



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Child Protection (Child Sex
Offender Register) Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 26~~5~~ of the Standing Orders of the
House of Representatives

1. I have considered whether the Child Protection (Child Sex Offender Register) 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 is inconsistent with s 9 (disproportionately severe treatment or punishment) and s 26(2) (double jeopardy) and cannot be justified under s 5 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 262, I draw this to the attention of the House of Representatives.

The Bill

4. The purpose of the Bill is to reduce the risk child sex offenders pose to children. It seeks to do this by establishing a Child Sex Offender Register ('the Register') which will:
 - 4.1 provide government agencies with the information needed to monitor child sex offenders in the community, including after the completion of their sentence; and
 - 4.2 provide up-to-date information to assist the Police to more rapidly resolve cases of child sexual reoffending by those on the Register.
5. The Bill defines a 'registrable offender' as a person who is convicted of a qualifying offence and sentenced to imprisonment, or sentenced to a non-custodial sentence and ordered to be placed on the Register at the discretion of the court. The person must be 18 years of age at the time of the commission of the offence. All registrable offenders will remain on the Register for life.
6. Registrable offenders sentenced to imprisonment will be required to comply with reporting obligations for 8 years, 15 years, or life depending on the qualifying offence committed. Registrable offenders sentenced to a non-custodial sentence who are placed on the Register at the discretion of the court will be required to comply with reporting obligations for 8 years regardless of the qualifying offence committed.
7. The reporting requirements will be imposed by law in consequence of registration. The court does not have discretion, save in relation to whether persons sentenced to non-custodial sentences are placed on the Register (with an 8 year period of reporting obligations then following automatically).
8. All registrable offenders, when residing in the community, will be required to report a range of personal information to the Register. Registrable offenders must update the information annually, within 72 hours of any change of details and at least 48 hours prior to any travel. In the case of travel they must report each address they intend to stay at, when they intend to stay there, whether a child generally resides at that address and their intended date of return to their home address.

Inconsistency with s 9 (Right not to be subjected to disproportionately severe treatment or punishment)

9. Section 9 of the Bill of Rights Act affirms that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.¹
10. The Supreme Court has held that for s 9 to be engaged, the treatment or punishment must reach the very high threshold of outrageousness.²
11. I consider that registration and reporting obligations constitute a punishment for registrable offenders. Being placed on the Register with the accompanying reporting obligations shares some of the traits that were identified by the Court of Appeal as making Extended Supervision Orders ('ESOs') a punishment for the purposes of s 26(2) of the Bill of Rights Act, namely that:³
 - 11.1 the triggering event is a criminal conviction;
 - 11.2 those on the Register are referred to throughout the legislation as registrable "offenders";
 - 11.3 the consequences are in effect a subset of the sanctions which can be imposed on offenders following release on parole; and
 - 11.4 it is an offence to fail to comply with reporting obligations without reasonable excuse punishable by up to one year imprisonment.
12. Being subject to reporting obligations is plainly less of a punishment than deprivation of liberty. Nonetheless, it does impose some restrictions on protected rights – the right to freedom of movement in s 18 is subjected to an advance notification requirement and the right to freedom of expression in s 14 is engaged because reporting obligations are a form of compelled speech.
13. Placing registrable offenders on the Register and requiring them to comply with reporting obligations is not, in itself, disproportionate. Parliament is entitled to take the view that persons convicted of sexual offences against children should be placed on a register and required to comply with reporting obligations. The Bill pursues legitimate aims – the prevention of sexual offending against children by such persons in the future.
14. The problem lies in there being no provision allowing registrable offenders to seek review of their reporting obligations on the ground they no longer pose a risk to the lives or sexual safety of children – particularly those whose offences are a "class 1 offence" and whose reporting obligations therefore endure for the remainder of their life.

¹ The 1985 "A Bill of Rights for New Zealand: A White Paper" made it clear that s 9 was intended to play a role in assessing the appropriateness of any treatment or punishment in particular circumstances – refer para. 10.162.

² *Taunoa v Attorney-General* [2007] NZSC 70 at para. 92.

³ *Belcher v Chief Executive of the Department of Corrections* (2006) CA184/05 (CA).

15. The United Kingdom Supreme Court in *R (F) v Secretary of State for the Home Department* held unanimously that, due to the absence of any provision for review, lifetime “notification requirements” under the Sexual Offences Act 2003 (UK) constituted a disproportionate interference with offenders’ right to “private life” under article 8 of the European Convention on Human Rights.⁴ As Lord Phillips said (Lady Hale and Lord Clarke agreeing and Lord Hope concurring):⁵

“If some of those who are subject to lifetime notification requirements no longer pose any significant risk of committing further sexual offences and it is possible for them to demonstrate this is the case, there is no point in subjecting them to supervision or management or to the interference with their article 8 rights...”

16. Lord Rodger similarly noted it was open to Parliament to take the view that notification requirements for sex offenders were a precaution against the risk of future offending, and said:⁶

“But that makes it all the more important for the legislation to include some provision for reviewing the position and ending the requirement if the time comes when that is appropriate.”

17. For the same reasons, I consider the absence in the Bill of any possibility for review, at least of lifetime reporting obligations, means that the punishment might, in individual cases, endure longer than is justified by the objective of the Bill.

18. The United Kingdom case was decided under article 8 of ECHR which affirms that everyone has “the right to respect for his private life” and that any interference with that right must be justified as being necessary (inter alia) to protect “public safety” and the “rights and freedoms of others”. There is no direct counterpart to article 8 in the New Zealand Bill of Rights Act. However I consider the same protection arises under s 9 which guarantees the right against disproportionate treatment or punishment.

19. In this regard I note the courts have endorsed⁷ the view of Williams J in *R v P*⁸ (my emphasis):

“the prohibition [in s 9] is extended by the words “disproportionately severe” to encompass punishment which is not in itself cruel or unusual but becomes so because it is disproportionately severe *in the particular circumstances*.”

20. The Supreme Court of Canada has also held that minimum sentences “grossly disproportionate” to the offence have the potential to be “cruel and unusual treatment or punishment” where the punishment goes beyond what is necessary to

⁴ [2010] UKSC 17.

⁵ *R and Thompson* at para. 51.

⁶ *R and Thompson* at para. 66.

⁷ *Taunoa v Attorney-General* [2007] NZSC 70 at paras. 175 – 176; *Puli'vea v Removal Review Authority* (1996) 2 HRNZ 510, at pg. 523.

⁸ *R v P* (1993) CRNZ 250, at pg. 255.

achieve the objective and is arbitrarily imposed.⁹ Here the reporting obligations, being automatic for qualifying offences, share the character of a minimum sentence. At the most general level, the imposition of a minimum sentence is inconsistent with the gradation in penalties that is otherwise provided in the Crimes Act 1961. Further, the length of the reporting period cannot take account of the individual circumstances of the case or the previous criminal history of the offender.

21. I therefore conclude it is disproportionate to impose a lifetime continuation of registration and reporting obligations without providing some opportunity for a registrable offender to seek review of their necessity.
22. The United Kingdom Supreme Court observed that “it was open to the legislature to impose a relatively high threshold for review”.¹⁰ A review mechanism was duly introduced following the Supreme Court’s decision, allowing the lifetime notification obligation to be reviewed after 15 years.¹¹ Application is made to the relevant chief officer of police, with a right of appeal to a magistrate. I have not been provided with any evidence that a review exercise would be impracticable in New Zealand.¹²
23. Without a similar mechanism, a registrable offender will continue to be registered and required to comply with reporting obligations regardless of whether they pose a risk. Ongoing punishment of a person who, however serious their original offence, no longer presents a risk to society and is precluded from seeking any review to demonstrate that, would, in my opinion, outrage standards of decency.
24. I note that where s 9 is engaged there is no scope for justification under s 5 of the Bill of Rights Act.¹³ If there is, as I believe, disproportionality due to the inability to seek review of lifetime reporting obligations, it cannot be a “reasonable limit” on the right to be free from disproportional treatment or punishment.

Inconsistency with s 26(2) (double jeopardy)

25. Section 26(2) of the Bill of Rights Act affirms that:

“No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”

⁹ *R v Smith* [1987] 1 SCR 1045.

¹⁰ *R and Thompson* at para. 57.

¹¹ Refer Sexual Offences Act 2003, ss 91A to 91F which were inserted by the Sexual Offences Act 2003 (Remedial) Order 2012.

¹² Clause 35(2) of the Bill does allow the Commissioner to suspend reporting obligations for a person who (in terms of cl 35(2)(a)) “does not impose a risk to the lives or sexual safety of a child or children” and (cl 35(2)(b) who has a terminal illness or impairment that makes it difficult to fulfil the reporting obligations. Clause 35(2)(a) therefore contemplates the sort of inquiry that the United Kingdom Supreme Court held to be required in the case of lifetime notification requirements.

¹³ *Hansen v R* [2007] NZSC 7 at para. 264.

26. This right recognises that there must be finality to proceedings. Once a person has been finally acquitted, pardoned, or convicted and sentenced, they should be able to move on.¹⁴

Registration constitutes a punishment

27. As noted above, I consider that the requirement to be registered and to provide and update information for the purposes of the Register may be regarded as a punishment.

Registration a further punishment when applied retroactively

28. I consider that registration may be seen as part of the original sentence for prospective child sex offence convictions and therefore might not be seen as being punished 'again' for the same offence.
29. Clause 51 of the Bill, however, provides for limited retrospective application of the requirement to register and comply with reporting obligations. The Bill will apply to registrable offenders who are serving a sentence already imposed for a qualifying offence or subject to an ESO following that sentence. The Cabinet Paper estimated there would be approximately 472 offenders to whom these transitional provisions would apply.
30. The registrable offenders to whom cl 51 applies did not face the prospect of registration at the time of their sentencing. I consider that the retrospective application of a requirement to register and be subject to reporting obligations means that they are facing an additional punishment for the same offence. This *prima facie* engages s 26(2) of the Bill of Rights Act.

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

31. 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:¹⁵
- 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?

¹⁴ *Police v Gilchrist* [1998] 16 CRNZ 55.

¹⁵ *Hansen v R* at para. 123.

Is the objective sufficiently important?

32. There is no question the Bill serves an important objective. Child victims of sexual abuse are amongst the most vulnerable and the resultant harm is often very serious and long lasting.

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

33. There may be some doubt as to whether there is a rational connection between retrospective registration and imposition of reporting obligations and the objectives of the Bill. There is limited evidence from other jurisdictions about the effectiveness of sex offender registers and the best practice for long term monitoring of high risk sex offenders in the community after their sentences end. The scarcity of evidence that child protection offender registers deliver significant benefits in terms of improved public safety has been noted in numerous studies.¹⁶
34. The lack of evidence for improved public safety should, however, be weighed against the severe harm caused to the victims of sexual offences against children. There is also some evidence from the literature to suggest that registers achieve reductions in reoffending.¹⁷ Limited retrospective application will therefore help to address the immediate risks presented by qualifying offenders as they move into the community.
35. I therefore consider there is a sufficient rational connection between the limitations and the objective.

Is the impairment on the right greater than reasonably necessary?

36. The issue is whether the objective is achievable by less intrusive means. Presumptions against retrospectivity are contained throughout the New Zealand legal system.¹⁸ However the Legislation Advisory Committee has stated that retrospective application may be appropriate where it is intended to address a matter that is essential to public safety.¹⁹
37. For the reasons discussed above, I consider that the measure is intended to address a matter essential to public safety. Moreover, as noted above, cl 51 narrows the scope of the retrospective application. It does not apply to all persons who would have met the threshold for registration prior to the Bill coming into force: only those currently serving sentences or subject to an ESO. In addition, the punishment imposed also does not amount to an explicit deprivation of liberty.
38. The Bill does not, however, minimally impair the rights of those offenders to whom it retrospectively applies. The Bill could, for example, limit the period of

¹⁶ See, for example: Terry Thomas, *The Registration and Monitoring of Sex Offenders: A Comparative Study* (Routledge, 2011), pg. 149; Amanda Y. Agan, 'Sex Offender Registries: Fear Without Function?' *Journal of Law and Economics*, Vol. 54, No. 1, 2011.

¹⁷ *Patterns of reconviction among offenders eligible for Multi-Agency Public Protection Arrangements (MAPPA)* ISBN: 978 1 84099 471 1.

¹⁸ Refer Interpretation Act 1999, s 7 and the Crimes Act 1961, s10A.

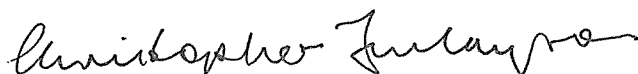
¹⁹ Legislation Advisory Committee Guidelines (2014 Edition), Chapter 11, at para. 11.1.

registration or reporting obligations for those it affects retrospectively or include a review mechanism allowing their case for de-registration or suspension of their reporting obligations to be heard.

39. These options would still limit s 26(2) because they do not eliminate the retrospective double punishment. Nevertheless, they would more minimally impair the right not to be punished again for the same offence.
40. I consider the Bill as it stands limits s 26(2) more than is reasonably necessary. People to whom the Bill retrospectively applies will have no effective means to seek relief from the effects of their double punishment. Due to the risk that this punishment will become disproportionately severe I therefore also consider the limit on s 26(2) is not in due proportion to the importance of the objective.

Conclusion

41. For the above reasons, I have concluded the Bill appears to be inconsistent with s 9 and 26(2) of the Bill of Rights Act and that the inconsistencies cannot be justified under s 5 of that Act.



Hon Christopher Finlayson

Attorney-General

6 May 2015