



Sentencing (Protection of Children from Criminal Offending) Amendment Bill

SUBMISSION BY THE CHILDREN'S COMMISSIONER
TO THE LAW AND ORDER COMMITTEE



MANAAKITIA A TĀTOU TAMARIKI

**Children's
Commissioner**

Sentencing (Protection of Children from Criminal Offending) Amendment Bill

Thank you for the opportunity to contribute to the Committee's work on this Bill.

INTRODUCTION

The Sentencing (Protection of Children from Criminal Offending) Amendment Bill ('the Bill') has been introduced to address the harm caused to children through exposure to adult criminal offending.

The Bill seeks to amend s9 of the Sentencing Act 2002 to make criminal offending that occurs in the presence of children an aggravating factor that the courts must apply when sentencing an adult offender.

My submission considers whether the Bill will advance the rights, welfare and best interests of children in a manner consistent with the New Zealand Government's obligations under the UN Convention on the Rights of the Child (UNCROC)¹.

SUMMARY OF MY POSITION

I support the Bill and consider that it advances the rights, welfare and best interests of New Zealand children for the following reasons:

- > The Bill strengthens the capacity of New Zealand's current sentencing laws to adequately respond to offending which affects children.
- > The intent of the Bill is aligned with the obligations of the New Zealand government under UNCROC to protect children from harm.

However, I see two gaps within the Bill that should be addressed:

- > The Bill's definitions of 'minor' does not cover all children aged under 18 and is therefore inconsistent with UNCROC's age coverage.
- > The Bill's application of "offenders aged 17 years or older" is inconsistent with UNCROC's juvenile justice principles.

I therefore make the following recommendations:

Recommendation 1:

I recommend that the Bill's definition of "minor" is amended to "a person aged under the aged of 18 years."

Recommendation 2:

I recommend that clause 5 of the Bill is amended to state; "(k) that the offence was committed by an offender aged 18 years or older..."

As Children's Commissioner, I have a statutory responsibility to advocate for children's interests, rights and welfare, and to report on any matter that relates to the welfare of children.

¹ As Children's Commissioner, I have a statutory responsibility to advocate for interests, rights and welfare of children aged 0-17, including advancing and monitoring the application of the UN Convention on the Rights of the Child (UNCROC) by departments of State and other Crown instruments. My powers, functions and responsibilities are contained in the Children's Commissioner Act 2003 and the Children, Young Persons and Their Families Act 1989. I am an independent Crown entity.

MY REASONS FOR SUPPORTING THE BILL

Strengthens New Zealand's sentencing laws

The Sentencing Act 2002 currently provides the Court with the following grounds to consider criminal offending that affects children as an aggravating factor when sentencing an offender:

- > Where the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender²; and
- > Where the offending concerns violence or neglect towards a child victim aged 14 years or under³.

However, there is no statutory basis for the Court to take into account, as an aggravating factor, the impact of criminal offending on child witnesses or bystanders⁴.

A child's exposure to criminal offending by parents, family members or other adults is likely to be harmful to their wellbeing⁵. The Bill therefore addresses a gap in our current sentencing laws and strengthens the capability of the Courts to take into account the impact of offending on children.

While it is difficult to predict whether the Bill will reduce the number of offences committed in the presence of children, it is imperative that the law is geared towards protecting children from exposure to harmful adult behaviour. The Bill seeks to achieve this through

requiring a greater degree of criminal accountability.

I note that similar sentencing laws or guidelines have been introduced in common law jurisdictions overseas. This includes New South Wales⁶, the United Kingdom (England and Wales)⁷ and a number of US states⁸.

Aligns with UNCROC

I consider that the intent of the Bill is aligned with the New Zealand Government's UNCROC obligations to protect children from harm, specifically:

- > Article 19.1 concerning the obligation on the state to provide measures to protect children from all forms of abuse, neglect and maltreatment at home
- > Article 33 concerning the obligation of the state to protect children from harm associated with drug offending and trafficking; and
- > Articles 34-36 concerning the obligations upon the state to provide preventative mechanisms to protect children from sexual offending, abduction and child trafficking, and criminal offending generally.

² Section 9(1)(g), Sentencing Act 2002

³ *ibid*, Section 9A – the Bill also highlights the needs to amended s9A that violent offending or criminal neglect towards a child is an aggravating factor in cases involving all children aged under 18 years. This would bring the Sentencing Act into line with ss195 and 195A of the Crimes Act 1961

⁴ This reflects the wider set of aggravating factors under s9 of the Act, none of which directly regard the impact of offending on any person who may be affected by the offence, but who is not a victim.

⁵ For example, research indicates that children who have been exposed to family violence, are more likely than other children to develop aggressive or violent tendencies, suffer from low self-esteem and poor impulse control, experience mental health problems, abuse drugs and alcohol and commit offences – see Jigsaw, *Effects of Family Violence on Children*, http://jigsaw.org.nz/Site/Help/Hot_Topics/family_violence.aspx

⁶ Crimes (Sentencing Procedure) Act 1999 (NSW), section 21A(2)(ea) – provides that an offence committed in the presence of a child aged under 18 years is an aggravating factor for the purposes of sentencing

⁷ Sentencing Guidelines Council, Guideline: Overarching Principles – Seriousness, para 1.23, December 2004, http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf – Includes, as an aggravating factor of a “more that usually serious degree of harm”, offending in the “presence of others: eg. relatives, especially children or partner of the victim.”

⁸ In the United States, domestic violence offending that occur in the presence of children is considered an aggravating circumstance in sentencing guidelines in eight states. Some states, such as Florida and Oregon, expressly require a harsher sentence in such cases. In Utah, any violent offending in the presence of children is considered aggravated for the purposes of sentencing – see Child Welfare Information Gateway, *Child Witnesses to Domestic Violence*, p3 Children's Bureau, Washington DC and Statutes of Utah – Title 76 – Criminal Code – Chapter 3 – Punishments – Code 76-3-203-9

GAPS IN THE BILL

Definition of 'minor' inconsistent with UNCROC

I am concerned that the Bill's definition of 'minor' as a 'person under the age of 17 years' is inconsistent with UNCROC as it does not extend to all children aged under 18 years of age⁹.

I also note that the Bill's definition of "minor" is inconsistent with the child neglect and ill-treatment offences under the Crimes Act 1961, which define a child as a person aged under 18 years¹⁰.

Inconsistent with UNCROC juvenile justice principles

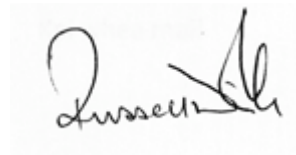
I am also concerned that the Bill is also inconsistent with the obligation under UNCROC to provide specialist juvenile justice measures for offenders aged below 18 years of age¹¹.

It appears that the Bill has been drafted to reflect the age a person can be prosecuted as an adult in New Zealand (17 years and over). However, I consider that this is not a sufficient reason to justify the Bill's inconsistency with UNCROC's age coverage.

There are examples of criminal legislation in both New Zealand¹² and the United Kingdom¹³ where 17 year old adult defendants are provided with special protections in reflection of their rights under UNCROC.

CLOSING

Thank you for your consideration of this submission. I would welcome the opportunity to appear before the Committee to speak to this submission. If you require further information, please contact Principal Advisor (Legal) John Hancock on (09) 374 6102 or at j.hancock@occ.org.nz.



Dr Russell Wills
Children's Commissioner

⁹ Article 1

¹⁰ Section 195, Crimes Act 1961

¹¹ Article 40.3

¹² Section 15 Bail Act 2000

¹³ In the UK, where 17 year olds are also prosecuted as adults, the Courts are nevertheless required to consider separate youth justice guidelines when sentencing 17 year olds – section 142A Criminal Justice Act 2003. The English High Court has also recently held that UNCROC principles must be applied to 17 year olds who are detained under the adult criminal justice system – *C v Secretary of State for the Home Department & Ors*. [2013] EWHC 982 (Admin)