

# Sex Offenders Registry Bill

5 August 2003

Attorney-General

LEGAL ADVICE

SEX OFFENDERS REGISTRY BILL:

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

## Introduction

1. We have considered the Sex Offenders Registry Bill, a Member's Bill in the name of Deborah Coddington MP, for consistency with the New Zealand Bill of Rights Act 1990. This Bill was introduced to the House on 6 March 2003 and was read for the first time on Wednesday 30 July 2003.
2. In our view, the Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act.

## Overview of the Bill

3. The Sex Offenders Registry Bill would establish a registry of offenders who have committed an offence under sections 128 to 144C of the Crimes Act 1961. That registry would contain the name(s) used by the offender, his or her address, date of birth, the offences (or alleged offences) committed, reference to identifying information held on the offender and other identifying information prescribed by regulations.
4. The registry would not be accessible to the general public (clause 13(1)). The registry would only be accessible to members or employees of the Police for the purposes of the Bill (set out in section 3) and law enforcement purposes. The Minister would also have discretion to authorise other persons to have access to the registry for the purposes of the Bill and law enforcement purposes (clause 13(2)).
5. The purposes of the Bill are stated broadly and include "to reduce sexual offending".
6. Sex offenders liable to registration are defined in the Bill as those who:
  - (i) On the day the Bill comes into force, are serving a sentence in respect of an offence under sections 128 to 144C of the Crimes Act (including individuals who are appealing their convictions) or are on parole or have been found not guilty of a sexual offence by reason of insanity and are still being held under the Mental Health (Compulsory Assessment and Treatment) Act 1992; and
  - ii) On or after the date on which the Bill comes into force, are convicted of committing a sexual offence, or are found not guilty of a sexual offence by reason of insanity, or

are cautioned by a member of the police in respect of a sexual offence which, at the time when the caution is given, the person admits.

7. The information recorded on a sex offender must be maintained either for the life of that person or for a minimum of 10 years depending on the nature of the offence and whether or not they are a repeat offender (clause 11).
8. Clause 9 of the Bill requires a sex offender who resides in the community to notify the Police of any changes to his or her name or address within 14 days of the change. If the person is imprisoned, detained or being treated in an institution, the institution must notify the Police within 14 days of the person's release date the last known home address for the person, the home address of the person upon release (if known) and any names the person may use. The person is able to view the record and ask for information to be corrected (clause 12). There is no power to remove a person's name from the registry (except where they have been wrongly included) unless that person has been pardoned.

### **Section 14 of the Bill of Rights Act: The right to freedom of expression**

9. We have considered whether clause 9(1) of the Bill raises an issue in relation to section 14 (freedom of expression) of the Bill of Rights Act. Clause 9(1) requires a person whose details are entered onto the register to notify the Police of any other names by which they are known, their home address and any change in address. Clause 10 of the Bill then makes it an offence not to notify the Police of any such change of address or name within 14 days.
10. We consider that this provision is not inconsistent with the right to freedom of expression. We acknowledge that the right to freedom of expression, as protected by section 14, includes the right to say nothing or the right not to say certain things. We also acknowledge the decision of the High Court in *Duff v Communicado Ltd* that freedom of expression under section 14 should generally be defined widely and question of limits on the right should generally be determined pursuant to section 5 (justified limitations in a free and democratic society). However, we do not consider that a statement of an individual's name and address is sufficiently expressive so as to attract the protection afforded by section 14 of the Bill of Rights Act.
11. The requirements of clause 9(1) do not compel any individual to disclose any opinion they hold, or to state any matter that they do not believe to be true. We note, in particular, Canadian judicial decisions holding that the Canadian Charter of Rights and Freedoms does not require the elimination of "minuscule" constitutional burdens, and legislative action that increases the costs of exercising a right should not be invalidated if the burden is "trivial".
12. In addition, we note (while acknowledging the minor differences between section 14 of the Bill of Rights Act and section 2(b) of the Canadian Charter) the decision of the Supreme Court of Canada in *Irwin Toy Limited* that "'expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That

meaning is its content." Here, a requirement to provide your name and address details does not appear to be sufficiently "expressive" in content to attract the protection of section 14. Rather, name and address information can be described as factual and descriptive in nature as opposed to expressive or representative of expressive content.

13. In reaching this conclusion, we note the decision in *Regina v Holman* that held that a person's right to freedom of expression was not infringed by being required to complete a census form.
14. Even if provision of this information could be said to attract the protection of section 14 of the Bill of Rights Act, we consider the nature and extent of any inconsistency is such that, having regard to the Bill's objectives, it would be "justified" in terms of section 5 of the Bill of Rights Act.

### **Other issues**

15. The sex offenders register will include the names and addresses of any person who is *cautioned* by the Police provided, at the time of the caution, they admitted that they had committed the offence (see clause 5(b)(iii)). We understand that this aspect of the Bill is based in part on similar provisions in the United Kingdom Sex Offenders Act. In the UK, cautions are a formal mechanism with a statutory basis. Cautions must be certified for the purposes of the UK Sex Offenders Act. By way of contrast, Police cautions or warnings in New Zealand are given informally. The administering of a caution is not always recorded and the Bill provides no mechanism to monitor the use of cautions.
16. We have considered clause 5(b)(iii) for consistency with section 25(c) - the right to be presumed innocent until proved guilty according to law - and 27(1) - the principles of natural justice - of the Bill of Rights Act. However, we have come to the conclusion that neither right arises under this provision. Section 25(c) only applies where a person has been charged with an offence, and 27(1) does not apply in this case because a Police officer does not make a "determination" for the purposes of this provision.
17. Any person, who has admitted an offence when given a Police caution, has a limited right to later challenge the inclusion of their details in the Register. Clause 12 of the Bill enables an offender whose name is on the registry to request that the responsible Minister correct any information. In deciding whether or not to correct (including remove) the information the Minister would be making a determination and so section 27(1) would apply and the Minister would therefore be required to act in accordance with the principles of natural justice when decided whether any information was incorrect. If the person was correctly included on the registry (i.e was cautioned for an offence and admitted the offence) then their name would remain on the register.

## Conclusion

18. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to Deborah Coddington MP, if you agree.

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Bill of Rights/Human Rights Team

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cc Minister of Justice  
Deborah Coddington MP

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