

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

Government Bill

Explanatory note

General policy statement

This Bill amends the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the **Act**) to clarify that the Act provides for registration of all child sex offenders, irrespective of whether offending occurred before or after the 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 Act came into force.

This clarification is in response to a recent Supreme Court decision (*D (SC 31/2019) v New Zealand Police* [2021] NZSC 2) (the **decision**), which determined that, where the qualifying offence was committed before the Act came into force, the Act is not sufficiently clear about eligibility for registration to displace the right in section 6 of the Sentencing Act 2002 (that is, the right to the lesser penalty if the penalty is varied between commission of the offence and sentencing).

To give effect to the Act's intent, the Bill inserts amendments, and new provisions in Schedule 1 of the Act, to clarify the Act's retrospective application. These new provisions include—

- a provision validating a person's placement on the Child Sex Offender Register (the **Register**), if their registration would have been valid if the amendments were in force at the time of their registration:
- a provision allowing the prosecutor to apply to the sentencing court to make or review decisions around a person's eligibility to be placed on the Register under section 9 of the Act, for those individuals covered by the amendment who were sentenced following the Supreme Court decision:

- a provision that explicitly clarifies that the Act's retrospective application overrides any other law, to the extent that the other law is inconsistent with the Act's retrospective application (including section 6(1) and (2) of the Sentencing Act 2002 and sections 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990).

The amendments apply retrospectively to persons removed from the Register or rendered ineligible for registration due to the Supreme Court decision. Those persons include ones who committed a qualifying offence before 14 October 2016, and who have been sentenced after the Supreme Court decision on 9 February 2021. An exception ensures that no obligations arise, under the amendments, after the decision and before the commencement of this Bill. That exception does not alter or affect a registrable offender's length of reporting period or period on the Register. There is also an exception for the particular appellant in the Supreme Court case.

Registration of these individuals 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.

Departmental disclosure statement

The New Zealand Police is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2021&no=16>

Regulatory impact assessment

A regulatory impact assessment is not required for this Bill.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 relates to commencement. This Bill is to come into force on the day after the date on which it receives the Royal assent.

Clause 3 indicates that the principal Act amended is the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

Part 1 Amendment to Part 1 of principal Act

Unnecessary provision repealed

Part 1 repeals section 9(1A), as inserted on 8 March 2017 with effect on and after 14 October 2016. Section 9(1A) is proposed to be repealed because—

- section 9(1A) was to help make clear the retrospective application of section 9(1) (which permits a sentencing court to make a registration order if the court imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence); but
- the reasons in the decision indicate section 9(1A) does not achieve clearly that purpose; and
- all intended retrospective application of all provisions of the principal Act is to be achieved clearly by Schedule 1 as amended by *Part 2*.

Part 2 Amendments to Schedule 1 of principal Act

Schedule 1 amended by inserting clarifying headings and new clauses 5 to 12

Part 2 amends Schedule 1, which contains transitional, savings, and related provisions. The amendments are—

- headings clarifying existing provisions; and
- *new clauses 5 to 12*.

Filling gap in retrospective application identified in decision

New clause 5(3) fills the gap identified in the decision by ensuring the principal Act applied or applies retrospectively to persons specified in *new clause 5(1) or (2)* who committed offences before, but were or are convicted and sentenced, etc, on or after, 14 October 2016.

In particular, *new clause 5(1) and (3)* ensures that a person was or is a registrable offender subject to the principal Act if the person—

- committed before 14 October 2016 a qualifying offence; and
- was convicted on or after 14 October 2016 of the qualifying offence; and
- on or after 14 October 2016 (and so, whether before or after the commencement of this Bill), in respect of that conviction,—
 - was or is sentenced to imprisonment; or
 - was or is sentenced to a non-custodial sentence, and was or is made subject to a registration order.

Validations

New clause 6 validates specified registrations under section 7(1)(a) or (2).

New clause 7 validates specified registration orders made by a court under sections 7(1)(b) and 9.

Application for registration order

New clause 8(2) enables the prosecutor to apply for a registration order in respect of a person and a conviction specified in *new clause 5(1)* if the person, in respect of that conviction, was sentenced to a non-custodial sentence (for example, in substitution for a custodial sentence), but was not made subject to a registration order (whether or not one was applied for),—

- after judgment was delivered, on 9 February 2021, in the decision; and
- before the commencement of this Bill.

However, *new clause 8(2)* does not apply if, at the time of sentencing, the court declined to make a registration order because it was not satisfied that the person posed a risk to the lives or sexual safety of 1 or more children, or of children generally.

Section 9 applies, with any necessary modifications, to an application made under *new clause 8*.

Exceptions to clauses about further retrospective application, etc

New clause 9(1) provides that *new clauses 5 to 7* are subject to *new clause 10*.

New clause 9(2) provides that *new clauses 5 to 8* are subject to *new clause 11*.

Exception for obligations between decision and Amendment Act

New clause 10(1) provides that, despite *new clauses 5 to 7*, a person to whom *new clause 5* applies has, under *new clauses 5 to 7*, no obligations of a registrable offender—

- after judgment was delivered, on 9 February 2021, in the decision; and
- before the commencement of this Bill.

New clause 10(2) ensures that *new clause 10* does not alter or affect a registrable offender's length of reporting period or period on the register.

Exception for particular appellant and decision as it relates to them

Clause 11 provides that *new clauses 5 to 8* do not—

- apply to the particular appellant in the decision; or
- affect the decision as it relates to that appellant.

Overriding any inconsistent other law

New clause 12(1) ensures that the following clauses of Schedule 1 had effect, and have effect, despite any other law if, or to the extent that, the other law is inconsistent with them:

- clause 1 as inserted on 8 March 2017 with effect on and after 14 October 2016;
- *new clauses 5 to 8.*

New clause 12(2) provides that, in particular, any other law, for the purposes of *new clause 12(1)*, includes any law in all or any of the following:

- section 6(1) and (2) of the Sentencing Act 2002;
- sections 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990;
- the decision.

New clause 12 thus ensures that the clauses specified in *new clause 12(1)(a) and (b)* had effect, and have effect, to override—

- the right, in section 6(1) of the Sentencing Act 2002 and section 25(g) of the New Zealand Bill of Rights Act 1990, to the lesser penalty if the penalty is varied between commission of the offence and sentencing; and
- section 6(2) of the Sentencing Act 2002, which provides that section 6(1) of that Act applies despite any other enactment or rule of law.

Hon Poto Williams

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act **2021**.
- 2 Commencement** 5
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Principal Act** 10
This Act amends the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

Part 1**Amendment to Part 1 of principal Act****4 Section 9 amended (Court may make registration order)**

Repeal section 9(1A).

Part 2

5

Amendments to Schedule 1 of principal Act**5 Schedule 1 amended**

(1) In Schedule 1, before clause 1, insert:

Retrospective application provisions as inserted in 2017 (with effect on and after 14 October 2016)

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(2) In Schedule 1, before clause 1(1), insert:

Subject to sentence of imprisonment, etc, on 14 October 2016

(3) In Schedule 1, before clause 1(2), insert:

Convicted of qualifying offence before, but sentenced in respect of that conviction on or after, 14 October 2016

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(4) In Schedule 1, before clause 1(3), insert:

Convicted of corresponding foreign offence before, but sentenced, etc, as a consequence of that conviction on or after, 14 October 2016

(5) In Schedule 1, before clause 1(4), insert:

Person to whom clause applies is registrable offender

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(6) In Schedule 1, before clause 2, insert:

Related provisions inserted in 2017

(7) In Schedule 1, after clause 4, insert:

Further retrospective application provisions inserted in 2021

5 Further retrospective application to fill gap identified in *D (SC 31/2019) v New Zealand Police [2021] NZSC 2*

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Committed qualifying offence before, but convicted and sentenced in respect of that offence on or after, 14 October 2016

(1) This clause applies to a person who—

(a) committed before 14 October 2016 a qualifying offence; and

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(b) was convicted on or after 14 October 2016 of the qualifying offence; and

(c) on or after 14 October 2016, in respect of that conviction,—

- (i) was or is sentenced to imprisonment; or
- (ii) was or is sentenced to a non-custodial sentence, and was or is made subject to a registration order.

Committed corresponding offence in foreign jurisdiction before, but convicted and sentenced, etc, as a consequence of that conviction on or after, 14 October 2016 5

- (2) This clause applies to a person who—
 - (a) committed before 14 October 2016 a corresponding offence in a foreign jurisdiction; and
 - (b) was convicted on or after 14 October 2016 of the corresponding offence in a foreign jurisdiction; and 10
 - (c) as a consequence of that conviction, on or after 14 October 2016,—
 - (i) was or is sentenced to imprisonment; or
 - (ii) was or is required to report in that jurisdiction information about himself or herself to a person or body performing functions substantially similar to those of the Commissioner under this Act, and to keep that information current for a particular period (and would, if the person were currently in that jurisdiction, still be required to report that information); or 15
 - (iii) was or is deported from that jurisdiction. 20

Person to whom clause applies must be taken to have been, or to be, registrable offender

- (3) A person to whom this clause applies must be taken to have been, or to be,—
 - (a) a registrable offender for the purposes of section 7(1) and this schedule (if **subclause (1)** applies); and 25
 - (b) a corresponding registrable offender for the purposes of section 8 and a registrable offender for the purposes of section 7(2) and this schedule (if **subclause (2)** applies); and
 - (c) subject to all other provisions of this Act with any necessary modifications. 30

Related provisions inserted in 2021

6 Validation of specified registrations

This clause makes valid, from when it occurred, a registration—

- (a) under section 7(1)(a) or (2); and
- (b) that occurred on or after 14 October 2016 and before the commencement of the **Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021**; and 35

- (c) that occurred in respect of a person and a conviction specified in **clause 5(1) or (2)**; and
- (d) that is invalid, but would be valid if **clause 5** were in force when the registration occurred; and
- (e) even if the registration is in any way undone or deprived of effect by the Commissioner or a court before that commencement on the ground only that a person to whom **clause 5** applies was not a registrable offender. 5
- 7 Validation of specified registration orders**
- This clause makes valid, from when it was made, a registration order—
- (a) made by a court under sections 7(1)(b) and 9; and 10
- (b) made on or after 14 October 2016 and before the commencement of the **Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021**; and
- (c) made in respect of a person and a conviction specified in **clause 5(1) or (2)**; and 15
- (d) that is invalid, but would be valid if **clause 5** were in force when the order was made; and
- (e) even if the order is in any way undone or deprived of effect by a court before that commencement on the ground only that a person to whom **clause 5** applies was not a registrable offender. 20
- 8 Application for registration order**
- (1) This clause applies in respect of a person who—
- (a) committed before 14 October 2016 a qualifying offence; and
- (b) was convicted on or after 14 October 2016 of the qualifying offence; and
- (c) in respect of that conviction, was sentenced to a non-custodial sentence (for example, in substitution for a custodial sentence), but was not made subject to a registration order (whether or not one was applied for),— 25
- (i) after judgment was delivered, on 9 February 2021, in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2; and
- (ii) before the commencement of the **Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021**. 30
- (2) Despite section 9(4), the prosecutor may, in respect of a person described in **subclause (1)**, apply to the court that imposed the sentence for a registration order (which may be made because **clause 5** and this clause apply to the person). 35
- (3) However, **subclause (2)** does not apply if, at the time of sentencing, the court declined to make a registration order because it was not satisfied that the per-

son posed a risk to the lives or sexual safety of 1 or more children, or of children generally.	
(4) Section 9 applies, with any necessary modifications, to an application made under this clause.	
9 Exceptions to clauses about further retrospective application, etc	5
(1) Clauses 5 to 7 are subject to clause 10 .	
(2) Clauses 5 to 8 are subject to clause 11 .	
10 Exception for obligations between decision and Amendment Act	
(1) Despite clauses 5 to 7 , a person to whom clause 5 applies has, under clauses 5 to 7 , no obligations of a registrable offender—	10
(a) after judgment was delivered, on 9 February 2021, in <i>D (SC 31/2019) v New Zealand Police</i> [2021] NZSC 2; and	
(b) before the commencement of the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021 .	15
(2) This clause does not alter or affect a registrable offender's length of reporting period or period on the register.	
11 Exception for particular appellant and decision as it relates to them	
Clauses 5 to 8 do not—	
(a) apply to the particular appellant in <i>D (SC 31/2019) v New Zealand Police</i> [2021] NZSC 2; or	20
(b) affect that judgment as it relates to that appellant.	
<i>Overriding any inconsistent other law</i>	
12 Clauses 1 and 5 to 8 override any inconsistent other law	
(1) The following clauses had effect, and have effect, despite any other law if, or to the extent that, the other law is inconsistent with them:	25
(a) clause 1 as inserted on 8 March 2017 with effect on and after 14 October 2016:	
(b) clauses 5 to 8 .	
(2) In particular, any other law , for the purposes of subclause (1) , includes any law in all or any of the following:	30
(a) section 6(1) and (2) of the Sentencing Act 2002:	
(b) sections 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990:	
(c) <i>D (SC 31/2019) v New Zealand Police</i> [2021] NZSC 2.	

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Wellington, New Zealand:

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