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**THE CHILD PROTECTION OFFENDER REGISTER: AN
ANALYSIS OF THE PROPOSED NEW ZEALAND CHILD SEX
OFFENDER REGISTER**

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Abstract

Sex offender registries are prominent and controversial methods of managing sex offenders once released into the community. The purposes and form of these registers vary between jurisdictions. A current proposal has been made for the development and implementation of such a register in New Zealand which would focus on child sex offenders specifically. In determining whether this intervention would be justified and serve a practical purpose, this paper looks at the risk posed by child sex offenders and the current measures in place to manage this risk. This paper finds that the proposed child sex offender register will enhance the current management measures and information sharing arrangements regarding child sex offenders. Various rights and interests are affected by the implementation of a sex offender registry; the inherent tension being between freedom of expression and privacy. This paper looks at whether the current proposal achieves an appropriate balance between these rights. Whilst an appropriate balance is achieved by the register itself, this balance will have to be more carefully considered in the development of the proposed disclosure scheme.

Word length

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I Introduction

“The test of a civilised society is the way it treats its sex offenders, because they provoke the most visceral reaction.”¹ As a subset of offenders, significant attention is given to sex offenders and how their offending can be prevented. An internationally popular yet controversial approach is the use of a sex offender registry. For the purposes of this paper a sex offender registry is deemed to be a database containing information about persons who have been convicted of specific sexual offences. New Zealand’s Cabinet has recently approved a paper presented by Minister of Police and Corrections Anne Tolley, providing for the implementation of a child sex offender registry named the Child Protection Offender Register (CPOR). The purposes of this registry are to enhance the current management of child sex offenders and information sharing arrangements surrounding such offenders. As the CPOR will initially be focused on child sex offenders, where possible this paper will refer to child sex offenders specifically. Furthermore, a child sex offender, for this paper, refers to an adult who has committed a specified sexual crime against a child under the age of 16.

This paper will begin by analysing the particular societal problem and deficiencies that the register is looking to remedy. As such, the general nature and reoffending rates of child sex offenders will be analysed to determine whether this is an issue that warrants such government intervention. Parts IV and V will look at the current management and information-sharing arrangements, determining whether there are alleged deficiencies which could be remedied by the register. The paper will then move on to look at the New Zealand proposal in detail before analysing the competing rights at play, focusing particularly on the tension between freedom of expression and privacy. Part IX then examines international approaches to registries

¹ Debra L. Weiss “The Sex Offender Registration and Community Notification Acts: Does Disclosure Violate an Offender’s Right to Privacy?” (1996-1997) 20 Hamline L. Rev. 557 at 557.

which can inform the development and implementation of the New Zealand scheme. Finally the proposal for a corresponding disclosure scheme will be analysed with a particular focus as to how such a scheme can be implemented without disrupting the balance of rights and general nature of the register itself.

Ultimately this paper finds that there is a substantial gap in current management of child sex offenders to justify a restricted register. A restricted access register also achieves an appropriate balance of competing rights. However caution is advised in the development of a disclosure scheme to ensure that the balance of competing rights is adequately addressed.

II (Child) Sex Offending

A Prevalence of child sex offending

The prevalence of child sexual abuse is very difficult to determine and therefore estimates generally vary widely.² This difficulty spurs from the fact that sex offending and in particular child sex offending, is largely a ‘hidden’ crime. The vast majority of sexual offences take place in private, with only the victim and offender present. As such, witnesses and corroborating evidence are often difficult to come by which both skews conviction rates and perhaps discourages victims from reporting.³ Furthermore, child victims of sexual offences will often not understand the nature of what has taken place, particularly in cases of intrafamilial abuse, and simply may not realise that there was anything wrong or unusual about that behaviour.⁴ These factors contribute to what is known as the ‘dark figure’ of unreported sexual crimes which suggest that it is unwise to place too much reliance on reported levels of offending.⁵ Determining the actual rate and prevalence of child sexual abuse requires a need to “rely on assumptions, guesswork and a bit of ‘putting one’s finger to the wind’”.⁶

² Kelly Richards “Misperceptions about child sex offenders” (2011) 429 Trends and Issues in Crime and Criminal Justice 1 at 1.

³ Cathy Cobley *Sex Offenders: Law, Policy and Practice* (2nd ed, Jordan Publishing Limited, Bristol, 2005) at 27.

⁴ Cathy Cobley, above n 3, at 27.

⁵ Cathy Cobley, above n 3, at 28.

⁶ Cathy Cobley, above n 3, at 28.

However, both reported offence levels and research surveys will be examined in this paper to provide some indication as to the level of such offending in society. 2005 figures from New Zealand show that there were 1 824 convictions for all sexual offences. Of this number, 40% (720) of these convictions involved the victimisation of children under 12 and 36% (646) of these convictions involved victims between the ages of 12 and 16.⁷ However as these statistics only represent instances of child sex offending which resulted in a conviction, these figures are not representative of the actual level of such offending. As has been discussed, child sex offending is often not reported and even if reported, not all cases will result in a conviction.

A United Kingdom study based on 2 869 18-24 year olds found that 11% had reported sexual abuse before the age of 13.⁸ In comparison, an Australian prevalence study found that 4-8% of males and 7-12% of females experience penetrative child sex abuse. The same study found that 12-16% of males and 23-36% of females experience non-penetrative child sex abuse.⁹ A Christchurch Health and Development survey recently followed 1000 children from birth and found that 7.3% of the surveyed girls and 3.4% of the surveyed boys reported that they were sexually abused before the age of 16.¹⁰ Whilst the dependency of such survey figures may vary, they provide an indication outside of conviction statistics as to the prevalence of such offending.

Aside from the initial trauma of being abused, the sexual abuse of young children has also been shown to result in depression, Post Traumatic Stress Disorder, antisocial behaviour, parenting difficulties, sexual re-victimisation and sexual dysfunction.¹¹ Therefore we can see that this issue is one that is both prevalent and one which leads to a multiplicity of issues for its victims.

⁷ Ministry of Justice "Prosecutions and convictions for all offences" (2006) Ministry of Justice <<http://www.justice.govt.nz/publications/global-publications/c/just-published-a-summary-of-conviction-and-sentencing-of-offenders-in-new-zealand-1996-to-2005/conviction-and-sentencing-of-offenders-in-new-zealand-1996-to-2005-1/2-prosecutions-and-convictions-for-all-offences#2.6>>

⁸ Richards, above n 2, at 1.

⁹ Richards, above n 2, at 1.

¹⁰ STOP "Why do people sexually abuse?" (28 September 2014) STOP <<http://www.stop.org.nz/main/whyabuse/>>

¹¹ Richards, above n 2, at 1.

B Misconceptions about child sex offenders

There are various misconceptions held by society about child sex offenders, often prompted by media and popular culture. These misconceptions can both prevent society from protecting their children from these individuals and impede on offender rehabilitation and acceptance in the community.

1 All child sex offenders are paedophiles

It is important to note that child sex offenders and paedophiles are two different categories of persons, and whilst there is a general overlap they should not be confused as being the same thing. Importantly, not all child sex offenders are driven by a need to sexually offend against children in particular. For this category of offenders, opportunity can play an important role.¹² For the purposes of this paper, child sex offenders will be referred to as the relevant group of offenders. Within this category there will likely be a high number of offenders who would be classified as paedophiles or having paedophilic tendencies. Whilst this may be relevant for each individual at the rehabilitation stage, this paper will analyse these offenders on the basis that they are child sex offenders.

2 Child Sex Offenders target strangers

Whilst popular culture and media may have created a fear of ‘stranger danger’, child sex offences generally carry a low incidence of stranger abuse. As such, the majority of child sex offenders are known to their victims.¹³ The Department of Corrections has estimated that 85% of child sex abuse is committed by someone known to the child or their family.¹⁴ However it has been found that male children are likely to be abused by a stranger at a much higher rate than female children.¹⁵

¹² Richards, above n 2, at 2.

¹³ Richards, above n 2, at 2.

¹⁴ Department of Corrections “Release and Management of sexual offenders” Department of Corrections
<http://www.corrections.govt.nz/working_with_offenders/community_sentences/employment_and_support_programmes/release-and-management-of-sexual-offenders.html>

¹⁵ Richards, above n 2, at 3.

3 *All child sex offenders were victims of sexual abuse themselves*

It has been suggested that this misconception has arisen as a comfort factor to act as reassurance that “if offenders are just victims then no one has to face the reality...that there are people out there who prey on others for reasons we simply don’t understand.”¹⁶ However as a group of offenders, there is no evidence that an overwhelming majority suffered such abuse.¹⁷

III Sex Offender Recidivism and Risk of Reoffending

One of the primary rationales behind sex offender registries is that released sex offenders pose an on-going risk to society as they are significantly likely to reoffend once released into the community.¹⁸ However the likelihood of recidivism for this particular group of offenders is often disputed. This Part will analyse the way in which the risk of reoffending is assessed as well as the current levels of recidivism and whether this justifies the use of a register to manage child sex offenders.

A How do we Calculate the Risk of Reoffending?

1 Automated Sexual Recidivism Scale (ASRS)

The ASRS is an automated scoring instrument of static risk variables.¹⁹ These static risk variables can all be obtained from the offender’s criminal history.²⁰ Under an ASRS analysis, offenders are divided into four risk categories; low, medium to low, medium to high and high.²¹ ASRS is most useful when large numbers of offending need to be screened quickly and consistently.²² In New Zealand the risk ratings from the ASRS analysis provide an initial screening for sexual offenders under

¹⁶ Richards, above n 2, at 3.

¹⁷ Richards, above n 2, at 3.

¹⁸ Alan R. Kabat “Scarlett Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol’s Sake” (1997) 35 Am. Crim. L. Rev. 333 at 335.

¹⁹ Skelton A., Riley D., Wales D., and Vess J. “Assessing risk for sexual offenders in New Zealand: Development and validation of a computer-scores risk measure” 12 Journal of Sexual Aggression 277 at 280.

²⁰ Skelton et al, above n 19, at 280.

²¹ *R v Peta* [2007] 2 NZLR 627 at [21].

²² Skelton et al, above n 19, at 284.

consideration for release from prison and for those eligible for extended periods of parole supervision.²³ However these initial ratings are then supplemented by comprehensive assessment of the individual's risk by psychological staff.²⁴

2 *Sex Offender Needs Assessment Rating (SONAR)*

This risk assessment tool assesses both stable dynamic factors that contribute to risk but change slowly over time and acute factors that may be present for a shorter period of time.²⁵ The stable dynamic factors used are intimacy deficits, negative social influences, attitudes tolerant of sexual offending, sexual self regulation and general self-regulation.²⁶ The acute dynamic factors which are assessed are substance abuse, negative moods such as depression, and victim access.²⁷ Department of Corrections psychologists undertake semi-structural clinical assessment which are based (but not entirely consistent) on the factors in *SONAR*. This can lead to some discrepancies and variation between offenders dependant on the factors used in assessment.²⁸

B Limitations of Calculated Risk Assessment

Risk assessments based on static factors (as seen in ASRS) are “by definition unchanging and insensitive to changes over time in the individual or their circumstances.”²⁹ Furthermore, actuarial risk measures based on group outcomes are less effective when the future behaviour of an individual offender is being predicted.³⁰ This issue is often analogised with the determination of survival rates in cancer patients. “Survival analysis can account accurately for outcomes with subgroups of patients defined by shared risk factors and treatment approaches but cannot say precisely what the fate of any individual patient will be.”³¹ In order to provide the most accurate determination of the risk of an individual offender reoffending, it is

²³ Skelton et al, above n 19, at 284.

²⁴ Skelton et al, above n 19, at 284.

²⁵ *R v Peta*, above n 21, at [32].

²⁶ *R v Peta*, above n 21, at [32].

²⁷ *R v Peta*, above n 21, at [34].

²⁸ *R v Peta*, above n 21, at [36].

²⁹ *R v Peta*, above n 21, at [30].

³⁰ *R v Peta*, above n 21, at [285].

³¹ Skelton et al, above n 19, at 285

recommended that ASRS and SONAR should be administrated and integrated with other relevant information pertaining to the particular individual which are known to relate to a risk of reoffending.³²

C Child Sex Offender Recidivism Rates in New Zealand

The level and rate of reoffending by a particular group of offenders can be persuasive evidence in determining whether interventions such as an offender register are justified. A study conducted by the Department of Corrections found that 5% of the surveyed child sex offenders were re-imprisoned for another sexual offence.³³ Whilst this may seem to be a particularly low figure, it ought to be noted that this does not include any non-custodial convictions.

Independent research using the ASRS analysis has been undertaken to determine the risk of child sex offenders reoffending against children. Reoffending of the monitored offenders was recorded for five years after release and ten years after release.³⁴ The level of recidivism varied in accordance with the differing risk categories as determined under the ASRS analysis. Low risk offenders were found to have a recidivism rate of 2% at the five year stage and 8% at ten years. Medium to low offenders were calculated at 5% for 5 years and 11% for ten years, with medium to high offenders posing a 7% risk at five years and 16% at ten years. Finally, high risk offenders posed a risk of reoffending against children of 21% after five years and 36% after ten years.³⁵ The overall risk of reoffending for child sex offenders was 5% after five years and 11% after ten years.³⁶

However, as discussed in Part II sexual offences have a high incidence of failing to result in the apprehension or conviction of an offender due to a lack of reporting and

³² *R v Peta*, above n 21, at [51].

³³ Department of Corrections “Reconviction Rates of Sex Offenders: Five Year follow-up study” (16 August 2011) Department of Corrections
<http://www.corrections.govt.nz/resources/reconviction_rates_of_sex_offenders.html>

³⁴ *R v Peta*, above n 21, at [25].

³⁵ *R v Peta*, above n 21 at [25].

³⁶ *R v Peta*, above n 21, at [25].

inability for cases to be resolved.³⁷ Unfortunately this means that the level of conviction of sex offenders individually and as a group is unrepresentative of actual offending. This issue is also relevant when analysing reoffending.

A common characteristic of sexual offending is the compulsive behaviour which persists over the offender's lifetime.³⁸ Therefore there may be long gaps between a sex offenders offending which may be misconstrued as successful rehabilitation when in fact the offender may still be at risk of reoffending. The variance of risk levels between the five year and ten year follow up data in the above independent research supports the idea that child sex offenders often have long periods of time between offending. Therefore, an individual's level of risk is likely to vary over time, contributing to the difficulty of assessment.

1 Do these recidivism rates justify a sex offender register?

Although this paper has highlighted that recidivism rates and risk assessment tools are often inaccurate, these figures can be used as an indication of whether a register is appropriate and necessary for the management of child sex offenders. In New Zealand, studies undertaken by the Department of Corrections have found that those who committed sexual offences were less likely to commit further offences compared to those who committed dishonesty offences such as burglary, car conversion and theft, and violent offences such as homicide and assault.³⁹ Furthermore, among the general category of sex offenders, child sex offenders had a much lower re-imprisonment rate than that of rapists.⁴⁰ This prompts some scepticism about whether the recidivism rates of child sex offenders justify the use of a register in comparison to the recidivism rates of other offenders.

³⁷ Department of Corrections "Reconviction Rates of Sex Offenders: Five Year follow-up study" (16 August 2011) Department of Corrections
<http://www.corrections.govt.nz/resources/reconviction_rates_of_sex_offenders.html>

³⁸ Department of Corrections, above n 37.

³⁹ Department of Corrections "Re-imprisonment rates by original offence type" Department of Corrections <<http://www.corrections.govt.nz/resources/reconviction-patterns-of-released-prisoners-a-48-months-follow-up-analysis/re-imprisonment-rates-by-original-offence-type.html>>

⁴⁰ Department of Corrections, above n 39.

It is plausible that the recidivism rates for violent offenders suggest a greater need for a register in this area of offending. Perpetrators of homicide and assault in New Zealand have been found to have re-imprisonment rates of 28% and 48% respectively.⁴¹ These rates are significantly higher than that of child sex offenders. Other jurisdictions, such as America and the UK have established registers for persistent violent offenders. However it is important to note that most violent offences are generally not as secretive as that of child sex offences and do not always have the same disparity in reporting rates. This may account somewhat for the comparably higher reoffending rate. It is likely that the general social stigma around sexual offending, particularly of children, and the international prominence of sex offender registries have prompted this group of offenders to be targeted.

If CPOR is found to be a success the government may look at extending the register to both adult sexual offending and serious violent offending. This eventual combined approach would also be consistent with other policy initiatives such as the Parole (Extended Supervision Orders) Amendment Bill which aims to expand the application of Extended Supervision Orders (ESO) to violent offenders as well as child sex offenders. However there is a risk that dealing with both groups of offenders through the same measures will lead to ineffective outcomes given the particular characteristics and needs pertaining to each group of offenders.

Therefore, whilst the recorded rates of recidivism for child sex offenders do not prompt an urgent need to register these offenders, these rates are unlikely to be the only factor to determine the appropriateness of a register. The devastating effect that such offending has on its victims, the 'slipperiness' with which it often evades the legal system and international acceptance of sex offender registries are factors that encourage use of a register. Therefore, although the risk of reoffending does not on its own provide overwhelming support for a register, it does not exclude its use either.

IV Current management of released Sex offenders

⁴¹ Department of Corrections, above n 37.

Sex offenders are generally dealt with through a combination of retributive justice and reformatory justice. “Retributive justice assumes that punishment deters crime, discourages offenders from committing further crimes, and illustrates to society the consequences for violations of the law.”⁴² Reformatory justice assumes that there is something wrong with the offender and that the offender will benefit from treatment.⁴³ This Part of the paper will examine how New Zealand implements both forms of justice in their management of released sex offenders.

A *Extended Supervision Orders*

Where child sex offenders are deemed to be an on-going risk to children under the age of 16, the Department of Corrections can apply for an Extended Supervision Order (ESO) of up to 10 years.⁴⁴ In order to be eligible for an ESO, an offender must have committed and been sentenced to imprisonment for a relevant offence under s107B of the Parole Act 2002. These offences include all sexual offences committed in respect of persons under the age of 16.⁴⁵ The application for an ESO must be made whilst the offender is still in prison or subject to release or detention conditions.⁴⁶

Under such an order, offenders can be required to report to their probation officer, attend treatment programmes and comply with employment and residential requirements.⁴⁷ The ESO can also include monitoring conditions such as GPS monitoring⁴⁸ or being accompanied and monitored at all times by approved personnel.⁴⁹ Courts have stated that ESOs amount to punishment given the severe

⁴² Gemma Russell, Fred Seymour and Ian Lambie “Community Reintegration of Sex Offenders of Children in New Zealand” (2011) 57 International Journal of Offender Therapy and Comparative Criminology 55 at 55.

⁴³ Russell et al, above n 42, at 56.

⁴⁴ Department of Corrections “Extended Supervision” Department of Corrections <http://www.corrections.govt.nz/working_with_offenders/community_sentences/sentences_and_orders/extended-supervision.html>

⁴⁵ *R v Peta*, above n 21, at [5].

⁴⁶ *R v Peta*, above n 21, at [5].

⁴⁷ Department of Corrections, above n 44.

⁴⁸ Anne Tolley ‘Minister announces Child Protection Offender Register’ (14 Augst 2014) <<http://www.beehive.govt.nz/release/minister-announces-child-protection-offender-register>>

⁴⁹ *R v Peta*, above n 21, at [12].

levels of restrictions that can be imposed and the fact that they are inflicted in response to criminal behaviour.⁵⁰

The purpose of these orders is to protect members of the community from those who pose a real and on-going risk of committing sexual offences against children or young persons.⁵¹ As such, the test is whether the Court is satisfied, after considering a health assessor's report, that the offender is likely to commit any of the relevant offences in the future.⁵² The health assessor's report must address, directly or by inference;⁵³

- a) the nature of any likely future sexual offending, including the age and sex of likely victims;
- b) the offender's ability to control his or her sexual impulses;
- c) the offender's predilection and proclivity for sexual offending;
- d) the offender's acceptance of responsibility and remorse for past offending; and
- e) any other relevant factors.

It is important to note that the granting of an ESO is a judicial decision and not that of a health assessor; courts have warned against simply 'rubber stamping' the reports of health assessors.⁵⁴ This establishes judicial control over the "imposition of the most restrictive form of management of offenders".⁵⁵ The judicial jurisdiction for making this order depends on the risk of relevant offending being both real, on-going and one that cannot be sensibly ignored having regard to the nature and gravity of the likely reoffending.⁵⁶

The term of the ESO must not exceed 10 years⁵⁷ and must be the minimum period required for the purpose of the safety of the community in light of:⁵⁸

⁵⁰ *R v Peta*, above n 21, at [13].

⁵¹ Parole (Extended Supervision) Amendment Act 2004, s107I(1)

⁵² *R v Peta*, above n 21, at [6].

⁵³ *R v Peta*, above n 21, at [6].

⁵⁴ *R v Peta*, above n 21, at [7].

⁵⁵ Parole (Extended Supervision Orders) Amendment Bill Explanatory note at 1.

⁵⁶ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 at [11].

⁵⁷ Parole (Extended Supervision) Amendment Act 2004, s107I(4)

⁵⁸ Parole (Extended Supervision) Amendment Act 2004, s107I(5)

- a) the level of risk posed by the offender; and
- b) the seriousness of harm that might be caused to victims; and
- c) the likely duration of risk.

1 Parole (Extended Supervision Orders) Amendment Bill

Changes to the ESO system are in the process of being implemented to help minimise the risk of serious harm to the public by offenders.⁵⁹ The Parole (Extended Supervision Orders) Amendment Bill aims to expand ESOs for child sex offenders beyond the current maximum ten-year time frame and is currently before the Law and Order Select Committee. The Bill would allow ESOs to be renewed for as long as they are needed with regular mandatory review by the courts.⁶⁰ It would also allow for ESOs to be extended to include the management of high risk adult sex offenders and very high risk violent offenders.⁶¹ Anne Tolley says that this reform is timely as the first implemented ESOs lasting ten years will begin to run out at the start of 2015. “We need to act to ensure that those offenders who still pose a risk at the end of an order can continue to be managed by Corrections.”⁶²

The Bill also amends the test for imposing a ESO. The current test is whether an offender is likely to commit further relevant offences. The Bill provides that a court may impose an ESO where the offender has, or has had, a pervasive pattern of serious sexual or violent offending and either: a) where there is a high risk that the offender will commit a relevant sexual offence in the future or b) where there is a very high risk that the offender will in future commit a relevant violent offence.⁶³ Here we can see that the test for future sexual offences is of a lower threshold than that required for

⁵⁹ Department of Corrections “Parole Extended Supervision Orders Amendment Bill” (17 April 2014) Department of Corrections <
http://www.corrections.govt.nz/resources/parole_extended_supervision_orders_amendment_bill.html>

⁶⁰ Suzanne Kennedy *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (Department of Corrections, 21 November 2013) at 2.

⁶¹ Parole (Extended Supervision Orders) Amendment Bill 2014

⁶² Parole (Extended Supervision Orders) Amendment Bill 2014

⁶³ Parole (Extended Supervision Orders) Amendment Bill 2014

future violent offences. The threshold for the high risk of sexual offending is met where the Court is satisfied that the offender;⁶⁴

- a) displays an intense drive, desire or urge to commit a relevant sexual offence; and
- b) has a predilection or proclivity for serious sexual offending; and
- c) has limited self-regulatory capacity; and
- d) displays either of the following,
 - a. a lack of acceptance of responsibility or remorse for past offending;
 - b. an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

This Bill seems to provide more stringent requirements for when an ESO can be imposed upon an offender. This is to ensure that only the highest-risk offenders will be subject to an order and that offenders are only subject to these orders for as long as the serious risk of harm to the public warrants it.⁶⁵

B Public Safety (Public Protection Orders) Bill

The Public Safety (Public Protection Orders) Bill aims to complement the above Bill by placing a small number of offenders who pose a very high risk of imminent serious sexual or violent offending into secure residences on prison precincts.⁶⁶ In order to place a Public Protection Order (PPO) upon an offender, the Court would have to consider the evidence (including medical and psychological evidence) and decide on the balance of probabilities that the offender poses a very high risk of imminent and serious sexual or violent reoffending and that less restrictive forms of supervision are not adequate for preventing almost certain further offending.⁶⁷ The Select Committee found that it was appropriate for a civil standard to be set given that “the regime

⁶⁴ Parole (Extended Supervision Orders) Amendment Bill 2014

⁶⁵ Parole (Extended Supervision Orders) Amendment Bill Explanatory note at 1.

⁶⁶ (3 July 2014) 700 NZPD 19201

⁶⁷ Public Safety (Public Protection Orders) Bill 2012 (2014 68-2) (Bills Digest No. 2165.

proposed by the bill would involve non-punitive civil detention, and applications for PPOs would be made to the High Court in its civil jurisdiction”.⁶⁸

PPOs will only capture those offenders who impose such a severe risk of harm, and thus the amended ESO’s are intended to capture those sexual offenders who pose the required high risk of harm but do not meet the standard for a PPO.⁶⁹ In fact, it is expected that where an application for a PPO is declined by the High Court, that Corrections will automatically make an application for an ESO. If implemented, Corrections may find it more practical to apply for both a PPO and an ESO contingently, though in effect the court would consider each of these applications separately.⁷⁰

C Preventative Detention

Alternatively, high risk sex offenders can be dealt with under the provisions for preventative detention under the Sentencing Act 2002. Preventative detention is an indeterminate sentence where no minimum period is specified. After their release, offenders who were sentenced to preventative detention are subject to recall for life.⁷¹ The purpose of preventative detention is to “protect the community from those who pose a significant and ongoing risk to the safety of its members”.⁷² This purpose aligns with that of ESOs and PPOs. The legislative purpose has been said to be inherently protective rather than punitive.

Preventative detention is available where:⁷³

- a) a person is convicted of a qualifying sexual or violent offence; and
- b) the person was 18 years of age or over at the time of committing the offence; and

⁶⁸ Public Safety (Public Protection Orders) Bill 2012 (2014 68-2) (Bills Digest No. 2165.

⁶⁹ (3 July 2014) 700 NZPD 19201.

⁷⁰ Suzanne Kennedy *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (Department of Corrections, 21 November 2013) at 13.

⁷¹ Parole Act 2002, s 6(4)(d).

⁷² Sentencing Act 2002, s 87(1)

⁷³ Sentencing Act 2002, s 87 (2)

- c) the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date.

In deciding whether to impose preventative detention, courts need to consider:⁷⁴

- a) any pattern of serious offending disclosed by the offender's history; and
- b) the seriousness of harm to the community caused by the offending; and
- c) information indicating a tendency to commit serious offences in the future; and
- d) the absence of, or failure of, efforts by the offender to address the cause or causes of offending; and
- e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

Since 2003, courts have imposed preventative detention more frequently however it is still only used in a small number of cases, with 16 persons sentenced to preventative detention in 2010.⁷⁵

D Rehabilitation and Reintegration

Two main models for reintegration of sex offenders are used in New Zealand; the 'risk-need-responsivity' model and the 'good lives model'. These models operate under the presumption that child sex offenders are treatable. The 'risk-needs-responsivity' model operates under the presumption that the probability of recidivism will be minimised if an individual's dynamic risk factors are reduced through need-specific treatment.⁷⁶ This is to be complemented by teaching offenders how to recognise their individual risk factors.⁷⁷ The 'good lives model' assumes that criminal behaviour occurs where an individual's self determined needs are not sought appropriately.⁷⁸ Therefore, treatment under this model focuses on constructing an

⁷⁴ Sentencing Act 2002, s 87(4)

⁷⁵ Halls Sentencing (NZ) commentary: Sentencing Act 2002

⁷⁶ Russell et al, above n 42, at 56.

⁷⁷ Russell et al, above n 42, at 56.

⁷⁸ Russell et al, above n 42, at 56.

individual's 'ideal self' and giving them both the internal capabilities (such as social skills) and the external environment (for example, opportunities) to make their 'good life' a reality.⁷⁹ Significantly, these models both share a focus on individual factors that contribute to that particular offending, highlighting that often a 'one size fits all' approach will not be effective.

There are a variety of state-established programs that aim to help sex offenders to be rehabilitated and reintegrated into society. These include the prison based sex offender treatment programmes; Kia Marama based in Christchurch and Te Piriti based in Auckland.⁸⁰ These programs primarily operate under the 'risk-needs-responsivity' model of reintegration.⁸¹ The key objectives of these programmes are for offenders to take responsibility for their offending, to understand the impact of offending on their victims, to recognise high-risk situations and to learn skills to respond appropriately in such situations.⁸² Recent evaluations have found the Te Piriti programme to be effective in preventing reoffending with a 5% reoffending rate after 2-4 years following release compared with a 21% reoffending rate of a comparable control group.⁸³

STOP and SAFE programmes are community-based programmes run through the SAFE Network which encourage and assist offenders to examine their deviant sexual fantasies and thought patterns and how to control their urges.⁸⁴ These programmes are available for both court-mandated and non-mandated offenders.⁸⁵ A study conducted on various STOP and SAFE programmes around New Zealand found that the overall reconviction rate for those mandated to attend was 8.1%, with a 5.2% recidivism reconviction rate for those who completed the programme.⁸⁶ However the completion rate for mandated attendees was only 45%.⁸⁷ Given the significant disparity between

⁷⁹ Russell et al, above n 42, at 56.

⁸⁰ Ministry of Justice *Safer Communities-Action Plan to Reduce Community Violence and Sexual Violence* (Ministry of Justice, June 2004).

⁸¹ Russell et al, above n 42, at 57.

⁸² Ministry of Justice, above n 80.

⁸³ Ministry of Justice, above n 80.

⁸⁴ Ministry of Justice, above n 80.

⁸⁵ Ian Lambie and Malcolm Stuart *Community Solutions for the Community's Problem: An Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programmes* (Department of Corrections, February 2003) at 9.

⁸⁶ Lambie and Stewart, above n 85, at 9.

⁸⁷ Lambie and Stewart, above n 85, at 29.

the reconviction rates of those who completed the programme and those that didn't, consideration should be given as to how to improve the level of completion of such programmes.

E Is the Current Management Sufficient or is there a Need for a Register?

An argument can be made that there is already adequate management of released sexual offenders and thus that a child sex offender registry is unnecessary. This argument is likely to be particularly convincing should the mentioned Bills become law. However it is important to note that given the high level of restrictions imposed, these preventative measures will only apply to the highest risk offenders who pose a severely high risk of danger to society. In particular, PPOs will only cover a minute portion of all sexual and violent offenders with the Justice and Electoral Committee stating that at any one time as few as five and no more than 12 offenders would be placed under a PPO.⁸⁸ A child sex offender registry will cover all released (child) sex offenders regardless of whether they individually pose a risk to society. The majority of released child sex offenders will not meet the high standard required for an ESO or PPO, however this does not automatically suggest that there is no need for monitoring their movements. Given the difficulty in accurately determining the on-going risk that such offenders pose, it seems pragmatic that all child sex offenders are contained in one register, regardless of the level of risk they may pose to the public. Thus, the more appropriate argument would seem to be that a sex offender register can work in conjunction with current measures to cover all levels of child sex offenders that are released into the community.

We can see that the current system provides a high level of management for our highest risk offenders however this is generally through draconian and highly restrictive measures. This is unlikely to be seen as appropriate or acceptable if applied to a larger sub-group of offenders than the current application. When preparing the section 7 report for the Parole (Extended Supervision) and Sentencing Amendment Bill, the Attorney-General cautioned the use of such restrictive measures. "Preventative measures based solely on predictions of offending that has yet to and

⁸⁸ Justice and Electoral Committee *Public Safety (Public Protection Orders) Bill* at 11

may not, occur should be carefully constrained and reviewed in order to prevent potential abuse, disproportionate social stigma and infringements of basic rights and freedoms”.⁸⁹ The proposed registry, as it stands, provides for a less restrictive means of managing a much larger group of offenders. Furthermore, the majority of current management measures focus on improving public safety and saving potential victims from harm.⁹⁰ These measures do little to achieve the goal of enhanced and efficient information-sharing, which the proposed register purports to do.

As it stands, New Zealand arguably has measures in place which adequately deal with the risk posed by our highest risk child sex offenders. This management will be further enhanced should the proposed changes to ESOs and the implementation of PPOs occur. However this is a naturally small group and thus there is scope for those offenders who don’t meet this high threshold to be managed more effectively through a register. A combination of the register, current high-risk management measures and general rehabilitation programmes is likely to provide the most comprehensive and effective management system of released child sex offenders.

V *Current Information Sharing Arrangements*

A *Purpose*

The effective sharing of information between agencies is vital in attempting to manage released offenders in order to achieve greater levels of public safety. The proposed register aims to facilitate the communication and sharing of information between agencies which are involved in the management and release of child sex offenders including the Police and Corrections services. This is to be achieved by having all the necessary information accessible to authorised personnel from the relevant agencies in one particular database. “There needs to be one definitive place with all of the information.”⁹¹ Without full information between all agencies, it is

⁸⁹ Hon Margaret Wilson *Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill* (11 November 2003) at [4].

⁹⁰ (17 September 2013) 693 NZPD 13441

⁹¹ Matthew Backhouse “Cabinet signs off on first sex offenders register” (4 August 2014) The New Zealand Herald
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11303639>

difficult for offenders of any nature to be managed in the most effective way. “Public , private and voluntary sector organizations will continue to require access to personal information in order to provide goods and services, combat crimes, maintain national security and to protect the public”⁹² When applied specifically to the management of child sex offenders, the Dunedin Best Practice Pilot found that information-sharing between agencies was critical in detecting and preventing reoffending of these particular offenders.⁹³ Furthermore, the UK registry has been praised on the positive effects of successfully facilitating agency cooperation.⁹⁴

B Corrections Act 2004

Currently the Corrections Act 2004 legislates for the circumstances and manner in which information can be shared regarding a child sex offender. This only applies to the agencies specified under the Act: the Department of Corrections, the Department of Child, Youth and Family Services, Housing New Zealand Corporations, the Ministry of Social Development, the New Zealand Police and any public sector agency that the Minister of Justice, after consultation with the Privacy Commissioner identifies as a specified agency.⁹⁵ Where a specified agency enters into an information-sharing agreement under s182D with another specified agency, they are authorised to disclose information about that child sex offender where the disclosure is for, or relates to the listed purposes.⁹⁶ The purposes for which personal information can be disclosed under an information sharing agreement are:⁹⁷

- a) to monitor compliance by the child sex offender with his or her release conditions, detention conditions, conditions of a sentence of supervision, intensive supervision, community detention or home detention, post-detention conditions of a sentence of home detention, or conditions of an extended supervision order;

⁹² Richard Thomas and Mark Warport *Data Sharing Review Report* (London, 2008) at 9-10.

⁹³ Ministry of Justice *Action Plan to Reduce Community Violence and Sexual Violence* (Ministry of Justice, June 2004).

⁹⁴ Rachel L. Rinehart “Cooperative Endeavours: A Comparative Analysis of Agency Efforts Regarding Sex Offender Laws in The United States and the United Kingdom” (2008) 10 *European Journal of Law Reform* 383 at 383.

⁹⁵ Corrections Act 2004, s182C.

⁹⁶ Corrections Act 2004, s182A(1).

⁹⁷ Corrections Act 2004, s182A(3).

- b) to manage the risk that the offender may commit further sexual offences against children;
- c) to identify any increased risk that the offender may commit further sexual offences against children;
- d) to facilitate the reintegration of the offender into the community.

For these purposes an information sharing agreement must specify the nature of the information to be disclosed, the manner in which the information may be disclosed and set out how the information privacy principles will be complied with.⁹⁸ Furthermore, before the conclusion of an information sharing agreement the specified agencies must consult with the Privacy Commissioner.⁹⁹

Therefore it can be seen that a comprehensive system is in place to ensure that different agencies are able to share information between themselves to ensure the effective reintegration and management of offenders and to protect society from further offending. Legislating for specific child sex offender information sharing agreements demonstrates that the sharing of information regarding these particular offenders is a high priority. Had these specific provisions not been in place, information sharing about child sex offenders would be dealt with under s181A¹⁰⁰ which deals with the disclosure of information relating to highest-risk offenders which has a comparatively higher standard.

C Are the Current Information Sharing Arrangements Sufficient?

It could be argued that the information sharing goals of the register are already being achieved through information sharing agreements. The purposes for which the information sharing must be made seem to align with the general purposes of sex offender registries. The specified agencies under this provision also highly correlate with the agencies which would have authorised access to the proposed sex offender register. However the Corrections Act provides for a laboured process which requires many 'hoops' to be jumped through. This process was criticised in *Brown v Attorney-*

⁹⁸ Corrections Act 2004, s182D(2).

⁹⁹ Corrections Act 2004, s182D(3).

¹⁰⁰ Corrections Act 2004.

General with Spear J stating that there was an absence of any satisfactory working relationship between the police and probation services in relation to high-risk offenders released on parole.¹⁰¹ The proposed sex offender registry would speed up the information sharing process which is likely to lead to increased use by the relevant agencies. Furthermore, as it stands Police only have an ad hoc system of identifying convicted sex offenders.¹⁰² There is no doubt that one comprehensive registry compiling the identities and addresses of such offenders would be helpful to Police in sexual offence investigations, specifically at the stage of identification and elimination of suspects. However, it is unclear whether this multi-agency cooperation could be achieved through an ‘internal re-shaping’ rather than through policy and legal reform in the creation of a sex offender register.

VI Sex Offender Registries

Sex offender registries are based on the presumption that sexual offenders pose an ongoing risk to society after their release from custody which can be managed by monitoring these offenders.¹⁰³ As such the purpose of sex offender registry laws are generally two fold: firstly, to monitor released offender’s behaviour in the community to prevent further offences and secondly, to facilitate the investigation of new crimes that are committed.¹⁰⁴ However it will be seen that the particular purposes and aims of registers will vary between jurisdictions and will be reflected in the form and structure of the registers.

VII Proposed New Zealand Register

At the time of publication of this paper, Cabinet had signed off on Anne Tolley’s sex offender register proposal, the Child Protection Offender Register (CPOR). The initial

¹⁰¹ *Brown v Attorney General* [2006] DCR 630 at [47].

¹⁰² (30 July 2003) 610 NZPD 7494.

¹⁰³ James Vess, Andrew Day, Martine Powell and Joe Craffam “International sex offender registration laws: research and evaluation issues based on a review of current scientific literature” (2013) 14 *Police Practice and Research: An International Journal* 205 at 205.

¹⁰⁴ Vess et al, above n 103, at 405.

pilot register will include offenders who have committed sex crimes against children.¹⁰⁵ “We want to know where they are and have more information about their circumstances, so they can be managed, and increased risks of reoffending can be detected before they take place”.¹⁰⁶

Access to the register will be open to only authorised staff from the Police and Corrections and authorised staff from relevant agencies such as Child, Youth and Family, Ministry of Social Development and Housing New Zealand.¹⁰⁷ The technological cost of the register has been totalled at 35.5 million dollars over the next ten years and the initial ICT work is already underway.¹⁰⁸ The register is expected to be in operation by early 2016 once enabling legislation has been passed.¹⁰⁹

Registration will be required by offenders aged 18 or above at the time of committing their offence who are;¹¹⁰

- a) convicted of a qualifying offence and sentenced to prison;
- b) convicted of a qualifying offence and sentenced to a non-custodial sentence, and directed to be registered by the sentencing judge;
- c) convicted of an equivalent offence and sentenced overseas, if they intend to reside in New Zealand for six months or more.

Those who qualify for the register will need to report to Police within 72 hours of their release from prison or after receiving their non-custodial sentence. Upon reporting, registered offenders will be required to provide Police with a range of information including fingerprints, photographs, aliases, address, workplace and employer, car registration, computer IP address and passport details.¹¹¹ Offenders must notify and report to Police within 72 hours if any of this information changes and must also report annually to Police within seven days of the anniversary of their

¹⁰⁵ Backhouse, above n 91.

¹⁰⁶ Backhouse, above n 91.

¹⁰⁷ ONE News “Work begins on child sex offenders register” (14 August 2014) TVNZ
<<http://tvnz.co.nz/national-news/work-begins-child-sex-offenders-register-6057147>>

¹⁰⁸ ONE News, above n 107.

¹⁰⁹ ONE News above n 107.

¹¹⁰ Anne Tolley, above n 48.

¹¹¹ Anne Tolley, above n 48.

registration. At this point the registered information will be confirmed and fingerprints and photographs will be updated.¹¹² Registered offenders will also have to advise Police or Probation services 48 hours prior to taking a trip away from their home address for more than 48 hours and must give dates of travel, the address where they plan to stay and whether children normally reside at this address.¹¹³ Criminal penalties will be established for non-compliance. Offenders who fail to report or who provide false information will face a fine of up to \$2 000 or a maximum jail term of one year.¹¹⁴

The length of time each individual offender stays on the register will vary dependant on the scale of offending with available registration times being 8 years, 15 years or life.¹¹⁵ Current estimations put the number of offenders on the register after one year at 472, rising to approximately 1500 after four years at which time an evaluation will be completed and totalling almost 3000 after ten years.¹¹⁶

Whilst information in the register will not be publically available, in certain circumstances where there is a significant threat to the safety of children, information may be released to a third party such as a partner of an offender.¹¹⁷ This information will only be able to be released with the approval of a senior Police officer or senior Corrections staff. Where this approval is given in good faith, immunity from a breach of privacy claim will apply.¹¹⁸ Further analysis of this proposed disclosure scheme and other disclosure schemes takes place in Part VI of this paper.

A 2003 Bill

The current proposal is not the first attempt to establish a New Zealand sex offender register. In 2003 Deborah Coddington introduced the unsuccessful Sex Offender Registry Bill to Parliament. The purpose of this Bill was to assist in the investigation

¹¹² Anne Tolley, above n 48.

¹¹³ Anne Tolley, above n 48.

¹¹⁴ Anne Tolley, above n 48.

¹¹⁵ ONE News, above n 107.

¹¹⁶ ONE News, above n 107.

¹¹⁷ Anne Tolley, above n 48.

¹¹⁸ Anne Tolley, above n 48.

of offences and to speed up the elimination of potential suspects of sex offences. A secondary purpose of the Bill was to deter the commission of such offences and to bolster public safety.¹¹⁹ Offenders were to stay on this registry for a minimum of 10 years. While registered, offenders were to report any change in their name or residential address.¹²⁰ While access to the registry was restricted to authorised persons, such persons were able to use the information for any law enforcement purposes or in any manner which achieved the purposes of the Bill.¹²¹ Given the wide scope of the purposes of the Bill, particularly that of public safety, the use of this information would have been largely unrestricted.

The Attorney-General's office found that the requirement to provide information about changes in name or address, did not conflict with the right to freedom of expression as imparting such information was not deemed 'expressive' enough to prompt protection.¹²² In doing so, it was highlighted that freedom of expression includes the right not to say something.¹²³ Ultimately the Bill was not passed, with the Justice and Electoral Committee stating simply that it would "not achieve its intended purpose".¹²⁴

VIII Competing rights

Any sex offender register system will invoke a need for the careful examination and balancing between the right to freedom of expression and the rights of an offender to privacy, particularly in the context of public safety and matters of public interest. "It is a question of balance and it should not be assumed that any interests of the community will always eclipse the interests and rights of sex offenders."¹²⁵

A Freedom of Expression

¹¹⁹ Sex Offenders Registry Bill 2003.

¹²⁰ Ministry of Justice "Sex Offenders Registry Bill" (5 August 2003) Ministry of Justice<<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/sex-offenders-registry-bill>>

¹²¹ Sex Offenders Registry Bill 2003.

¹²² Ministry of Justice, above n 120.

¹²³ Ministry of Justice, above n 120.

¹²⁴ Justice and Electoral Committee *Sex Offenders Registry Bill*, at 2.

¹²⁵ Marcus Erooga "A human rights-based approach to sex offender management: The key to effective public protection?" (2008) 14 *Journal of Sexual Aggression* 171 at 181.

Freedom of expression is generally considered to be one of the cornerstone rights of society. However its application is often varied and dependent on the circumstances in which it is prompted. Thomas Emerson stated that “[t]he theory of freedom of expression is a sophisticated and even complex one. It does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation, but for each new situation.”¹²⁶

Freedom of expression is generally founded upon four theories; the marketplace of ideas, pursuit of democracy, self fulfilment and to act as a society safety-valve.¹²⁷ Firstly, Oliver Wendell Holmes J found that the marketplace of ideas requires the truth to be found by allowing unrestricted public debate regardless of whether ideas are offensive or objectionable.¹²⁸ Furthermore, the pursuit of democracy has been found to require this forceful and uncensored debate.¹²⁹ Human self-fulfilment upholds freedom of expression in its own right by allowing humans to reach their full potential.¹³⁰ Finally, the use of freedom of expression as a societal safety-valve prevents ideas from being driven underground where the risk of conspiracy abounds.¹³¹

1 Application of theories to sex offender registers

It is arguable that the fundamental theories behind freedom of expression could be used to argue for an (inherently public) sex offender register. Firstly, allowing the public to have access to this information could enhance the marketplace of ideas, promoting greater and more effective discussion around the issues of sexual offending. It could also be argued that by restricting this information, that the information will be disseminated in an unofficial manner which is unable to be regulated (as seen in the Sensible Sentencing Trust unofficial public register). Finally,

¹²⁶ Thomas Emerson “Toward a General Theory of the First Amendment” (1963) 72 Yale LJ 877 at 894.

¹²⁷ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (Wellington, LexisNexis NZ Limited, 2005) at 307.

¹²⁸ *Abrams v United States* (1919) 250 US 616.

¹²⁹ Butler and Butler, above n 127, at 309.

¹³⁰ Butler and Butler, above n 127, at 309.

¹³¹ Butler and Butler, above n 127, at 309.

proponents of a public register argue that individual self fulfilment can only be achieved if individuals are aware of the dangers around them, uninhibited by the fear of unknown sexual offenders that are in their community. However it could be said that the individual self fulfilment of the offenders themselves is significantly restricted if they are required to reintegrate themselves into society when such information is publically accessible. Ultimately whilst informative, the application of these theories to the use of a sex offender register cannot be conclusive.

2 *Freedom of expression in New Zealand*

Section 14 of the New Zealand Bill of Rights Act 1990 provides that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

It has been noted that the use of the word “including” does not limit this right to the strict application to the ability to seek, receive and impart information.¹³² As such, freedom of expression in New Zealand has been found to include the right to say nothing or the right not to say certain things. This was seen in the Attorney-General’s office report on the Sex Offender Registry Bill 2003. However in this case it was found that this right did not extend to the provision of offender information to the relevant officials, as providing this information did not constitute “expression”.

3 *The inclusion of “seek” and “receive”*

On face value, the inclusion of the right to seek and receive information could be advanced as an argument that members of the public have the right to seek and receive information on released sex offenders. However, this is generally not the case. It has been found that the inclusion of “seek” does not bestow upon individuals the right to be given certain information or require the state to make available a certain medium by which information can be sought.¹³³ Furthermore, the right of freedom to

¹³² Butler and Butler, above n 127, at 310.

¹³³ Butler and Butler, above n 127, at 320.

receive information is not as broad as to give individuals the right to insist on being given access to information and opinions.¹³⁴

4 *Limits on freedom of expression*

Section 5 of the New Zealand Bill of Rights Act provides that the rights and freedoms contained in the Act can be subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society. Often freedom of expression is required to be limited in order to vindicate other rights and societal values, such as the right to privacy and the right to reputation which are acknowledged through common law.¹³⁵

B Privacy

New Zealand does not have a general protection of the right to privacy in the New Zealand Bill of Rights Act. However *Hosking v Runting*¹³⁶ confirmed that this omission could not be taken as a legislative rejection of privacy as a fundamental value.¹³⁷ This case introduced the tort of invasion of privacy to New Zealand which requires publicity to be given to facts in which there is a reasonable expectation of privacy and that the publicity be offensive to a reasonable ordinary person.¹³⁸

1 Name Suppression

Courts can protect the privacy of offenders through issuing a name suppression order. Under the Criminal Procedure Act 2011, a court may make an order suppressing the publication of the name, address, or occupation of a person who is charged with,

¹³⁴ Butler and Butler, above n 127, at 320.

¹³⁵ Butler and Butler, above n 127, at 323.

¹³⁶ *Hosking v Runting* [2005] 1 NZLR 1 (CA)

¹³⁷ *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [92].

¹³⁸ Law Commission *The news media meets 'new media': rights, responsibilities and regulation in the digital age* (NZLC IP27, 2011).

convicted, or acquitted of an offence.¹³⁹ A suppression order can be made permanently or for a limited period as determined by the Court¹⁴⁰. Such an order can only be made where the court believes that the publication of such information would be likely to:¹⁴¹

- a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
- b) cast suspicion on another person that may cause undue hardship to that person; or
- c) cause undue hardship to any victim of the offence; or
- d) create a real risk of prejudice to a fair trial; or
- e) endanger the safety of any person; or
- f) lead to the identification of another person whose name is suppressed by order or by law; or
- g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- h) prejudice the security or defence of New Zealand.

Section 203 also provides for the automatic suppression of the identity of the complainant in specified sexual cases which include all child sex offences. The purpose of this provision is to protect the complainant/victim.

There may be some opposition to the impact that CPOR, and more specifically the disclosure scheme, has on current name suppression laws. Although the disclosures under the scheme will only be made in limited circumstances, it may need to be considered whether it is appropriate for disclosures to be made where the offender is subject to a name suppression order. However, given that the focus of both name suppression laws and the disclosure scheme is on the protection of the victim, this may be seen as appropriate in certain circumstances.

2 *Opposition to current name suppression laws*

¹³⁹ Criminal Procedure Act 2011, s 200(1).

¹⁴⁰ Criminal Procedure Act, s 208(1)(a).

¹⁴¹ Criminal Procedure Act 2011, s 200(2).

Anne Tolley has repeatedly stated that one of the main reasons that CPOR will not be open to the public is because the register will include offenders who have been granted name suppression for the purpose of protecting the identity of their victim/s. However proponents of publically accessible registers have argued that this stance and current name suppression laws are ‘enabling’ sex offenders. Ruth Money, spokesperson for the Sensible Sentencing Trust (SST) has launched a public petition to remove name suppression in New Zealand named ‘Protect that Child’.¹⁴² This initiative was spurred from legal proceedings faced by the SST. The Director of Human Rights Proceedings took action against the SST for naming a convicted child sex offender who had been granted interim name suppression on their offender database.¹⁴³ “In what we think is a failing of our justice system this offenders ‘interim’ name suppression continues solely to protect the so called ‘privacy’ of a convicted paedophile.”¹⁴⁴ The SST claims that current name suppression laws are putting the rights of offenders above the need for public safety, leading to New Zealand’s reputation as a “paedophile haven”.¹⁴⁵ In particular they assert that offenders are riding on the coattails of suppression aimed to protect the victims and complainants of these crimes. “Name suppression is, in effect, a denial of truth and here we see the law allowing offenders to effectively piggyback on the rightful application of name suppression that is awarded to survivors of sexual abuse.”¹⁴⁶

The SST’s proposed policy is to restore open justice while seeking reform on current name suppression laws. Specifically they contend that final name suppression should only be available for the benefit of the victims whilst those victims wish it to be in place.¹⁴⁷ Furthermore they argue that victims should be able to have the name suppression granted to the offender “(which is only ever a derivative benefit as it is solely to protect the victim/s)” revoked at any stage. This proposed reform is to be coupled with an open public register.¹⁴⁸ It is of course, important to note that the SST

¹⁴² Sensible Sentencing Trust “What is the protect that child project?” Protect That Child Project < <http://www.protectthatchildproject.co.nz/>>

¹⁴³ Sensible Sentencing Trust, above n 142.

¹⁴⁴ Sensible Sentencing Trust, above n 142.

¹⁴⁵ Sensible Sentencing Trust, above n 142.

¹⁴⁶ Sensible Sentencing Trust, above n 142.

¹⁴⁷ Sensible Sentencing Trust, above n 142.

¹⁴⁸ Sensible Sentencing Trust, above n 142.

offers an extremist and largely unrealistic view on these issues and places significant weight on freedom of expression at the expense of privacy. However their focus on name suppression in the interests of the victim correlates with Tolley's reasoning as to the restricted nature of the CPOR. It is likely that if the register and disclosure scheme do proceed to implementation that this will provoke debate regarding name suppression, privacy and the accountability of sex offenders.

C Competing Interests in Sex Offender Case Law

Both *Brown v Attorney General*¹⁴⁹ and *R v Chief Constable of North Wales*¹⁵⁰ analyse the competing tensions between ensuring the safety of the public and protecting the privacy of the offender. These cases also touch on the right of freedom of expression in regards to the disclosure of particular information about sex offenders. This tension is one which will have to be carefully managed under the proposed New Zealand system, particularly in regard to any disclosure scheme (as discussed in Part X).

Brown v Attorney-General concerned the disclosure of information regarding a child sex offender who had been released 3 ½ years into his sentence for the kidnapping and indecent assault of a 5 year old boy.¹⁵¹ The police involved were worried about the offender's risk of reoffending particularly given the seriousness of the initial offence, his lack of support in the community, his blasé attitude to his rehabilitation program and the number of potential victims in the area given his proximity to a number of schools.¹⁵² The police prepared and distributed a flyer in the immediate community detailing the offender's name, sentence, criminal history, address and an accompanying photograph.¹⁵³ Spear J stated that a released offender is entitled to a reasonable expectation of privacy and that by providing a photograph and home address in these circumstances breached that expectation. The judge also rejected the argument that there was a legitimate public concern in this information.¹⁵⁴

¹⁴⁹ *Brown v Attorney General* [2006] DCR 630.

¹⁵⁰ *R v Chief Constable of North Wales police and Others Ex Parte* [1998] 2 FLR 571.

¹⁵¹ *Brown v Attorney General*, above n 149, at [6].

¹⁵² *Brown v Attorney General*, above n 149, at [31].

¹⁵³ *Brown v Attorney General*, above n 149, at [33].

¹⁵⁴ *Brown v Attorney General*, above n 149, at [33].

R v Chief Constable of North Wales concerned the disclosure by police of information pertaining to a married couple's serious sex offending history. The disclosure was made to the owner of a caravan site where the couple were living.¹⁵⁵ This disclosure was found to be a justified breach of privacy as it met a pressing social need required for the prevention of crime and the protection of rights and freedoms of others.¹⁵⁶ It is important to note that the disclosure made in this case was more restricted than that made in *Brown v AG*. Disclosing the information to the owner who had control over the caravan site is arguably more justifiable than providing information via the distribution of flyers to all households in a particular neighbourhood.

The case of *Venables and Thompson v News Group Newspapers Ltd*¹⁵⁷ highlights an extreme example of where the privacy of child sex offenders was deemed to trump any rights to freedom of expression in the public interest. The (childhood) killers of James Bulger sought permanent injunctions to restrain the press from releasing their new identities, addresses and their photographs. These applications were made on the grounds that the release of such information would be a breach of privacy and would pose a real threat to their lives and freedom from inhuman and degrading treatment (as provided by Articles 2 and 3 in the European Convention on Human Rights).¹⁵⁸ The press argued that this restricted their right to impart important information to the public (affirmed by Article 10).¹⁵⁹ The court found that exceptions to freedom of expression must be necessary in a democratic society for the achievement of certain stated purposes (such as the protection of national security).¹⁶⁰ This is a similar standard to that required by the New Zealand Bill of Rights Act.¹⁶¹ In this case, the injunctions were granted and it has been argued that this may provide the basis for sex

¹⁵⁵ Helen Power "Disclosing information on sex offenders: The human rights implications" in Amanda Matravers (ed) *Sex Offenders in the Community: Managing and Reducing the risks* (Routledge, New York, 2001) at 85.

¹⁵⁶ Power, above n 155, at 85.

¹⁵⁷ *Venables & Thompson v News Group Newspapers Ltd* [2001] EWHC 32 (QB)

¹⁵⁸ Power, above n 155, at 94.

¹⁵⁹ Power, above n 155, at 95.

¹⁶⁰ Power, above n 155, at 95.

¹⁶¹ New Zealand Bill of Rights Act 1990, s 5.

offenders to apply for injunctions were the press may be contemplating a ‘name and shame’ campaign.¹⁶² However this has not occurred and any flood of injunctions is unlikely given that “the claimants are uniquely notorious [and] their case is exceptional”.¹⁶³

D Will CPOR Achieve an Appropriate Balance of Rights?

Under the Privacy Act 2003, the collection of personal information by an agency is prohibited unless there is a lawful purpose for which the information is collected.¹⁶⁴ As access to the proposed register itself is restricted to authorised personnel, this is likely to strike an appropriate balance between freedom of expression and privacy. Information within the register will initially only be shared between authorised staff of the relevant agencies managing the offenders release and reintegration into the community. Although proponents of public registries such as the SST would argue that this provides comparatively too much protection for the privacy of offenders, this approach avoids the likely breaches of privacy which would result from a public register. However as will be seen in Part X, the balancing of these rights in regards to the proposed disclosure scheme is significantly more tenuous.

IX International approaches

It can be helpful to look to examples of sex offender registration laws in other jurisdictions to assist in the formulation of a New Zealand register and to avoid any shortfalls or inefficiencies experienced by other jurisdictions. This Part will examine the sex offender registry laws and their development in both the United States of America and the United Kingdom. These two jurisdictions have fundamentally different approaches particularly in regard to the balancing of rights. Whilst the experiences of other jurisdictions can be informative, it is important to note that New

¹⁶² Power, above n 155, at 95.

¹⁶³ Power, above n 155, at 95.

¹⁶⁴ S 6(a)

Zealand need not rely heavily on these examples particularly given that sex offender registries are not ‘one size fits all’.

A America

1 Development of federal sex offender laws

Prior to the current sex offender registration laws, states themselves were responsible for enacting and enforcing sex offender laws.¹⁶⁵ These laws generally required enforcement agencies to compile lists of sex offenders with access limited to law enforcement personnel.¹⁶⁶ Following these state enacted statutes and registries, the federal government enacted the Jacob Wetterling Act 1994¹⁶⁷ named after 11 year old Jacob Wetterling who was abducted in 1989 while riding his bike with two friends.¹⁶⁸ This Act required sex offenders to register with their State once released into the community.¹⁶⁹ Whilst 24 states had already enacted their own equivalent statutes, this federal law was enacted to prevent sex offenders from avoiding registration simply by relocating to another state.¹⁷⁰ All States had complied with the Act by 1996, having created some form of sex offender registration laws.¹⁷¹

The next development in the United States sex offender laws was Megan’s Law. In 1994, seven year old Megan Kanka was sexually assaulted and murdered by her next door neighbour who was a recently released sex offender.¹⁷² Megan’s case highlighted the shortcomings of the current system as it was widely argued that had

¹⁶⁵ Richard A Paladino “Adam Walsh Act as Applied to Juveniles: One Size Does Not Fit All” (2011) 40(1) Hofstra Law Review 269 at 273.

¹⁶⁶ Paladino, above n 165, at 274.

¹⁶⁷ Paladino, above n 165, at 274.

¹⁶⁸ Paladino, above n 165, at 275.

¹⁶⁹ Paladino, above n 165, at 275.

¹⁷⁰ Richard A Paladino, above n 3, at 276.

¹⁷¹ Richard A Paladino, above n 3, at 276.

¹⁷² Lisa L. Sample and Timothy M Bray “Are Sex Offenders Dangerous?” (2003) 3 Criminology and Public Policy 59 at 62.

Megan's parents been aware that their neighbour was a sex offender they would have been able to take reasonable steps to ensure her safety.¹⁷³ Megan's Law introduced mandatory community notification of sex offenders, allowing members of the public to be notified of the existence of sex offenders and where they lived. When signing the Bill into law, President Bill Clinton stated "If you dare prey on our children, the law will follow you wherever you go. State to State, town to town."¹⁷⁴ States themselves could determine how they would notify the community, with approaches including passive measures such as having registry lists available at police stations and more active approaches such as holding community meetings, posting flyers and informing management at at-risk institutions including day cares and schools.¹⁷⁵ The most popular form of community notification has now become publically accessible websites containing the necessary information on the relevant offenders. As it stands, all states and the district of Columbia have a state registered, publically accessible sex offender website.¹⁷⁶ With the rise in technological capabilities and access to the Internet, this has allowed the public greater ease of access to the information within the registers.

The most recent development was the Adam Walsh Child Protection and Safety Act 2006 (AWA).¹⁷⁷ The first title of the AWA is called the Sex Offender Registration and Notification Act (SORNA).¹⁷⁸ The purpose of SORNA was to create a "comprehensive national system for the registration" of sex offenders named the Dru Sjojin National Sex Offender Registry.¹⁷⁹ SORNA also regulates the content and administration of all State registries.

2 *Offender categories*

Section 111 of the AWA defines three distinct categories of sex offenders based on the type and seriousness of the offence and the age of the victim where the victim was

¹⁷³ Paladino, above n 165, at 276.

¹⁷⁴ Paladino, above n 165, at 277.

¹⁷⁵ Molly J. Walker Wilson "The Expansion of Criminal Registries and the Illusion of control" (2013) 73 Louisiana Law Review 509 at 517.

¹⁷⁶ The United States Department of Justice, above n 22.

¹⁷⁷ Mary P. Brewster, Philip A. DeLong, Joseph T. Moloney "Sex Offender Registries: A Content Analysis" (2013) 24 Criminal Justice Policy Review 695 at 695

¹⁷⁸ Adam Walsh Child Protection and Safety Act 42 USC

¹⁷⁹ Richard A Paladino, above n 165 at 278.

a minor.¹⁸⁰ These tiers then determine the minimum lengths of registration ranging from 10 years to life.¹⁸¹

3 *Information within the registry*

Section 114 of the AWA provides the mandatory information that must be included in state registries. These are the offender's name, social security number, residential address, name and address of employer or school, license plate number and vehicle description.¹⁸² Section 114 also requires the administrator of the registry, most often a state agency, to maintain additional information including the specific criminal law the offender violated, a current photograph, fingerprints and DNA.¹⁸³ Sex offenders are required to register in the state they were convicted in and the state/s that they reside, are an employee or a student.¹⁸⁴ It is a federal offence for an offender to knowingly fail to register or update their registration.¹⁸⁵

It is important to note that not all of the above information can be included on the publically accessible registry. Section 118 lists guidelines for the public web-based registries including the mandatory exemption of information such as the identity of the victim and optimal exemptions such as employer details and school name.¹⁸⁶ A comprehensive study on all 51 state registries found that a large portion of states had exceeded the minimum requirements prescribed by SORNA by providing case-specific information such as the offender's appearance, information about the specific offence, victim information and place of employment.¹⁸⁷ It could be argued that this is allowing the public more information than is necessary to ensure their own safety, and as such is an unjustified intrusion into the offender's privacy.

¹⁸⁰ Brewster et al, above n 177, at 696.

¹⁸¹ Brewster et al, above n 177, at 696.

¹⁸² Brewster et al, above n 177, at 697.

¹⁸³ Brewster et al, above n 177, at 697.

¹⁸⁴ Paladino, above n 165, at 279.

¹⁸⁵ The United States Department of Justice "Child Exploitation and Obscenity Section" The United States Department of Justice <<http://www.justice.gov/criminal/ceos/subjectareas/sorna.html>>

¹⁸⁶ Brewster et al, above n 177, at 697.

¹⁸⁷ Brewster et al, above n 177, at 695.

Although Anne Tolley has made it clear that the proposed New Zealand register will not be open to the public, it is important to examine the rationale behind public registers and the consequences of allowing such access. This is particularly important given that the proposed system includes the restricted disclosure to certain members of the public.

The primary rationale for community notification is that allowing the public to have access to such information will allow them to better protect themselves and other members of society, particularly children.¹⁸⁸ However increased information does not always result in increased safety. Studies of the American system have indicated that sex offender registries are generally failing to meet the goal of making communities safer, however public support for such registries is increasing.¹⁸⁹ It has been suggested that this public support is driven by the common perception that sex offenders are most likely to prey on vulnerable members of society and that they cannot be rehabilitated.¹⁹⁰ Using behavioural analysis Molly Wilson suggests that crime registries make people feel safer by providing for an increased sense of control over risks which are seen as threatening.¹⁹¹ It is also possible that the reactive and personal nature of these laws has been a factor in driving public support.

Furthermore, given that the majority of sexual offences are committed by someone known to the victim, public accessibility is unlikely to have a significant effect on equipping the public with the information they need to protect themselves.¹⁹² The common fear of ‘the man in the white van’ is in fact a misconception and such ‘stranger danger’ cases are rare.

¹⁸⁸ Walker Wilson, above n 175, at 509.

¹⁸⁹ Walker Wilson, above n 175, at 509.

¹⁹⁰ Walker Wilson, above n 175, at 510.

¹⁹¹ Walker Wilson, above n 175, at 510.

¹⁹² Alissa R Ackerman, Maghan Sacks & Lindsay N. Osler “The Experiences of Registered Sex Offenders With Internet Offender Registries in Three States” (2013) 52 *Journal of Offender Rehabilitation* 29 at 30.

One argument raised against publically accessible registries is the possibility of public vigilantism. SORNA attempts to combat this by requiring all public registry sites to provide warnings about using the information within the registry to injure, harass or commit a crime against the offenders.¹⁹³ 92% of state registries provide such warnings.¹⁹⁴ Unfortunately the American public has not always heeded these warnings, often resorting to “lynch mob tactics to run the offender out of the neighbourhood”.¹⁹⁵

The isolation and threats made by the rest of the community have been seen to “exacerbate existing risk factors leading to recidivism. These include lifestyle inability, negative moods and a lack of positive moral support.”¹⁹⁶ Offenders subject to public registries have reported experiencing increased negative emotions such as anger and hopelessness.¹⁹⁷ This is exacerbated by the practical problems such offenders face upon re-entering the community such as difficulty finding employment and housing.¹⁹⁸ Therefore open registries may in fact be creating more harm than protection for society by stiling the rehabilitation of offenders. This was also highlighted in the New Zealand case of *Brown v AG*¹⁹⁹ where it was stated that “placing a person like the plaintiff [a child sex offender] under the stress that would invariably accompany a public shaming, not only would that inhibit the subject’s attempts to reintegrate himself into the community, it would actually increase the risk of him reoffending”.²⁰⁰

Publically accessible registries also create the risk that by outing particular offenders this can prompt the public to overlook the danger of other unknown sexual offenders in the community.²⁰¹ This is particularly problematic given the secretive nature and

¹⁹³ Brewster et al, above n 177, at 697

¹⁹⁴ Brewster et al, above n 177, at 695

¹⁹⁵ Meghann J Dugan “Megan’s Law or Sarah’s Law-A Comparative Analysis of Public Notification Statutes in the United States and England” (2001) 23 Loy.L.A. Int’l & Comp. L. Rev 617 at 618.

¹⁹⁶ Walker Wilson, above n 175, at 525.

¹⁹⁷ Ackerman et al, above n 192, at 36.

¹⁹⁸ Ackerman et al, above n 192, at 38.

¹⁹⁹ *Brown v Attorney General* [2006] DCR 630

²⁰⁰ *Brown v Attorney General*, above n 199, at [49]

²⁰¹ *Brown v Attorney General* above n 199, at [50]

low conviction rates of such sexual offending. However the public nature of these registries have been found to combat problems in reporting and detection created by the secretive nature of such sex crimes.²⁰²

6 *Challenges*

Despite a generally high level of public support, the sex offender registration and notification laws have been challenged academically, politically and by the offenders themselves. In 2003 a convicted sex offender challenged Megan's Law as a violation of procedural due process.²⁰³ He argued that the use of the public registry "stigmatized him as a 'dangerous sex offender' without first affording him the opportunity to demonstrate that he was not currently dangerous."²⁰⁴ The court however found that this challenge was not viable as Megan's Law and the resulting State registries are based on the existence of a previous conviction rather than the level of danger posed by the individual.²⁰⁵ This case raises the common argument that sex offender registries create a double jeopardy issue where released offenders are continually punished for their crimes after their release. This argument contends that the invasion of privacy and the way that society is allowed to perceive such offenders is further punishment on top of the offender's initial criminal sentence.

B United Kingdom

1 National Register

Sex offender registration in the UK was initially governed by the Sex Offenders Act 1997, setting out the requirements of a national register and allowing Police to inform schools and certain members of the public in exceptional circumstances of convicted

²⁰² Walker Wilson, above n 175, at 510.

²⁰³ *Connecticut Department of Public Safety v Doe* Supreme Court 123 S. Ct. 1140, 1154 (2003).

²⁰⁴ Harvard Law Review "Making Outcasts out of Outlaws: the Unconstitutionality of Sex Offender Registration and Criminal Alien Detention" (2004) 117 Harvard Law Review 2731 at 2733.

²⁰⁵ Harvard Law Review, above n 204, at 2733.

child sex offenders living in the area.²⁰⁶ Such disclosures were only to be made where there was a “pressing need”.²⁰⁷ Sex offender registration laws in the UK are now governed by Part 2 of the Sexual Offences Act 2003, which established the current register known as ViSOR (the Violent and Sex Offender Register). The register includes convicted sex offenders as well as non-convicted individuals who are deemed to be potentially dangerous persons and terrorist offenders.²⁰⁸ Recent data has shown that the number of offenders on the register sits at around 30 000.²⁰⁹

The relevant offender must provide the police with their date of birth, national insurance number, name/s used on the relevant date, home address, the address of any other premises they regularly reside or stay and relevant passport information.²¹⁰ Offenders are also required to notify the Police within a minimum of 3 days where any of this information changes.²¹¹ Failure to comply with these registration requirements may result in up to five years imprisonment.²¹² Similarly to the US register, offenders must stay on the register for varying amounts of time depending on the severity of their sentence with the minimum period of time being seven years.²¹³

2 *Restricted access*

Unlike the USA, the information within the register is not available to the public. The register is managed as part of the Multi-Agency Public Protection Arrangements (MAPPA) where the prison, probation and police services share information to manage dangerous sex offenders.²¹⁴ The established purpose of the register is to allow officials to assess and manage the risks of known sexual and violent offenders, which will help increase public safety and protection.²¹⁵ In this regard, the UK registration system has a narrower purpose than that of its American counterpart which also

²⁰⁶ Dugan, above n 195, at 630.

²⁰⁷ Dugan, above n 195, at 632.

²⁰⁸ National Offender Management Service *Mandatory Use of Visor* 11 February 2003 at 2.

²⁰⁹ Terry Thomas “The Sex Offender “Register”: A Case Study in Function Creep” (2008) 47(3) The Howard Journal 227 at 227.

²¹⁰ Sexual Offences Act 2003 (UK), s83(5).

²¹¹ Sexual Offences Act 2003 (UK), s 84.

²¹² Lissa Griffen “Megan’s Law and Sarah’s Law: A Comparative Study of Sex Offender Community Notification Schemes in the United States and the United Kingdom” (2010) 46 Crim. L. Bull 987 at 995.

²¹³ Griffen, above n 212, at 994.

²¹⁴ Griffen, above n 212, at 995.

²¹⁵ National Offender Management Service *Mandatory Use of Visor* 11 February 2003.

focuses on enhancing public safety through open access to information. The focus in the UK is on multi-agency information sharing and management of existing offenders²¹⁶, which appears to be the primary goal of the proposed New Zealand registry.

The British Parliament decided against a community notification provision due to the fear that vigilante action would drive offenders into hiding rather than registering.²¹⁷ However the public has generally been disappointed with the sex offender registration laws and the lack of community notification.²¹⁸

Informal attempts have been made in Britain to make information regarding released sex offenders more publically available. Following, the highly publicised murder of eight-year-old Sarah Payne in 2000 by Roy Whiting, a convicted child sex abuser, the News of the World implemented its 'Name and Shame' campaign.²¹⁹ The campaign argued that there was clear need for a 'Sarah's Law' to inform parents when convicted sex offenders moved into the community. The paper claimed that if the "police were not going to tell them, the paper would".²²⁰ The newspaper published a number of names and pictures of individuals who they asserted were convicted sex offenders, claiming they possessed information regarding 110 000 known child sex offenders.²²¹ The resulting vigilante action highlighted the danger of providing such information to members of the public, especially when measures are taken in response to a particular personalised event. As a direct result of the campaign the public organised protests outside the alleged paedophiles' residences, assaulted such individuals and even harassed one to the point of suicide.²²²

3 *Sarah's Law: Child Sex Offender Disclosure Scheme*

²¹⁶ National Policing Improvement Agency "ViSOR Standards Version 2.0" (2010) National Policing Improvement Agency <http://www.acpo.police.uk/documents/crime/2011/20110404%20ViSOR%20Standards%20v2%200_Nov%202010.pdf> at 7.

²¹⁷ Dugan, above n 195, at 633.

²¹⁸ Dugan, above n 195, at 633.

²¹⁹ Richard Garside "Does Sarah's law work?" (23 December 2013) Centre for Crime and Justice Studies <<http://www.crimeandjustice.org.uk/resources/does-sarahs-law-work>>

²²⁰ Garside, above n 219.

²²¹ Dugan, above n 195, at 634.

²²² Dugan, above n 195, at 618.

The National Register is now complemented by the Child Sex Offender Disclosure Scheme known as Sarah's Law.²²³ This is a procedure through which members of the public can request information about suspected child sex offenders.²²⁴ Such requests can be made where they have a personal relationship with the person of interest and that person has regular unsupervised access to their children.²²⁵ These requests are only granted if the Police deem that the sex offender poses a serious risk of harm in that particular situation.²²⁶ This scheme is in place at all 43 police forces across England and Wales.²²⁷ Great restraint has been shown in the management of the Disclosure Scheme with only 700 disclosures made out of approximately 4 700 applications since 2011.²²⁸ The inclusion of a disclosure scheme to complement the proposed register in New Zealand will be analysed in Part VI of this paper.

C Applicability to the proposed New Zealand register

New Zealand can learn from and avoid the difficulties faced by these other jurisdictions. However it is important to note that one particular model of register will not have the same effect within all jurisdictions as societal norms and legal and political structures will have a significant impact on the success of any registration scheme.

In using the American system as an example, many of the developments made in this jurisdiction have been in response to issues arising from their federal system, particularly the discrepancies between the application of sex offender registry laws between states.²²⁹ This is will not be an issue in New Zealand as there will only be one national register, making the system more streamlined and simple than that in the USA.

²²³ Richard Garside, above n 219.

²²⁴ Griffen, above n 212, at 997.

²²⁵ Sally Lipscombe *Sarah's law: the child sex offender disclosure scheme* (Home Affairs, Standard Note: SN/HA/1692, March 2012).

²²⁶ Griffen, above n 212, at 998.

²²⁷ Home Office "Criminal record disclosure" (26 March 2013) Gov.UK <<https://www.gov.uk/find-out-if-a-person-has-a-record-for-child-sexual-offences>>

²²⁸ Richard Garside, above n 219.

²²⁹ Dugan, above n 195, at 622.

The focus of the proposed New Zealand register is on the sharing of information and effective management of released offenders. In this sense, the UK national register is most applicable to the development of the New Zealand register. Furthermore, the legal and constitutional structures of New Zealand are more similar to the UK than the USA. The government can look to both the function and content of the UK register when developing the registration system. The UK register also provides an example of how certain members of the public can be granted restricted access to the information through the Sex Offender Disclosure Scheme. This application of the UK experience to the proposed New Zealand disclosure scheme will be analysed in Part X.

D Balance of rights

The American approach to sex offender registries is one which favours freedom of expression over the privacy of offenders. This can be seen through the high level of public accessibility and the fact that many state registries provide more information about the offenders to the public than is required by the AWA. The right to freedom of expression is given express protection in the First Amendment of the United States Constitution. This right is absolute and carries no express provisions which allow justifiable limitations,²³⁰ however where opposing principles are compelling and substantial they may justify restrictions on the exercise of freedom of speech.²³¹ In comparison to the First Amendment there is no express protection of privacy in the United States Constitution, though support has been derived from various Amendments and the common law.²³² Therefore when considering the comparable protections of these two rights, it is unsurprising that the American approach allows freedom of expression to significantly outweigh the right to privacy.

The UK protection of rights is similar to that of New Zealand with common law protection of privacy and statutory recognition of freedom of expression in the Human Rights Act 1998.²³³ Given the restricted nature of the UK register, a more

²³⁰ Amelia Simonsen "A proposed Sex Offender Register for New Zealand: Privacy and Freedom of Expression in Perspective" (LLB(Hons), Victoria University of Wellington, 2008) at 20.

²³¹ Eric Barendt *Freedom of Speech* (Oxford University Press, Oxford, 2005) at 51.

²³² Amelia Simonsen, above n 230, at 19.

²³³ Amelia Simonsen, above n 230, at 22

appropriate balancing of rights has been achieved in this jurisdiction, similar to that of the proposed New Zealand register.

X Disclosure schemes

Anne Tolley has confirmed that the proposed register will be complemented by a disclosure scheme where particular members of the public will be informed of information regarding offenders on the register. Tolley has often referred to the English disclosure scheme as an example of the proposed New Zealand disclosure scheme.²³⁴ However as this paper will discuss, there seems to be a fundamental difference between the English scheme and the intended scheme for New Zealand

A The English Disclosure Scheme

Tolley has referred to the English Child Sex Offender Disclosure Scheme as an example of the approach New Zealand will take. However, as outlined in Part IX above, the English disclosure scheme requires individuals to apply to Police about a particular individual. Officials then have to determine whether that application will result in a disclosure to the applying individual. Tolley has however indicated that the flow of information within the New Zealand scheme will likely be working in the opposite direction to that of the British system. Information released about the proposed register implies that information about offenders will be provided by authorised personnel directly to at-risk members of the public without the need for application, thus a more proactive disclosure scheme than that adopted in England.

For the purposes of this analysis, this paper assumes that the proposed New Zealand disclosure scheme will involve the proactive disclosure of information by authorised agencies to particular individuals without the need for application. This raises a

²³⁴ Interview with Anne Tolley Minister of Police (Toni Street, Breakfast TVNZ, 27 April 2014)
<<http://tvnz.co.nz/breakfast-news/anne-tolley-explains-sex-offender-register-video-4854305/video>>

question as to whether the State should have a positive obligation to inform at-risk members of the public or whether eligible individuals should be required to apply to officials before this information can be released (as seen under the English disclosure scheme).

1 Should the onus be on the public?

There are some fundamental flaws in requiring members of the public to make an application themselves before a disclosure can be made. Firstly, it may actually do very little to prevent offending as the onus is on the parents of children and other members of the public to determine whether their children are at risk. Research on profiled applicants within the English scheme found that the most common factors which led to an application were ‘rumours’ and observation of the subject’s behaviour.²³⁵ This is an inefficient method of informing the public of risks, as rumours often carry little factual accuracy and most members of the public are unlikely to have sufficient knowledge of the behaviour of child sex offenders to be able to deduce when there is a risk. Secondly, it is arguable that placing the onus on parents or responsible adults is an unfair burden and that the State should take a more active role in informing at-risk individuals. Furthermore, requiring individuals to apply for a disclosure themselves could be seen to be endorsing and promoting a suspicious society.

The take up of the English scheme was lower than anticipated by officials, particularly given the ‘media clamour’ for a Sarah’s Law as evidenced by the News of the World campaign.²³⁶ Applicants surveyed expressed that they had concerns regarding their own anonymity, the potential for social services to become involved and the potential repercussions for the applicant.²³⁷ By taking the onus off members of the public and placing it on the State, these apprehensions will not hinder the disclosure process.

²³⁵ Hazel Kemshall, Gill Kelly & Bernadette Wilkinson “Child Sex Offender Public Disclosure Scheme: The views of applicants using the English pilot disclosure scheme” (2012) 18 *Journal of Sexual Aggression* 164 at 164.

²³⁶ Kemshall et al, above n 235, at 164

²³⁷ Kemshall et al above n 235 at 171.

2 *What can be learnt from the English disclosure scheme?*

Despite this fundamental difference regarding the manner in which information is disclosed, we can analyse the English disclosure scheme to enhance the development of a New Zealand scheme.

a) Who is likely to be the subject of disclosure?

In research undertaken in England it was found that the majority of applications were made about an ex-partner's new partner, neighbours or family friends.²³⁸ This trend seems to align somewhat with Tolley's common example of disclosing information to an offender's new partner. This also confirms that the general public are somewhat aware of the close and secretive nature of child sex offending and indicates that the general 'stranger danger' misconception has not disillusioned the public perception of such offending.

b) Confidentiality

One serious concern surrounding disclosure schemes is ensuring that the recipient of the information does not disseminate what they know further in the community. The applicants under the English disclosure scheme were bound by confidentiality and an evaluation of the pilot scheme found that there were no serious or damaging breaches of this confidentiality clause.²³⁹ The Home Office suggested the disclosures needed to be accompanied by clear explanations as to why the information was deemed confidential, the public order implications of breaching confidentiality and reassurance that any outstanding risks would be formally dealt with.²⁴⁰ Increased public understanding of the scheme is likely to prevent any individuals from 'taking

²³⁸ Kemshall et al above n 235 at 169.

²³⁹ Hazel Kemshall, Jason Wood, Sue Westwood, Brian Stout, Bernadette Wilkinson, Gill Kelly and Gill Mackenzie "Child Sex Offender Review (CSOR) Public Disclosure Pilots: A Process Evaluation" *London: Home Office* (2010) at ii.

²⁴⁰ Kemshall et al, above n 239, at 13.

matters into their own hands' and distributing the disclosed information further throughout the community.

The risk of breaches of confidentiality may be reduced under a disclosure system where the State actively provides such information to the necessary recipients. Under an application system it is inherently only those who apply that receive information. Such recipients may feel that other members of the community who need to know this information may have missed out simply because they did not make an application and as such, may be compelled to inform others. This risk may be reduced under a non-application scheme if recipients believe that the correct individuals have been informed.

c) When disclosures should be made

Disclosures are only made under the English Disclosure Scheme where the Police believe that the particular sex offender poses a serious risk of harm. A report by the Home Office evaluating the initial pilot of the English disclosure scheme provided case specific examples of where disclosures were made to applicants. Such examples could provide guidance as to when disclosures should be made under the New Zealand scheme. One such example includes an application made by a mother who was concerned about her neighbour. Once checks were made it was determined that her neighbour was subject to a Sexual Offences Prevention Order and was assessed as medium risk to children and adult females. A 'minimal' disclosure was made to the mother to enable her to protect her child.²⁴¹

d) Public education

The English disclosure scheme was implemented as one of a number of different schemes that aimed to engage the public in reducing child sex offending. Other methods included public representation on formal bodies (such as MAPPA) and extensive public education.²⁴² Public education is particularly important in this format given that individuals have to apply for information to be disclosed, therefore

²⁴¹ Kemshall et al, above n 239, at 12.

²⁴² Kemshall et al above n 235 at 167.

prompting the need for widespread knowledge and understanding about child sex offending and potential ‘warning signs’. It would be favourable for New Zealand to take a similar approach with a public education scheme about sex offender rehabilitation and warning signs, as well as some form of public representation on community boards. Research on the English scheme found that applicants usually possessed a general anxiety about sex offenders, particularly the difficulty in identifying who may be a sex offender and what level of risk they pose.²⁴³ This further affirms that the public generally lack knowledge about sexual offending and as such, that any disclosure scheme should be accompanied by a comprehensive education program.

B Past Examples of Disclosure in New Zealand

Whilst the proposed disclosure scheme will be the first such official system in New Zealand, there have been various examples of informal disclosure methods. Informal community disclosure often occurs throughout New Zealand with the distribution of pamphlets and fliers in communities where a released sexual or violent offender has been released. Generally the distributor of information in these circumstances is unknown,²⁴⁴ however there have been instances where officials such as Police have independently warned members of the public of the identity and whereabouts of a released sex offender.

One such case is that of *Brown v Attorney General*²⁴⁵ (as outlined in Part VIII). Whilst this case is seen as a breach of confidence and privacy case, there are important policy arguments that can be applied to the disclosure of information about offenders. Spear J stated that a released offender is entitled to a reasonable expectation of privacy and that providing a photograph and home address in these circumstances breached that expectation. This suggests that the legitimacy of a disclosure will often be dependent on the particular circumstances. The judge referred

²⁴³ Kemshall et al above n 235 at 171.

²⁴⁴ <http://www.stuff.co.nz/taranaki-daily-news/news/10432069/Flyers-warn-of-sex-abuser>

²⁴⁵ *Brown v Attorney General* [2006] DCR 630.

to the case of *R v Chief Constable of North Wales Police*²⁴⁶ which analysed the tension between protecting the public and protecting an offender. In such cases it was found that “disclosure must only be made when there is a pressing need for disclosure”.²⁴⁷ In particular it should be noted that in *Brown* there was a significant public response to the disclosure of this information, with the offender being subjected to both verbal and physical abuse.²⁴⁸ This suggests that New Zealand is perhaps not immune from the vigilante action experienced in America and the UK (as discussed in Part IX). Whilst *Brown v AG* involved a much wider (and unauthorised) dissemination of information than what would occur under the proposed disclosure scheme, the judgment highlights some dangers of disclosure and the competing interests at play (as addressed in Part VIII).

C Will the Disclosure Scheme Achieve an Effective Balance of Competing Rights?

Part VIII outlined the inherent tension between privacy and freedom of expression in the context of matters of public interest and safety. The balancing of these rights will be more contentious when considering the proposed disclosure scheme compared to CPOR itself (as addressed in Part VIII). The disclosure scheme is the point in the process where members of the public will be informed about offenders on the registry and as such there may be potential for these offenders to claim there has been a breach of privacy. As it stands, it seems that the safety of the public and freedom of expression is given greater weight by the disclosure scheme as officials will have immunity from a breach of privacy where the disclosure has been made in good faith. However, this may be justified if the controls put on the disclosure scheme ensure that the minimum amount of information is disclosed to the correct individuals to prevent a substantially likely and reasonable risk. As the proposed disclosure scheme (as anticipated by this paper) is more accurately represented by the disclosure made in *R v Chief Constable* (where there was a controlled disclosure to the minimum amount of persons), this may indicate that any breaches of privacy may be justified if the scheme is used appropriately. Furthermore, the Privacy Act allows for the disclosure of

²⁴⁶ *R v Chief Constable of North Wales*

²⁴⁷ Kathryn Dalziel “Should we name and shame? Disclosing personal information of child sex offenders” Office of the Privacy Commissioner August 2008 OPC/0396/A173944

²⁴⁸ *Brown v Attorney-General* at [35].

personal information held by an agency if the disclosure of information is necessary to prevent or lessen a serious threat to public safety or the life and health of another individual.²⁴⁹ Therefore the particular standard required before a disclosure is made, will also have an effect on whether the disclosure scheme appropriately balances these interests.

D Will a Disclosure Scheme Open Agencies up to Liability?

If the proposed disclosure scheme does in fact require authorised agents of the State to proactively inform at-risk individuals about released child sex offenders, it is possible that this may open the State and the relevant agencies up to claims of liability where disclosures are not made or where a disclosure is made inaccurately. This highlights the risk with establishing a system where the State is placed under an established duty to inform.

This issue can take note from the European Court of Human Rights case of *Osman v UK*²⁵⁰. This case was brought by the widow and son of Mr Ali Osman who was killed by Paul Paget-Lewis. The applicants claimed that the authorities involved failed to appreciate and act on the clear warning signs that Paget-Lewis represented a serious threat to the physical safety of Ahmet Osman and his family.²⁵¹ The claimants contended that the authorities had failed to comply with their positive obligation under Article 2 of the European Convention on Human Rights which provides the right to life.

The case failed in the Court of Appeal as the Court followed the House of Lords precedent from *Hill v Chief Constable of West Yorkshire*²⁵², which established that the police owed no duty of care to the victims of crime in relation to the way in which they conducted their investigation.²⁵³ The European Court of Human Rights found

²⁴⁹ S 6, Principle 11(f).

²⁵⁰ *Osman v The United Kingdom* (1998) 29 EHRR 245 (ECHR).

²⁵¹ *Osman v The United Kingdom*, above n 250, at [10].

²⁵² *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238.

²⁵³ *Power*, above n 155, at 89.

that “it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk.”²⁵⁴ The claim failed on the facts of the case as the court held that there was no point at which the police knew or ought to have known that the Osman’s lives were at a real and immediate risk.²⁵⁵ The Court also took into account the “unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”.²⁵⁶

It has been anticipated that similar claims could be made under a sex offender disclosure scheme where there is a failure to disclose information about a sex offender known to pose a serious risk to particular types of individuals. This could lead to liability on the part of an authorised agency such as the police or probations if the offender does seriously offend and a disclosure might reasonably have been expected to be made under the scheme.²⁵⁷ Conversely, the authorised agencies may also face liability if a disclosure is made inappropriately or outside of the established guidelines leading to particular consequences for the offender involved.²⁵⁸

However the approach from *Osman* suggests that there will be a significantly high threshold imposed in determining whether the relevant authorities should face liability. It is likely to be only in the most extreme circumstances where there has been significant derogation from the established disclosure guidelines that liability could be found. *Osman* also suggests that such claims of liability will be assessed on the facts, meaning it is largely hard to predict the legitimacy of such concerns. Regardless, the prospect of liability should be considered carefully by the government whilst developing the disclosure scheme and the protocols surrounding its use.

E Suggestions for the development of the disclosure scheme

²⁵⁴ *Osman v The United Kingdom*, above n 250, at [116].

²⁵⁵ Power, above n 155, at 89.

²⁵⁶ *Osman v The United Kingdom*, above n 250, at [116].

²⁵⁷ Power, above n 155, at 90.

²⁵⁸ Power, above n 155, at 90.

The disclosure scheme seems to be going beyond the primary purposes of CPOR (efficient management of offenders and information sharing). To allow such information to be disclosed seems to be moving towards an American approach where the onus is placed on the individual rather than the State to protect themselves from future offending. To ensure that the disclosure scheme adheres to the general purposes of the system, comprehensive guidelines and rules should be developed to ensure that the purposes of the scheme are met without disrupting the general non-public nature of CPOR. Currently, the only information made available about such guidelines is that the approval of a senior Police officer or senior Corrections staff will be required before a disclosure can be made.

Before a disclosure is made, authorities should be certain that there is no practicable, less invasive alternative means of protecting the individual and that a failure to disclose would put that individual in danger.²⁵⁹ In doing so, authorities should consider the effect that disclosure may have on the success of the offender's rehabilitation and reintegration in the community. Furthermore, only the information necessary to prevent harm should be disclosed.²⁶⁰ For example, in certain situations the authorised agencies may feel that simply the existence of a sex offender in a certain area rather than the offender's identity is necessary to protect at-risk individuals. Further to this, the disclosure should be made to the right person who can best ensure the safety of the particular child at risk.²⁶¹

Developers of the scheme may also want to consider whether to inform the offender about the fact that a disclosure is planned to be made regarding them. In order to uphold the purpose of the disclosure scheme, this suggestion could not be implemented if it would increase the danger to the at-risk individual.

XI Conclusions

²⁵⁹ Cathy Colby *Sex Offenders: Law, Policy and Practice* (2nd ed, Jordan Publishing Limited, Bristol, 2005) at 421.

²⁶⁰ Colby, above n 259, at 421.

²⁶¹ Colby, above n 259, at 421.

Both conviction rates and research regarding the prevalence of child sex offending suggest that there is a significant level of such offending within society. Given that these do not take into account the 'dark figure' of offending and the destructive effects of child sex abuse, government intervention in this area is justified. This paper attempted to determine whether the proposed CPOR would amount to a justified and practical intervention.

This paper also analysed whether the stated goals of CPOR of effective management of offenders and increased information-sharing would be achieved by the register. As it stands, there is currently a gap in current systems for the wide-scale management of all child sex offenders. Furthermore, CPOR will inherently allow more efficient information-sharing between relevant agencies which will assist in more effective management of offenders and investigation of new incidents.

There are inherent tensions between the public's right to be informed about these offenders and the privacy of the offenders themselves. This paper has found that CPOR itself achieves an appropriate balance between freedom of expression and privacy given its highly restricted nature. However, this tension is more precarious in regards to any disclosure scheme which will have to be carefully managed and monitored. Various suggestions have been made in regards to the way in which a disclosure scheme should operate to ensure an appropriate balance is maintained.

Ultimately, the current proposal is an appropriate response to the issues surrounding child sex offending which will bring New Zealand in line with other jurisdictions. However this paper advises caution in regards to the development of the disclosure scheme which, if taken too far, has the potential to disrupt the highly restrictive nature of CPOR itself and the precarious balance between competing rights and interests.

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