

18 March 2022

To the Minister of Justice Hon Faafoi and Minister for Children Hon Kelvin Davis

Cc The Chief Victims Advisor Dr Kim McGregor and Children's Commissioner Judge Frances Eivers

On Child Exploitation Awareness Day, we, the undersigned, ask that the Crimes Act 1961 is amended to better protect our tamariki from sexual (and broader) exploitation in Aotearoa New Zealand.

The current law does not uphold the best interests of children. We submit that the following amendments should be made:

- a. Ensure that section 98D of the Crimes Act is consistent with the Palermo Protocol and that the establishment of all 'means' (e.g., coercion and deception) is irrelevant for the purposes of culpability when the victim is a child;
- b. Amend section 98D to be consistent with the Palermo Protocol and clarify that the consent of a victim¹ is irrelevant to culpability under this;
- c. Broaden the kinds of "exploitation" to which section 98AA of the Crimes Act applies, to reflect the scope of that word as defined in section 98D of the Crimes Act, or to better reflect Article 3(a) of the Palermo Protocol; and
- d. Regularise the penalties for trafficking for section 98AA and section 98D.

There are further amendments that can also be made which would bring the Crimes Act 1961 provisions in line with international instruments to better serve all victims of trafficking in Aotearoa, New Zealand, and bring perpetrators to justice:

- e. Amend section 98B of the Crimes Act to clarify that a means by which trafficking in persons is done also includes "abuse of power", or "abuse of a position of vulnerability"; and
- f. Amend section 98D to include "the giving or receiving of payments or benefits".

The Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Palermo Protocol) states that "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation should be considered "trafficking in persons" even if this does not involve any of the means (e.g. coercion or deception).² However, coercion and deception must be evident to constitute an offence of child trafficking in New Zealand under section 98D of the Crimes Act 1961. This is a departure from the international definition,³ and it means that not all forms of child trafficking are criminalised under this section. Section 98D contains

¹ The consent of both children and adults should be irrelevant to culpability under this section

² Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) Article 3(c)

³ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) Article 3(c) states that "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set out in subparagraph (a)

further departures from international instruments, and amendments to this section could strengthen the law (as set out in more detail below).

Due to the limitations in Section 98D, child sex trafficking cases are often prosecuted as violations of the Prostitution Reform Act 2003 (PRA) instead, which criminalises the facilitating, assisting, causing, or encouraging a child to provide commercial sex⁴, in addition to receiving earnings from commercial sex acts provided by a child.⁵ The PRA prescribes penalties of up to seven years' imprisonment for the sex trafficking of children, which is significantly lower than those applicable for trafficking offenses under the Crimes Act.⁶ This has allowed convicted traffickers to get significantly lighter sentences, with the majority of those convicted under the PRA receiving a sentence of home detention and avoiding imprisonment.⁷ The prosecution of child sex trafficking under the PRA also means that it isn't counted as a human trafficking crime; this makes it difficult to substantiate the extent of human trafficking in Aotearoa New Zealand and thus limits opportunities for frontline workers to develop their awareness of and responses to child trafficking, for without the data there is no basis for resource deployment.

All forms of child trafficking can also be prosecuted under section 98AA of the Crimes Act 1961. However, the type of 'exploitation' to which this section applies is not as broad in scope as section 98D and could better reflect Article 3(a) of the Palermo Protocol. Section 98AA prescribes a penalty of up to 14 years imprisonment which is less severe than section 98D.⁸ Further, section 98AA provides for a defence, where the person charged believed on genuine grounds that the child they were dealing with for sexual exploitation, organ removal or forced labour, was over the age of 18. Section 98D does not contain such a defence, but the problematic wording of section 98D means that it could be difficult to secure a conviction for child trafficking under this section in the event the section 98AA defence is successfully used. As such, a perpetrator may escape being brought to justice.

Amendments to the Crimes Act 1961 have been consistently recommended by the US Trafficking in Persons report⁹, human rights reviews such as CEDAW and through the Human Trafficking Research Coalition's submissions¹⁰. If the Minister is not willing to amend this law, we, the undersigned, would appreciate a meeting with Ministers to understand why this amendment to promote children's safety is deemed unimportant.

We thank you for your consideration of this matter.

⁴ S20 Prostitution Reform Act 2003

⁵ S21 Prostitution Reform Act 2003

⁶ S98D)2) Crimes Act 1961 and s23 Prostitution Reform Act 2003

⁷ US Department of State (2021) *2021 Trafficking in Persons Report: New Zealand* Available at: <https://www.state.gov/reports/2021-trafficking-in-persons-report/new-zealand/>

⁸ The penalty is imprisonment for a term not exceeding 20 years, a fine not exceeding \$500,000, or both

⁹ To see copies of recent Trafficking in persons reports, view here: <https://www.state.gov/trafficking-in-persons-report/>

¹⁰ For information on the Human Trafficking Research Coalition, view here: <https://www.htrc.nz/>

Yours sincerely,

