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Report of the

# ***ATTORNEY-GENERAL***

under the New Zealand Bill of Rights Act 1990 on the Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) 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 265 of the Standing Orders of the House of Representatives

1. I have considered whether the Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) 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 limits the right to freedom of expression affirmed in s 14 of the Bill of Rights Act and that limit cannot be justified under s 5 of that 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 purpose of the Bill is to 'protect vulnerable members of society from child sex offenders by preventing those individuals from changing their name.' This ensures 'appropriate agencies can properly manage child sex offenders to assist in their rehabilitation and to maintain public safety.'
5. In order to achieve this, the Bill proposes a permanent ban on child sex offenders being eligible to register a name change with the Registrar-General (the official responsible for maintaining birth, death, marriage, civil union and name change information).
6. The Bill defines a 'child sex offender' as a person who has been convicted of a relevant offence and has not had their conviction quashed. 'Relevant offence' is defined as having the same meaning as in s 107B of the Parole Act 2002. 'Relevant offence' under s 107B of the Parole Act is defined for the purposes of imposing extended supervision orders. The definition includes a range of sexual and violent offences under the Crimes Act 1961 and certain offences under the Films, Videos, and Publications Classification Act 1993.
7. By using the definition of 'relevant offence' in s 107B of the Parole Act, the definition of 'child sex offender' in the Bill captures all persons convicted of certain sexual offences (not limited to cases where the victims were children) as well as all persons convicted of certain violent offences (ranging from murder to assault with intent to rob) and certain offences under the Films, Videos, and Publications Classification Act (relating to publication of objectionable material that is sexually exploitative of children and young persons).

### **Inconsistency with s 14 — Right to freedom of expression**

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. This right is 'as wide as human thought and imagination'.<sup>1</sup>

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<sup>1</sup> *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].

9. The ability to express oneself is a value in its own right as individuals seek fulfilment through expression.<sup>2</sup> Therefore the purpose of the right, amongst other things, is to allow humans to reach their full potential — to be themselves.<sup>3</sup>
10. Choice of name as a component of freedom of expression is recognised in international law. Principle 19 of the Yogyakarta Principles holds that the right to freedom of opinion and expression includes ‘the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means’.<sup>4</sup> Choice of name is also recognised in European Court of Human Rights jurisprudence.<sup>5</sup>
11. The right to freedom of expression is to be construed as having a wide ambit in New Zealand, and the broadly described examples in s 14 are non-exhaustive. I consider an individual’s choice of name is an element of freedom of expression.
12. The Bill imposes a permanent ban for a person convicted of relevant offences from registering a name change, with no exceptions. I therefore consider the Bill limits the right to self-expression through one’s registered name.

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

13. 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:<sup>6</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?

<sup>2</sup> Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 311; *R v Sharpe* 2001 SCC 2, [2001] 1 SCR 45 at [141].

<sup>3</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2<sup>nd</sup> ed, LexisNexis NZ Limited, Wellington, 2015) at 526 citing *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (SACC).

<sup>4</sup> Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007, principle 19. The Yogyakarta Principles were developed at a meeting of the International Commission of Jurists, the International Service for Human Rights and human rights experts. The Principles are intended to serve as an interpretive aid to human rights treaties.

<sup>5</sup> See for example, *Burghartz v Switzerland* (1994) 18 EHRR 101 (ECHR) and *Ünal Tekeli v Turkey* (2004) 42 EHRR 1185 (Section IV, ECHR). In these cases, choice of name was considered under the rights of privacy and non-discrimination.

<sup>6</sup> *Hansen v R* [2007] NZSC 7 at [123].

*Is the objective sufficiently important?*

14. There is no question the Bill serves an important objective. Victims of sexual abuse are extremely vulnerable and the resultant harm is often very serious and long lasting.

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

15. While the Bill serves to address an important objective, I do not consider a rational connection between the limit on the right to freedom of expression and the legislative objective is sufficiently established. At best, the legislative objective is achieved to a negligible extent.
16. First, the definition of ‘child sex offender’ is too wide, as it captures a wider group of persons than the ‘child sex offenders’ intended by the Bill. The ban applies to offenders convicted of certain violent offences, certain sexual offences (including cases where victim is over the age of 16 years) and certain offences under the Films, Videos, and Publications Classification Act.<sup>7</sup>
17. Notwithstanding its wide drafting, the Bill does not prevent, or only partially prevents, a ‘child sex offender’ from changing their name. At common law, a person can lawfully use a new name without registering it, so long as the new name is not used for fraudulent or improper purposes. The new identity is established simply by using the new name and by repute, and the change comes into effect when the person starts using the name.
18. Similarly, a person is not legally obliged to give their ‘registered’ name, address, or other information unless there are statutory requirements specifying otherwise.<sup>8</sup>
19. I consider the prohibition on ‘child sex offenders’ changing their registered name will have a minimal impact on the ability for a child sex offender to use other names, as they may lawfully use other names in many situations and for many purposes without the need to change their registered name. Further, the prohibition would not, in practice, prevent instances of child sex offenders committing identity theft or fraudulently using another name.

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

20. In my view a permanent ban on the right of ‘child sex offenders’ to register a name change impairs the right to freedom of expression more than necessary to achieve the stated legislative objective, because:

- 20.1 Alternative means which involve lesser impairments on the right to freedom of expression are available; and

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<sup>7</sup> The drafting could be more narrowly focused on child sex offenders by, for example, adopting the definition of ‘qualifying offence’ in Child Protection (Child Sex Offender Register) Bill, Sch 1. Clause 6 of the Bill would require offenders sentenced to imprisonment for qualifying offences or offenders sentenced to a non-custodial sentence and made subject to a registration order to be registered on the Child Sex Offender Register.

<sup>8</sup> For example, under ss 14, 44 and 114 of the Land Transport Act 1998 a person must not give false and misleading information where an enforcement officer stops a driver and asks for their full name, address and date of birth.

- 20.2 Existing legislation with respect to child sex offenders achieves (and legislation before the House, if enacted, will achieve) the Bill's policy objectives more effectively.
21. The least-intrusive mechanism which would still achieve the Bill's objective would be to require a child sex offender to notify a competent authority (for example New Zealand Police or the Department of Corrections) before or immediately after registering a name change. Alternatively, child sex offenders could be required to seek prior consent of a competent authority before a change of name is registered. Further, an exception could be allowed in cases where prohibition would be manifestly unjust.
22. I also consider existing legislation, and proposals currently before the House, are more effective mechanisms for achieving the legislative objective. These include:
- 22.1 A new requirement that all applicants provide identification information to the Registrar-General before a name change will be registered.<sup>9</sup>
- 22.2 Sentences such as Extended Supervision Orders that provide significant oversight of child sex offenders.<sup>10</sup> Offenders subject to extended supervision are actively monitored and supervised by the Department of Corrections for as long as they pose a real and ongoing risk of further serious sexual or violent offending.
- 22.3 Information sharing between relevant agencies for the purposes of monitoring child sex offenders' compliance with their sentences, to manage their risk, to identify any increased risk, and to facilitate their reintegration.<sup>11</sup>
- 22.4 A requirement for all persons working with children to be vetted ('safety checked') for their suitability.<sup>12</sup> Certain organisations including school boards are prohibited from employing people who have serious criminal convictions for sexual offending, offences against children and/or violent behaviour to work with children.<sup>13</sup> The new safety checking requirements will make it easier to identify the small number of people who are a risk to children.

<sup>9</sup> See reg 8B of the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995.

<sup>10</sup> See Part 1A of the Parole Act 2002. A former Attorney-General and I have drawn the House's attention to provisions of the Extended Supervision Order regime that appear to be inconsistent with the Bill of Rights Act. See Reports of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill (2003), Parole (Extended Supervision Orders) Amendment Bill (2009), Parole (Extended Supervision Orders) Amendment Bill (2014) and Electronic Monitoring of Offenders Legislation Bill (2015).

<sup>11</sup> Sections 182A–182E of the Corrections Act 2004 specifies the circumstances in which information about child sex offenders may be shared with specified agencies including Child, Youth and Family, Housing New Zealand Corporation, Ministry of Social Development and the New Zealand Police.

<sup>12</sup> See ss 21–34 of the Vulnerable Children Act 2014. Requirements include identity verification and vetting for any relevant criminal convictions.

<sup>13</sup> See s 28 of the Vulnerable Children Act 2014. Individuals convicted of a specified offence(s) but who would not pose an undue risk to children may be specifically exempted from the restriction.

- 22.5 A proposal to establish a Child Sex Offender Register under the Child Protection (Child Sex Offender Register) Bill.<sup>14</sup> The Register would enable Police and Corrections to obtain regular, up-to-date information about individual child sex offenders. If a Register is established in accordance with the current proposal, a comprehensive range of information on child sex offenders, including registered names and other aliases, will be available to relevant agencies.
- 22.6 Further work on information sharing about offenders, specifically offender identities, is also being addressed through the response to the Government Inquiry into the escape of Phillip John Smith/Traynor.<sup>15</sup> The Government has accepted, or accepted in principle, the majority of the Inquiry's recommendations to improve access and sharing information of offender identities.
23. As such, I consider the Bill limits s 14 more than is reasonably necessary.
- Is the limit in due proportion to the importance of the objective?*
24. Enhancing existing tools available to law enforcement and other government agencies to properly monitor, track, and reduce the risk of re-offending and harm to children is an important policy objective.
25. The Bill imposes a permanent ban on child sex offenders registering a name change, irrespective of their risk of re-offending or harm to children, with no ability for review. There is no discretion or ability to exempt individuals who pose a low risk of re-offending and have genuine reasons to register a name change.
26. There may be genuine reasons why a child sex offender decides to change their name. A name change may be registered for the purposes of marriage, civil union, adoption or witness protection. Further, a formal name change may assist in their rehabilitation and reintegration back into the community and thereby reduce their risk to children. Reintegration is particularly important for vulnerable offenders (for example, cases where the offender is a victim themselves, under the age of 18, and name change is warranted to protect family or victim identification). The Bill assumes child sex offenders will exploit existing mechanisms for changing registered names for nefarious purposes.
27. In reaching a conclusion as to whether the limit on freedom of expression is proportionate in light of the importance of the legislative objective, of necessity, value judgments are involved. In this case it is the value to society of the freedom of expression against the value society places on protecting children and vulnerable persons from risk of sexual abuse.

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<sup>14</sup> The Bill is currently before the Social Services Select Committee. I presented a report to the House concluding that the Bill is inconsistent with the Bill of Rights Act — see *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill* (2015).

<sup>15</sup> See John Priestley CNZM QC and Simon Murdoch CNZM, *Government Inquiry into Matters Concerning the Escape of Phillip John Smith/Traynor* (25 August 2015).

28. On balance, I do not consider the limit on freedom of expression is proportionate and can be justified under s 5 of the Bill of Rights Act. In reaching this conclusion, I have had regard to the fact that:
- 28.1 the Bill in its current form captures a wider group of persons than intended;
  - 28.2 the limit on freedom of expression is unlikely to achieve or have a material impact on a child sex offender's ability to change their name;
  - 28.3 alternative means that involve a lesser impairment on the right to freedom of expression are available; and
  - 28.4 the issues that the Bill attempts to address are more effectively addressed through current and proposed legislative and policy mechanisms to improve information sharing on and management of child sex offenders. In particular, I consider that if a Child Sex Offender Register is established, this will provide a comprehensive framework for obtaining and sharing information about child sex offenders, which is likely to supersede the current Bill.

### **Conclusion**

29. For the above reasons, I have concluded the Bill appears to be inconsistent with s 14 of the Bill of Rights Act and the inconsistency cannot be justified under s 5 of that Act.



Hon Christopher Finlayson  
**Attorney-General**

*60* November 2015

