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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

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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) 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 that the Bill appears to be inconsistent with the right to the benefit of a lesser penalty where the penalty is varied between the commission of the offence and sentencing (s25(g) of the Bill of Rights Act) and the freedom from double jeopardy (s 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). The purpose of the principal Act is to establish a Child Sex Offender Register that will reduce sexual reoffending against child victims, and the risk posed by serious child sex offending by:
  - a) providing government agencies with the information needed to monitor child sex offenders in the community, including after the completion of the sentence; and
  - b) providing up-to-date information that assists the Police to more rapidly resolve cases of child sexual offending.
5. Section 10 of the principal Act provided for the establishment a Child Sex Offender Register (the register)
6. The principal Act defines a “registrable offender” as a person who is convicted of a qualifying offence and sentenced to imprisonment or convicted of a qualifying offence and sentenced to a non-custodial sentence and made subject to a registration order by the court. A person who is sentenced to a term of imprisonment for a qualifying offence is automatically placed on the register, whereas where a person who is sentenced to a non-custodial sentence in respect of a conviction for a qualifying offence, the court may make a registration order but is not obliged to do so. 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.
7. Registrable offenders sentenced to imprisonment are required to comply with reporting obligations for 8 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 by order of the court must comply with reporting obligations for 8 years regardless of the qualifying offence committed.
8. On 9 February 2021, the Supreme Court released its decision in (*D (SC 31/2019) v New Zealand Police* [2021] NZSC 2. The majority held that the principal Act did not apply to the appellant who had committed a qualifying offence before, but who

was convicted and sentenced after, the principal Act came into force (14 October 2016). This decision will hold after the Bill is enacted.

9. The majority concluded that the principal Act was not sufficiently clear to displace the presumption against retrospective penalties in s 6 of the Sentencing Act 2002 (and s 25(g) of the Bill of Rights Act).
10. The majority also concluded that the same considerations apply to all those sentenced to imprisonment and registered automatically under the principal Act, if they committed the offence prior to the principal Act coming into force but were sentenced after the principal Act came into force.
11. The explanatory note provides that the Bill is a response to the Supreme Court decision and amends the principal Act to clarify that the principal Act provides registration of all child sex offenders, irrespective of whether the offending occurred before or after the principal Act came into force. The Bill clarifies that the Act's retrospective application explicitly includes those persons who committed a qualifying offence before, but who were convicted and sentenced after, the principal Act came into force.<sup>1</sup>
12. The Bill amends Schedule 1 of the principal Act to clarify the principal Act's retrospective application. It inserts new clause 5 to fill the gap identified by the Supreme Court decision. Clause 5(1) provides that clause 5 applies to persons who committed a qualifying offence before, but who were convicted and sentenced after, the principal Act came into force. Clause 5(2) provides the same in respect of persons who committed an offence in a foreign jurisdiction. Clause 5(3) provides that a person to whom clauses 5(1) or (2) apply must be taken to have been, or to be a registrable offender and subject to the provisions of the principal Act.
13. Clauses 6 and 7 validate specified registration orders that were rendered ineligible by the Supreme Court decision.
14. Clause 8 of the Bill allows a prosecutor to apply for a registration order for persons who committed a qualifying offence before the principal Act came into force, were convicted on or after it came into force, and, following that conviction were sentenced to a non-custodial sentence after the Supreme Court decision, and before the commencement of the Bill.
15. Clause 11 provides that the clauses 5 to 8 do not apply to the appellant in *D*.
16. The Bill inserts new clause 12 to make it clear that new clauses 1, and 5 to 8 apply despite any other law if the other law is inconsistent with them. In particular, this explicitly includes:

16.1 section 6(1) and (2) of the Sentencing Act 2002;

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<sup>1</sup> *D (SC 31-2019) v New Zealand Police* [2021] NZSC 2 at [82].

- 16.2 sections 26(2) and 25(g) of the Bill of Rights Act; and
- 16.3 the Supreme Court decision in *D*.
17. The explanatory note provides that the registration of the individuals to whom the Bill applies will continue to provide the New Zealand Police and the Department of Corrections with access to personal information that allows these agencies to proactively monitor and manage the risk of reoffending against children while registrable offenders are in the community.

### **Previous section 7 report**

18. In 2017, the then Attorney-General presented a report to the House of Representatives under the Bill of Rights Act on the 2017 Bill. That report concluded that the 2017 Bill appeared to be inconsistent with the freedom from double jeopardy affirmed in s 26(2) and the right to the benefit of a lesser penalty where penalties change affirmed in s 25(g).
19. The Attorney’s view that the Bill was inconsistent with s 26(2) was principally based on an acceptance that the retrospective registration of offenders is considered a “punishment”, thereby constituting a second punishment for an offence that the offender had already been punished for by way of the ordinary sentencing process.
20. The Attorney’s view that there was an inconsistency with s 25(g) was because the Bill retroactively applied a new punishment to persons who were convicted, but not yet sentenced on or after 14 October 2016, thereby limiting the right to the benefit of the lesser penalty.

### **Section 25(g) - Right to lesser penalty where penalties change**

21. 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 varied between the commission of the offence and sentencing, to benefit of the lesser penalty.
22. 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 a retrospective effect to the disadvantage of the offender.
23. Winkelmann CJ and O’Regan J in Supreme Court judgment in *D*, observed that the right conferred by s 25(g) of the Bill of Rights Act (and s 6 of the Sentencing Act) is a “truly fundamental one”.<sup>2</sup>
24. The Supreme Court in *D* concluded that a registration order is a “penalty” for the purposes of s 25 of the Bill of Rights Act.

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<sup>2</sup> At [54].

25. As already noted, the Bill applies to persons who committed a qualifying offence before the principal Act came into force but were convicted and sentenced to a non-custodial sentence after the principal Act came into force. Accordingly, I consider that the retrospective application of the provisions of the Bill and the validation of the earlier registration order, which would otherwise be treated as invalid as a result of the Supreme Court decision, constitutes a variation of the penalty, and engages s 25(g) of the Bill of Rights Act.
26. I also consider that s 25(g) is engaged by clause 8 of the Bill which allows a prosecutor to apply for a registration order for an offender who has been sentenced in the period after the Supreme Court decision and before the enactment of the Bill. Due to the Supreme Court decision, a sentencing court will not be able to impose a registration order on that person if they are in the group captured by the Supreme Court decision. I consider that clause 8 constitutes a variation of penalty and this engages s 25(g).
27. Furthermore, there is potentially a small group of people who could be impacted prospectively by the Bill. These are those individuals who committed an offence prior to the principal Act coming into force but who are convicted and sentenced after the Bill is enacted. But for the retrospective application of the provisions in the Bill, these people would have received the benefit of the Supreme Court decision, and should have been ineligible for registration. I consider that this is a variation of penalty and also engages s 25(g) of the Bill of Rights Act.

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

28. 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:<sup>3</sup>
- 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?

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<sup>3</sup> *R v Hansen* [2007] 3 NZLR 1 (SC)..

*Is the objective sufficiently important?*

29. 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 address risks presented by offenders as they moved into the community.
30. Allowing access to personal information to enable Police to address risks presented by registrable offenders in the community constitutes an important objective. The Attorney-General noted in his 2017 report 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?*

31. The Attorney-General noted in his 2015 report on the principal Act, that 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.<sup>4</sup>
32. The limited evidence for improved public safety should, however, be weighed against the severe harm caused to the victims of the offending in question.
33. I therefore consider there is a rational connection between the limitation and the objective.

*Is the impairment on the right greater than reasonably necessary?*

34. The provisions in the Bill apply to a very specific cohort of offenders. The Bill primarily applies to offenders who had previously, but should not have, been made subject to a registration order. Those individuals have, for a short period, received the benefit of the Supreme Court decision, with the result that they could be removed from the register. The retrospective application applies broadly to all offenders captured by the Supreme Court decision. The prejudicial effect on those retrospectively affected could be ameliorated by providing for a lesser period of reporting or by making it a requirement that offenders are only added to the register again following application to the Court, which would provide judicial oversight over the imposition of retrospective conditions.
35. In respect of clause 8, I note that a registration order may only be imposed following an application to the court and this allows judicial oversight of whether to impose a registration order. However, those individuals have been deprived the benefit of the Supreme Court decision.

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<sup>4</sup> Attorney-General Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill (6 May 2015).

36. For these reasons, I consider that the Bill limits s 25(g) more than reasonably necessary to achieve the objective.

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

37. The Legislation Advisory Committee Guidelines state that retrospective legislation may be appropriate where it is intended to address a matter that is essential to public safety.<sup>5</sup> It is noted that the principal Act and the provisions in this Bill are intended to address issues of the safety of children, which is a matter of public safety.
38. However, given the limited evidence as to the effectiveness of sex offender registers in improving public safety, and recognising that the importance of the right conferred by s 25(g), I consider the degree to which the Bill intrudes on the right not to be subjected to retrospective penalties outweighs the importance of the Bill's objective.
39. I therefore consider the limit on s 25(g) of the Bill of Rights Act is not in due proportion to the importance of the objective.

*Conclusion*

40. Accordingly, I have concluded that the limitations in the Bill are not justifiable in terms of s 5 of the Bill of Rights Act.

### **Section 26(2) – Freedom from double jeopardy**

41. 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.
42. 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.<sup>6</sup>
43. In his 2015 report, the Attorney-General found that registration and reporting obligations constituted a punishment.<sup>7</sup> This aligns with the Supreme Court decision, which found that the registration order constituted a “penalty” for the purposes of s 25. Therefore, I consider that the registration order and reporting obligations constitute a punishment for the purposes of s 26(2) of the Bill of Rights Act.
44. As noted above, there are potentially a small group of people who will be impacted prospectively by the Bill. These are those individuals who committed an offence prior to the principal Act coming into force but who are convicted and sentenced after

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<sup>5</sup>Legislation Advisory Committee Guidelines (2018 Edition), Chapter 12, at [12.1].

<sup>6</sup>*Police v Gilchrist* [1998] 16 CRNZ 55.

<sup>7</sup>Attorney-General Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection(Child Sex Offender Register) Bill (6 May 2015).

the Bill is enacted. For those impacted prospectively this punishment is part of the sentence and therefore will not entail being punished ‘again’ for the same offence. I do not consider that s 26(2) is engaged because the person has not yet been sentenced. However, for the reasons discussed above, it is considered that there has been a variation in penalty, and s 25(g) will be engaged.

45. The Bill introduces new provisions that would constitute a retrospective punishment to persons who, as a result of the Supreme Court decision, are deemed not have been eligible for registration at the time when they were convicted and sentenced. Those offenders should not have been considered to fall within the definition of “registrable offender” and should not have been placed on the register. Those offenders who were incorrectly placed on the register because it was considered at the time of sentencing that the principal Act did apply were entitled to be removed from the register as a consequence of the Supreme Court decision. The provisions in this Bill mean that those offenders do not receive the benefit of the Supreme Court decision and will be put back on the register by virtue of the retrospective provisions in the Bill. I consider that this can be seen as an additional punishment in respect of the same offence and is a prima facie limitation on s 26(2) of the Bill of Rights Act.
46. These same considerations apply to clause 8 of the Bill. As those persons were not eligible for a registration order at the time of sentencing, I consider that the later imposition of a registration order constitutes an additional punishment and is a prima facie limitation of 26(2) of the Bill of Rights Act.

*Is the objective sufficiently important and is there a rational connection?*

47. For the reasons laid out in analysis of the limitation on s 25(g), I consider that the objective of the Bill is sufficiently important, and that there is a rational connection between the limitation on s 26(2) and the objective.

*Is the impairment on the right greater than reasonably necessary?*

48. For similar reasons as discussed above in relation to s 25(g), I consider that the Bill does impair s 26(2) more than reasonably necessary to achieve the objective.

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

49. As above, the Legislation Advisory Committee Guidelines state that retrospective legislation may be appropriate where it is intended to address a matter that is essential to public safety.<sup>8</sup> It is noted that the principal Act and the provisions in this Bill are intended to address issues of the safety of children.
50. The core of the right to freedom from double jeopardy is in relation to legislation that imposes subsequent obligations or penalties. This is in order to prevent “a person

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<sup>8</sup> Legislation Advisory Committee Guidelines (2018 Edition), Chapter 12, at [12.1].



from suffering the patent injustice of being punished twice for the same offence.”<sup>9</sup> The retrospective requirement to register and fulfil reporting obligations is contrary to this principle.

51. On balance, I consider the degree to which the Bill intrudes on the right not to be subjected to retrospective punishment outweighs the importance of the Bill’s objective.
52. 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.

### *Conclusion*

53. Accordingly, I have concluded that the limitations in the Bill are not justifiable in terms of s 5 of the Bill of Rights Act.

### **Conclusion**

54. I have concluded that the Bill appears to be inconsistent with the right to the benefit of a lesser penalty where penalties change, affirmed in s 25(g) and with the freedom from double jeopardy affirmed in s 26(2) of the Bill of Rights Act.



Hon David Parker

**Attorney-General**

*March 2021*

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<sup>9</sup> *Daniels v Thompson* [1998] 3 NZLR 22 (CA) per Thomas J (dissenting) at [57].