law that does not meet that standard it is a serious matter, affecting expectations that this is the nature of New Zealand’s society.
- 2.3 The Law Society recognises that it is, of course, legally possible for Parliament to enact a Bill into law in these circumstances. It recognises also that the House’s members are entitled to reach a different view from that of the Attorney-General and may conclude that this Bill is not inconsistent and ought to be enacted, or is inconsistent but a justified limitation (see further para 3.3). The Law Society’s submission is that, if this path is taken, members must engage with the reasons advanced by the Attorney-General. That is, they must satisfy themselves that it is reasonable for the Bill to visit each of the proposed new information and reporting requirements not just on future offenders but on those who have already been dealt with under the law and are already on the register under the present registration regime.

3 Inconsistencies with the New Zealand Bill of Rights Act 1990

- 3.1 The Attorney-General’s view — both in 2022 and in 2024 — was that the underlying lack of evidence as to the efficacy of sex offender registration ought to compel only proportionate limits on fundamental rights. Taking that approach, to the extent it applies

¹ More information about the Committee is available on the Law Society’s website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

² “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” (17 September 2024).

to those already sentenced the Attorney-General's view is that this Bill breaches both section 25(g) and section 26(2) of the Bill of Rights.

3.2 As the Supreme Court in *D v Police* noted, the registration of an offender under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 is a penalty.³ For those who have already been sentenced, the amendments to the reporting requirements proposed in the Bill are added requirements, which have the effect both of increasing the penalty for offending that applied when current registered offenders were sentenced, and punishing them a second time for their offence (adding a punishment that they were not subject to before). In the Law Society's view, to the extent the Bill applies to those already sentenced it would consequently be inconsistent with:

- (a) section 25(g) of the Bill of Rights, which provides that where the penalty for an offence is varied between the commission of the offence and sentence, an individual should be subject to the lesser penalty;
- (b) section 6 of the Sentencing Act 2002, which reiterates and reinforces the right set out in section 25(g);
- (c) section 26(2) of the Bill of Rights, which provides that no one who has been convicted of an offence shall be punished for it again; and
- (d) article 15(1) of the International Covenant on Civil and Political Rights, which provides that a heavier penalty than that applicable at the time a criminal offence was committed shall not be imposed.⁴

3.3 Parliament can pass legislation that infringes on the rights and freedoms protected by the Bill of Rights. It should only do so when such limitations are demonstrably justified in a free and democratic society.⁵ In determining what limitations are demonstrably justified, the Supreme Court has adopted the 'proportionality test' in *R v Hansen*.⁶ To satisfy this test, the proposed regime must:⁷

- (a) be "rationally connected" to the objective of the legislation and not be arbitrary, unfair, or based on irrational considerations;
- (b) impair the right or freedom in question as "little as possible"; and
- (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

3.4 The limited evidence available of the effectiveness of child sex offender registers despite similar registers being used overseas over a number of years is relevant to these considerations. The Law Society has expressed this concern in previous submissions to select committees on both the principal Act and an earlier amendment Bill.⁸ It also raised

³ *D v Police* [2021] NZSC 2 (the leading case on registration orders at sentencing under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016).

⁴ Ratified by New Zealand on 27 December 1978.

⁵ New Zealand Bill of Rights Act 1990, s 5.

⁶ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

⁷ *R v Hansen* at [64].

⁸ New Zealand Law Society "[Child Protection \(Child Sex Offender Government Agency Registration\) \(Overseas Travel Reporting\) Amendment Bill 2022](#)" (13 September 2022).

concern that the register may undermine the rehabilitation of child sex offenders, by contributing to their social isolation and requiring them to confirm persistently to society their central identity as being that of a sex offender. The Ministry of Justice's Regulatory Impact Statement for the principal Act noted research suggesting that registers can stigmatise sex offenders, and may have the perverse effect of increasing their propensity to re-offend by reducing their opportunities for reintegration.

- 3.5 In the Law Society's view, any increase in reporting obligations for registered individuals is likely to exacerbate such concerns. In considering the issue of proportionality, the rights that protect against retroactive penalties are of significant importance, having been described as a "fundamental right" and a longstanding "plank of the common law".⁹
- 3.6 In the Law Society's view, the Bill's objectives do not outweigh the importance of the rights that would be affected.
- 3.7 The Bill is otherwise unobjectionable in applying to offenders whose offences postdate the commencement of the proposed new law.

4 The addition of new qualifying offences

- 4.1 The new qualifying offences to be added by the Bill will be prospective in their effect. Accordingly, the Law Society does not consider there are any rights issues with this proposed change.
- 4.2 Two of the proposed offences, sections 98AA and 216H of the Crimes Act 1961, are generalist offences: in other words, offences under which a range of different conduct, not specifically related to children, may be captured. However, the current drafting of relevant clauses appears adequate to ensure that the provisions will only be engaged where children are involved in the facts underlying conviction. From a prosecutorial perspective, prosecutors will just need to ensure that their summaries of facts as pleaded guilty to, or evidence underlying conviction that has been adduced at trial proves offending against a child.

5 Conclusion

- 5.1 If the Bill is to proceed, it should be examined and refined so as to make it truly prospective (that is, applicable only to persons whose offences are committed after it comes into force).

Nāku noa, nā



Taryn Gudmanz
Vice President

⁹ *R v Poumako* [2000] 2 NZLR 695 at [73]; *R v Pora* [2001] 2 NZLR 37 at [32].