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# Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill

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13/9/2022

## **Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill**

### **1      Introduction**

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (the **Law Society**) welcomes the opportunity to comment on the Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill (the **Bill**).
- 1.2 The Law Society supports effective and proportionate measures that promote the sexual 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 their propensity to re-offend by undermining their rehabilitation. The Law Society opposes this Bill and considers that its intended retrospective effect is inconsistent with the rights and freedoms protected by the New Zealand Bill of Rights Act 1990 (the **NZBORA**).
- 1.3 This submission has been prepared with input from the Law Society's Human Rights & Privacy Committee.<sup>1</sup>
- 1.4 The Law Society does not wish to be heard.

### **2      Inconsistencies with the New Zealand Bill of Rights Act 1990**

- 2.1 The Law Society considers that the Bill is inconsistent with the rights contained within the NZBORA.
- 2.2 It appears the Bill is intended to have retrospective effect, with the proposed additional reporting requirements being intended to apply to individuals who are currently on the Child Sex Offender Register.
- 2.3 If this is indeed the Bill's intended effect, in the Law Society's view this should be clearly set out so that Parliament squarely confronts the issue. The importance of this was highlighted recently by the Supreme Court in *D v Police*, the leading case on registration orders at sentencing under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.<sup>2</sup> Two members of the Court noted the common law principle of legality, which provides that "fundamental rights cannot be overridden by general or ambiguous words." Under this principle, in the absence of clear language or necessary implications to the contrary, the Courts should presume that a rights-consistent approach was intended.
- 2.4 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.<sup>3</sup> In the Law Society's view, if the Bill is intended to apply retrospectively it would be inconsistent with:
  - (a) Section 25(g) of the NZBORA, 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;

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<sup>1</sup> More information regarding this committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

<sup>2</sup> *D v Police* [2021] NZSC 2

<sup>3</sup> *D v Police* at [55]-[59] and [161]

- (b) Section 6 of the Sentencing Act 2002, which reiterates and reinforces the right set out in s 25(g);
  - (c) Section 26(2) of the NZBORA, 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.<sup>4</sup>
- 2.5 The Law Society also considers that, regardless of any retrospective effect, the Bill constrains the freedom of movement protected by section 18 of the NZBORA, in that it places limitations on the ability of registered individuals to travel outside of New Zealand at short notice, given the requirement to report travel details at least 48 hours before departure (in the absence of ‘exceptional circumstances’).
- 2.6 The NZBORA constrains policy choices only to the extent that rights or freedoms are implicated, and unreasonably so. While Parliament can pass legislation that infringes on the rights and freedoms protected by the NZBORA, it should only do so when such limitations are demonstrably justified in a free and democratic society.<sup>5</sup>
- 2.7 In determining what limitations are demonstrably justified, the Supreme Court adopted the ‘proportionality test’ in *R v Hansen*.<sup>6</sup> In order to satisfy this test, the proposed regime must:<sup>7</sup>
- (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.
- 2.8 The stated intention of the Bill is to allow Police and Customs networks to better protect children in the countries the offenders travel to, and to support identification of cases of sex tourism. The Bill also aligns international reporting requirements to the requirements a registered individual must meet when travelling within New Zealand. The Law Society acknowledges the importance of this objective. Children are amongst the most vulnerable victims of crime, and the offending that the Bill seeks to prevent is known to cause significant and long-lasting effects.
- 2.9 However, the Law Society also reiterates its views, expressed when the principal Act was being considered by the Select Committee, that there is limited evidence available of the effectiveness of child sex offender registers, despite similar registers being used overseas over a number of years.
- 2.10 The Law Society also raised concern that the register may undermine the rehabilitation of child sex offenders, by contributing to their social isolation and requiring them to confirm

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<sup>4</sup> The International Covenant on Civil and Political Rights was ratified by New Zealand on 27 December 1978

<sup>5</sup> NZBORA, section 5

<sup>6</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC)

<sup>7</sup> *R v Hansen*, at [64]

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 also recognised research that suggested registers can stigmatise sex offenders, and may have the perverse effect of increasing their propensity to re-offend by reducing their opportunities for reintegration. In the Law Society's view, any increase in reporting obligations for registered individuals is likely to exacerbate such concerns.

- 2.11 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".<sup>8</sup> In the Law Society's view, the Bill's objectives do not outweigh the importance of the rights that would be affected.
- 2.12 The Law Society suggests the Committee seek advice from officials as to whether the objectives of the Bill are already sufficiently met by the typical requirements to disclose a traveller's criminal history as part of visa or international entry requirements.

### **3 Other comments**

- 3.1 The Law Society notes that in relation to the requirement in proposed section 21(4)(f)<sup>9</sup>, this is potentially already covered under the Act. Under section 16(1)(l), a registered individual is required to include details of any passports held at the time of making an initial report. Under section 20(1)(b), a registered individual is also required to report any change in this information (for example, where a further passport is obtained) within 72 hours of the change. Accordingly, the current requirements already require up-to-date information on passports held to be reported to the Commissioner.
- 3.2 Lastly, the Law Society does not consider there are any issues with the proposed amendments set out in Supplementary Order Paper No 175, which provides for information sharing between Customs and the Commissioner of Police.



Caroline Silk  
**Vice-President**

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<sup>8</sup> *R v Poumako* [2000] 2 NZLR 695 at [73]; *R v Pora* [2001] 2 NZLR 37 at [32]

<sup>9</sup> This requires that at least 48 hours before travelling, a registered individual must disclose the passport number, place of issue, and date of expiry of each valid passport held by that individual to the Commissioner of Police