

# **Sentencing (Offences Against Children) Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

The Sentencing (Offences Against Children) Amendment Bill amends the Sentencing Act 2002 by inserting a new section 9A, “Cases involving violence against, or neglect of, child under 14 years”. This section provides guidance to the court when sentencing for offending against children involving violence or neglect.

While the Sentencing Act 2002 provides generic aggravating factors that are relevant to offending against children, it does not expressly address the distinguishing characteristics of such offending. Offending against children involving violence or neglect is particularly abhorrent, and sentencing law should reflect this. The new section lists factors to be considered alongside the factors already provided in section 9 of the Sentencing Act 2002.

The section is aligned with the Children, Young Persons, and Their Families Act 1989 definition of a child as “a boy or girl under the age of 14 years”.

The degree of cruelty, and therefore culpability, is very similar for deliberate neglect and acts of violence against children, and the court should therefore sentence those who offend in either manner using the same criteria. The Bill therefore applies when sentencing for any violent crime or crime of neglect perpetrated on a child.

Where sexual abuse of a child is accompanied by violence (other than that inherent in the abuse) or neglect it will be captured by the above test. It is not intended that the new provision capture incidents of predatory, “stranger-danger” sexual offending, which is dealt with by the criminal justice system through a different set of sanctions. These include extended supervision orders and preventive detention, which is basically a life sentence, the most severe sanction available in New Zealand law.

The new section obliges the court to take into account the defencelessness of children, who cannot fight back or permanently escape the offender. It requires the court to consider the serious or long-term harm that can result from offending against children, and the breach of the special relationship of trust that children are entitled to enjoy with adults. Finally, it reminds the court that some offenders go to great lengths to conceal their offending, and that this must be considered an aggravating factor when sentencing.

This Bill represents the first phase of the Government’s policy response to violent offending against children. The Government plans to address maximum penalties for offending against children in a second Bill to be introduced early next year.

### **Clause by clause analysis**

*Clause 1* is the title clause.

*Clause 2* provides that the Bill comes into force on the day after Royal assent.

*Clause 3* states that the Bill amends the principal Act, being the Sentencing Act 2002.

*Clause 4* inserts a *new heading* and *section 9A* into the principal Act. *New section 9A* provides for additional aggravating factors that must be taken into account in a case involving violence against, or neglect of, a child under 14 years.

### **Regulatory impact statement**

#### ***Executive summary***

New Zealand has an unacceptably high rate of offending against children that involves violence or neglect. The Sentencing Act 2002 (the Act) does not provide any express guidance to the court on sentencing where there is such offending.

The Ministry of Justice (**Justice**) considered various drafting options to provide effective guidance, with a subsidiary objective of ensuring that such offending is clearly denounced. The Department of Corrections (**Corrections**), NZ Police (**Police**), and the Ministry of Social Development (**MSD**) were consulted on these options.

A new stand-alone section will be inserted into the Act, providing a list of factors that the court must take into account when sentencing for offending against children that involves violence or neglect. Justice will monitor the impact of this provision.

The proposal will be implemented by way of the Sentencing (Offences Against Children) Bill to be introduced in December 2008. Justice will liaise with the judiciary and with Corrections on the implementation of the legislation in the period running up to it coming into force.

#### *Adequacy statement*

Justice considers this RIS to be adequate given the time frame.

#### *Status quo and problem*

Offending against children has extremely serious consequences, including the long-term consequences for both its victims and society as a whole. In 2006, Child, Youth and Family received over 63 000 referrals as a result of child abuse, violence, and trauma. Reported family violence, a substantial proportion of which involves violence against children, is growing faster than the reported violence category as a whole. Although much of this increase is due to increased reporting by the public and changed attitudes and focus on family violence by the Police, the level of family violence in New Zealand remains unacceptable.

There are numerous government initiatives in place to address issues associated with child abuse, domestic violence, and family violence. Rightly, most of these are aimed at prevention. The chief legislative response is the Children, Young Persons, and Their Families Act 1989 (the **CYPFA**), which has a focus on protecting children from harm and addressing family problems, rather than punishing offenders.

All offenders, including those who offend against children, are dealt with under the Act. The Act lists aggravating factors that are to be

taken into account at sentencing, some of which broadly apply to offending against children. However, it does not expressly deal with such offending, which has different features from other offending, and may require a different sentencing approach.

### *Objectives*

The objectives are as follows:

- to ensure that those who commit offences against children that involve violence or neglect are sentenced appropriately; and
- to indicate society's denunciation of those who commit offences against children that involve violence or neglect.

### *Alternative options*

Decisions on sentencing are made by the judiciary. The executive's options for influencing discretionary decisions by the judiciary are limited in accordance with the separation of powers. Such options inevitably have a legislative basis.

#### **Option 1**

Option one is to list a number of offences in a schedule to the Act, and prescribe that if those offences are committed against a child, childhood should be taken to be an aggravating factor. This approach has the benefit of certainty before the law. It has detriments in that it can lead to injustice in individual cases and arbitrary decision making. In some circumstances, an offence that is not listed in the Schedule will involve behaviour that is more culpable than offences that are listed. A prescribed list can obstruct that occurring. This option is too tightly focused to comprehensively meet the first objective, and therefore does not adequately meet the second.

#### **Option 2**

Option two is to add "that the victim is a child" to the list of aggravating factors that are listed in section 9 of the Act. This has the benefit of catching all offending against children, avoiding arbitrary distinctions. It has the detriment of failing to provide any detailed guidance as to the reasons why the fact that the victim is a child is an aggravating factor, and how the court should address those reasons. It does

not provide enough detail to meet the first objective, and therefore does not adequately meet the second.

### **Option 3**

Option three is to provide that, when an offence falls within the CYPFA definition of child abuse, the fact that the victim is a child is an aggravating factor at sentencing. The CYPFA definition of child abuse is “the harming (whether physically, emotionally, or sexually), ill-treatment, abuse, neglect, or deprivation of any child or young person”. This has the benefit of providing a familiar, and therefore reasonably certain, scope to the offending that will be targeted. It has the detriment of including all sexual offending against children, some of which (eg, opportunistic offending by a stranger) is more appropriately dealt with by other approaches that the criminal justice system has developed, such as extended supervision orders and preventive detention. It is too inaccurately targeted, while also not providing enough guidance to the sentencing court, to meet the first objective. It therefore does not accurately meet the second.

### ***Preferred option***

The preferred option is to target the proposal expressly at offending involving violence or neglect against children, using the CYPFA definition of child as a boy or girl under 14 years of age, and to provide a list of factors that must be taken into account when sentencing for such offending. This has the benefit of being appropriately targeted and providing sufficient guidance to the court to ensure that appropriate sentences are handed down for offending against children. It therefore meets the first objective. Placing a substantive new provision into the Act requiring, amongst other things, the court to take into account society’s denunciation of child abuse, meets the second objective.

The proposal will impact on sentencing practice in the District and High Courts, possibly meaning that sentencing hearings for those who commit offences against children that involve violence or neglect will take a little longer than currently. However, as the factors that the court will be required to take into account are already usually taken into account under the current regime, we do not believe that this impact will lead to any substantive delay in courts.

Justice will conduct ongoing monitoring of the impact of the proposal on court hearings.

Officials cannot accurately cost the impacts of the proposal. The data available to Corrections does not usually specify the age of the victim, therefore the size of the target group cannot be accurately predicted. However, the proposal is likely to result in modest increases in the number and length of sentences of imprisonment.

It is predicted that, in conjunction with other new policy initiatives, the proposal will contribute to an increase in the prison population, with attendant fiscal implications for Corrections. These volume increases have not been factored into the 2008 prison muster forecast, but will be included in future forecasts once the actual impact becomes apparent.

Justice and Corrections will monitor the effect of the proposal on sentence outcomes.

The proposal will overlap with other aggravating factors that are listed in the Act for general application. These are currently listed in section 9 of the Act. There is no intention to alter or remove any of those factors, as they remain relevant for general sentencing, and may also be relevant to sentencing those who commit offences against children that involve violence or neglect. The new factors capture aspects of behaviour that are not directly covered by the existing factors, and can coexist with them.

### *Implementation and review*

The proposal will be introduced by way of the Sentencing (Offences Against Children) Bill to be introduced, passed, and brought into effect in December 2008. Justice will liaise with Heads of Bench to inform them of the legislative change at the time it is made. Justice will keep Corrections informed of the Bill's progress, to ensure that it is prepared to manage the impact of the policy when the legislation is passed. The public will be notified of the proposal by way of government media release, and media coverage of Parliament and of court hearings.

Justice will conduct ongoing monitoring of the impact of the proposal.





*Hon Simon Power*

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### **The Parliament of New Zealand enacts as follows:**

- Title**  
This Act is the Sentencing (Offences Against Children) Amendment Act **2008**.
- Commencement**  
This Act comes into force on the day after the date on which it receives the Royal assent. 5

- 3 Principal Act amended**  
This Act amends the Sentencing Act 2002.
- 4 New heading and section 9A inserted**  
The following heading and section are inserted after section 9:  
*“Additional aggravating factors in cases  
involving violence against, or neglect of, child  
under 14 years* 5
- “9A Cases involving violence against, or neglect of, child  
under 14 years**
- “(1) This section applies if the court is sentencing or otherwise 10  
dealing with an offender in a case involving violence against,  
or neglect of, a child under the age of 14 years.**
- “(2) The court must take into account the following aggravating  
factors to the extent that they are applicable in the case:**
- “(a) the defencelessness of the victim: 15**
- “(b) in relation to any harm resulting from the offence, any  
serious or long-term physical or psychological effect on  
the victim:**
- “(c) the magnitude of the breach of any relationship of trust  
between the victim and the offender: 20**
- “(d) threats by the offender to prevent the victim reporting  
the offending:**
- “(e) deliberate concealment of the offending from author-  
ities.**
- “(3) The factors in **subsection (2)** are in addition to any factors 25  
the court might take into account under section 9.**
- “(4) Nothing in this section implies that a factor referred to in **sub-  
section (2)** must be given greater weight than any other factor  
that the court might take into account.”**

