

LEGISLATION NOTE: THE CHILD PROTECTION (CHILD SEX OFFENDER GOVERNMENT REGISTRATION) ACT 2016

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The Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act) commenced on 14 October 2016;¹ it had to be modified under urgency by the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 to ensure its retrospective application. This retrospectivity was one of the reasons why the proposed legislation was found by the Attorney-General to be in breach of the New Zealand Bill of Rights Act 1990 in his report to Parliament under s 7 of that Act.² This article describes the background to and content of the Act as passed, and analyses issues to which it gives rise, including the potential human rights issues.

In the first part of the article, the basics of the scheme are described, including who is registered (some 1750 people at the outset and around 3000 after 5 years), the detailed information they have to provide and update for between 8 years and the rest of their life, the limited opportunities to be removed from the register, the offences for non-compliance, and the regime for accessing the register. The second part sets out the international comparators in the USA and the UK, and notes case law in the UK that led to the requirement to have review processes; it is also noted that the regime is not considered to involve a criminal penalty (and hence not be problematic on retrospectivity grounds). The third part sets out the policy statements behind the regime as introduced, including that policy makers do not expect it will prevent many offences (between 4 and 34 over a 10-year period is the estimate, though grounds are given for suggesting that there will be more, given the underreporting of such offences) but estimate that it will cost over \$146 million to run over that period; the absence of any rationale for limiting the scheme to child sex offenders is noted. Finally, the fourth part of the article analyses the regime for compliance with the New Zealand Bill of Rights Act and international human rights standards, assesses whether the offences created are strict liability, considers the impact of registration on the quantum of the sentence otherwise imposed and examines the interplay between being a registrable offender and being given notice of that fact; several drafting points are also raised, such as the effect of home detention on whether an offender is covered.

I. THE REGIME DESCRIBED

Section 3 of the Act sets out that its purpose is the establishment of a Child Sex Offender Register, which, it is asserted, will “reduce sexual reoffending against child

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¹ Section 2 of the Act provided for commencement 30 days after Royal Assent, which was on 14 September 2016. One wonders why, given that it is viewed as so necessary for protective purposes that it is retrospective in effect, that it did not come into effect on the day of Royal Assent.

² Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill* (6 May 2015).

victims, and the risk posed by serious child sex offenders". The legislature has indicated that this will flow from the fact that the Register will provide:

- (a) ... government agencies with the information needed to monitor child sex offenders in the community, including after the completion of the sentence; and
- (b) ... up-to-date information that assists the Police to more rapidly resolve cases of child sexual offending.

A. The Register

Section 10 of the Act requires the Commissioner of Police to establish the Child Sex Offender Register; "significant operational decisions" about the administration of the Register must involve consultation with Corrections (s 11(2)). The Act regulates who is included on the Register and for how long, what information about them is recorded and needs to be updated, and who can access the information.

B. The Registrable Offender

As to who is covered, s 7 defines a "registrable offender" as someone imprisoned for a qualifying offence (ie they are automatically covered) or someone made subject to a registration order if a non-custodial sentence is made (ie there is a level of discretion). Also covered are "corresponding registrable offenders", defined in s 8 as those resident in New Zealand (or entering with a view to residence)³ and who have been sentenced to imprisonment abroad following conviction for a "corresponding offence" (defined in s 4 as relating to "the same or substantially similar conduct") or required to register in that jurisdiction under a similar scheme following their conviction.

As to what is a "qualifying offence", s 4 has a convoluted approach: it defines a "qualifying offence" as a "class 1 offence, a class 2 offence, a class 3 offence, or an equivalent repealed offence", and then goes on to further define those terms by reference to sch 2 of the Act. The latter lists various offences against the Crimes Act 1961 and three offences against the Films, Videos, and Publications Classification Act 1993; in all cases, the victim must be under 16. The place of the offence in the different categories is relevant to the length of the reporting obligation, discussed below: in brief, class 3 offences involve sexual connection, class 2 offences are instances of indecency and assaults, and class 1 offences are those involving more preparatory conduct (though including abduction offences contrary to s 208 of the Crimes Act that carry up to 14 years' imprisonment).

The classification of people as registrable offenders is designed to be retrospective. Whilst general principles of interpretation might allow an argument against retrospectivity, s 5 brings into effect transitional provisions in sch 1 to the Act which make express that it is retrospective. It covers those who, as of 14 October 2016, are

³ This will cover people deported to New Zealand from overseas, most notably Australia: see Kris Gledhill "Legislation Note: The Returning Offenders (Management and Information) Act 2015" [2016] NZCLR 19.

in custody,⁴ on parole or otherwise subject to release conditions, or subject to an Extended Supervision Order (ESO) or Public Protection Order (PPO) in relation to a qualifying offence (clause 1(1) of sch 1); sentenced on or after 14 October 2016 in relation to a conviction before that date (clause 1(2) of sch 1); or subject to an overseas sentence or registration requirement on or after 14 October 2016. Since the ESO and PPO could relate to a conviction that was more than a decade old, clearly there is significant retrospectivity. The only caveat is that if the person was under 18 at the time of the offence, they are outside the regime: this is set out in s 7(3).

There is a different approach for those who are not imprisoned. If a non-custodial sentence is imposed, registrability depends on the making of a registration order under s 9 of the Act. This is expressly retrospective by reason of s 9(1A), which makes the date of the offence irrelevant. The order is classed as a sentence and so is appealable: this is by reason of s 9(4). It is also classed, under s 9(5), as a means of dealing with an offender and so gives rise to the judicial duty to give reasons for a sentence or other order, set out in s 31 of the Sentencing Act 2002. The making of an order turns on the court being "satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally": s 9(2). The court can take into account anything it thinks relevant, but has to consider various factors, such as the seriousness of the offence, the time since it was committed and any risk assessment evidence: s 9(3). For those who received a non-custodial sentence during the period after commencement and before 13 March 2017, the Commissioner was able to seek a registration order unless the court had already rejected it at the time of sentencing: clause 4 of sch 1.

The Regulatory Impact Statement relating to the legislation, which is discussed further below, suggests that there are around 210 child sex offenders released from prison into the community each year and 115 placed on community based sentences.⁵ Clearly, given the significant retrospectivity in the legislation, it will cover a significant number of people. Indeed, a government press release at the time the Act was passed suggested that 1750 people would be on the register at the outset, rising to 3000 after five years.⁶

C. The Information to be Reported and the Time-scale for Reporting

⁴ This includes someone transferred to a psychiatric hospital under sections 45 and 46 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or section 34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003: see the definition of "custody" in Child Protection (Child Sex Offender Register) Act 2016, s 4.

⁵ New Zealand Police *Regulatory Impact Statement: Child Protection Offender Register and Risk Management Framework* (6 June 2014) at [28]. The Attorney General indicated that it was understood that 472 people would be caught by the retrospective element of the regime: Christopher Finlayson, above n 2, at [29].

⁶ Hon Anne Tolley MP "Legislation passed to establish first child sex offender register" (8 September 2016) Beehive.govt.nz <<https://www.beehive.govt.nz/release/legislation-passed-establish-first-child-sex-offender-register>>.

A person who is registrable by virtue of the sentence received or registration order (or their position overseas) has to provide an initial report and then various periodic reports. This relates to "relevant personal information", and is extensive, some might say Orwellian, set out in s 16(1)(a)-(q): it covers not just the usual identifying details of name, date of birth and address, but details of children in the same household, details of work, details of user names for social media accounts, details of modems and routers, details of cars owned or driven, and details of tattoos and scars. Any changes to this information must be reported by reason of s 20. In addition, an annual periodic report must be made whilst the registration requirement remains in place: ss 18 and 19.⁷ As Ellis J has commented, the obligations arising under the Act are "onerous".⁸

Time limits exist for this reporting. Under s 17, the initial report has to be made within 72 hours of release from custody, the making of a registration order if a non-custodial sentence is imposed, or entering New Zealand as a citizen or resident or applying for a residency visa after entering New Zealand. Any changes to the personal information, such as a new tattoo or modem or a new social media name, must be advised within 72 hours; but any address change must be advised at least 48 hours prior. These requirements are set out in s 20(1). In addition, under s 21, 48 hours' notice has to be given of travel plans that involve being away from home for more than 48 hours (though there is an exception if "exceptional circumstances" make this "impracticable" – s 21(4)). Changes in plans have to be reported, as does return to New Zealand if the travel is overseas: ss 22 and 23. One specific point to note is that a Registrable Offender cannot change their name without advance permission of the Commissioner (which can be refused if it might adversely affect such matters as rehabilitation, facilitate criminality or be offensive to a victim or the family of a deceased victim): see ss 52-54. Under s 53(3), breach of this by making an application under the Births, Deaths, Marriages, and Relationships Registration Act 1995 without a reasonable excuse carries up to two years' imprisonment.

Much of the reporting by the offender has to be in person; this includes initial and periodic reports, changes of address, and changes to tattoos (s 25(1)). It is possible for other matters to be reported by other means, such as by e-mail, if the police agree. The Commissioner can direct a specific place for reporting or otherwise designate approved places (s 24), and privacy has to be guaranteed for the reporting (s 26). Some things, including initial and periodic reports and reports as to travel outside New Zealand, have to be reported to a constable; other things can be reported to an authorised police or Corrections employee (ss 25(3), 11(3) and 4). Under ss 28 to 32, the police can require proof of identify at the time of the reporting, and can take and store fingerprints and photographs.

In addition to the information supplied by the offender, s 10(2) indicates that the Register has to contain information about the offending and such matters as the sentencing notes of the judge. This in turn means that the creation of a record on the

⁷ Special provision is made by s 33 for reporting by those in witness protection programmes.

⁸ *Bird v New Zealand Police* [2017] NZHC 1296 at [17].

Register about the offender is not limited to situations in which people comply with their obligations as to the initial report. In other words, people will be placed on the Register by virtue of the conviction and sentence: for example, those in custody in relation to a relevant offence will be registered even though their obligation to report will not commence until they are released. However, much of the information will be that supplied by the offender.

The commencement of the time limits as set out in s 17 marks the start of the reporting obligation by reason of s 34. Section 35 then controls how long the reporting obligation continues: for life for a class 3 offence where there is imprisonment; 15 years for a class 2 offence where there is imprisonment; and eight years for a class 1 offence where there is imprisonment or for an offence of any class in relation to which a non-custodial sentence is imposed and registration order made.⁹

There are provisions under s 36 for suspending the requirements in two different sets of circumstances. Firstly, in short-term circumstances of the person being in custody or out of New Zealand. Secondly, the Commissioner has the power to suspend reporting on the basis that it is no longer necessary. This arises under s 36(2) and requires that the Commissioner be:

... satisfied, on reasonable grounds,—

- (a) that the offender does not pose a risk to the lives or sexual safety of 1 or more children, or of children generally; and
- (b) that the offender has a terminal illness or a significant cognitive or physical impairment that makes it difficult or impossible for the offender to fulfil his or her reporting obligations.

If either of these criteria cease to exist (ie, the risk reappears or the illness or impairment no longer applies), the suspension may be revoked by reason of s 37.

An alternative course for seeking a suspension of the reporting requirements exists under s 38 by way of application to the District Court, but in restricted circumstances. Only those subject to lifelong restriction can apply and only after 15 years and if they are not then on any form of parole or ESO or PPO; the test is that the offender satisfies the court that “he or she does not pose a risk to the lives or sexual safety of 1 or more children, or of children generally”. The court is required to take into account similar features as the Police in relation to s 36, and the Police and Corrections are parties to the application. An application can be made only every five years.

Although the provisions of ss 17 and 34, setting the time limits for the initial and ongoing reporting obligations, turn on the person being a registrable offender and certain events occurring (release from custody, the making of an order or the arrival into New Zealand or making of a residence application), there are duties as to notification. Sections 12-15 of the Act require notice of the registration requirement to be given by the sentencing judge and the court registrar in relation to a person

⁹ There are detailed provisions in s 35(2)–(3) for corresponding registrable offenders, which take the period back to the date of release from custody or the date of conviction if there was no imprisonment.

being sentenced, Corrections in relation to a person in custody for 14 days or more,¹⁰ and the Police in relation to someone who has entered New Zealand. In addition, the Police may give notice of the obligation and the penalties to anyone if the Commissioner “suspects that a registrable offender may not have received notice, or may otherwise be unaware, of the offender’s reporting obligations”: s 14. This latter power could no doubt cover someone who makes a residence application (in relation to whom there is no statutory notification obligation).

In relation to those covered by the retrospectivity provisions in sch 1, notice of their obligations has to be given by the Department of Corrections or the Commissioner of Police. By reason of cl 3 of the Schedule, their reporting obligation is to provide an initial report within 72 hours of receipt of the notice (or any longer time set out in the notice) and s 34 is expressly replaced by a provision to the effect that the reporting obligation begins on the receipt of the notice (which will affect the dates of annual reports), and the length of the reporting period (which will matter if it is not for life) is calculated to be from the date of sentence or the date of release from custody for the offence, whichever is later.

It is an offence, contrary to s 39, to fail to comply with reporting obligations without a reasonable excuse: this carries up to a year in prison; providing what is known to be false or misleading information carries up to two years, and is contrary to s 40.

The registrable offender may ask to be provided with the information held about them on the Register and for the correction of any errors: s 48. In addition, a person can challenge whether they are properly placed in the Register and the correct length for their placement. This involves an application to the Commissioner for a review of the placement (except if it follows from the making of a registration order in relation to a non-custodial sentence, which is subject to an appeal): this can be done within 28 days of notice being given under ss 12-15 (noted above). The Commissioner must make a decision after giving the person a chance to state their case. If the decision as to placement is upheld, it may be appealed to the District Court under s 50. No further appeal is possible, by reason of s 50(4).

D. Access to the Information

Under s 41(2) of the Act, the Commissioner of Police is required to issue guidelines as to access which restrict it “to the greatest extent that is possible without interfering with the purpose of this Act”, and allow access for the purposes of “preventing, detecting investigating and prosecuting qualifying offences; monitoring registrable offenders in the community”; and for information sharing among the government agencies specified in s 43(2), namely Police, Corrections, the Ministry of Social Development, Housing New Zealand, Internal Affairs and Customs. Section 43(2)(g) allows the Minister of Police to add other public sector bodies, after consultation with the Privacy Commissioner: this was used to allow the Ministry of Vulnerable Children to be

¹⁰ Section 4 defines custody as including police custody or psychiatric hospital detention: however, the notice has to come from Corrections.

added.¹¹ This information sharing must be for one of several purposes specified in s 43(1), namely monitoring the offender's whereabouts, verifying his or her personal information, managing the risk of further child sex offences or any risk or threat to public safety.

There is also a power to inform a parent, guardian, teacher or caregiver if "the Commissioner believes on reasonable grounds that the registrable offender poses a threat to the life, welfare, or sexual safety of a particular child or particular children": s 45. These various powers of disclosure override suppression orders (and must be accompanied by the suppression order, meaning that it is also something that should be on the Register, although it is not mentioned in s 10): see s 46. Section 47 preserves the confidentiality of the information except for the authorised disclosure scenarios, and backs this with six months' imprisonment and a fine of up to \$50,000 for a corporate body if (i) a person with access to the register discloses information other than with authority, or (ii) a person to whom information has been given passes it on without reasonable excuse.

II. BACKGROUND – OVERSEAS REGISTERS AND JURISPRUDENCE

The Register is not novel: indeed, New Zealand is a slow follower of registration schemes. The content of the Register is clearly the result of some consideration of overseas experience, particularly that in the UK. The starting point is the USA.

The US Department of Justice has an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (known by the semi-accurate acronym SMART), which was established under the Adam Walsh Child Protection and Safety Act 2006.¹² This is set out in 42 USC Chapter 151, which deals with Child Protection and Safety and has two main substantive parts, namely Sex Offender Registration and Notification and Civil Commitment of Dangerous Sex Offenders. The latter involves preventive detention, the former the requirement to register with the authorities. The website of SMART¹³ contains a potted history of the registration legislation that has developed over time, starting with the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act 1994.¹⁴ These contained requirements that states compile information on sex offenders, which have gradually extended to requirements that the information be made available to the public. SMART provides assistance to states in relation to these obligations.

¹¹ See "Child Protection (Child Sex Offender Government Agency Registration) (Specified Agency) Notice 2017," (23 March 2017) 33 *New Zealand Gazette* (online ed) <<https://gazette.govt.nz/notice/id/2017-go1384>>.

¹² Adam Walsh Child Protection and Safety Act 42 USC § 16901, and following, which opens with the recognition of numerous children who were murdered or assaulted. The various US statutes are named after victims.

¹³ See Office of Justice Programs "SMART" <https://www.smart.gov/index.htm>.

¹⁴ Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act 42 USC § 14071.

The United Kingdom (UK) followed suit, at least partially, with its Sex Offenders Act 1997, which required sex offenders to register with the authorities. The current legislation there is the Sexual Offences Act 2003 (the 2003 Act). Under s 80 of this Act, notification requirements are imposed if, in relation to certain offences, a person is convicted, found not guilty by reason of insanity, found to have committed the act after being found unfit to stand trial or accepts a caution for the offence. The offences, listed in sch 3 to the Act, are not limited to child sex offences, and those under 18 at the time of the offending are covered in relation to some offences (eg rape, sexual assault if the sentence was 12 months or more). As such, the coverage is wider than the New Zealand Register. The information to be recorded in the UK includes personal details and address, passport details; and there are ongoing requirements to give details of travel away from home for more than 3 days. The reporting obligations under the New Zealand statute are much more extensive.

The length of the reporting requirement in the UK turns on the sentence or order made, the range being two years (for a caution), five years (for a non-custodial sentence), seven years (if the sentence is six months or less or involves a hospital order), 10 years (if the sentence is more than six months but less than 30 months) or indefinite (if a sentence of 30 months or more is imposed or an order for detention in hospital with restrictions is made).¹⁵ It will be seen that the length of the reporting under the UK regime turns on the sentencing court's view of the seriousness of the offence as reflected in the sentence: in the New Zealand regime, there is only a very limited such link in that the use of a non-custodial sentence means that registration is for eight years, but the use of imprisonment means that it is the nature of the offence, not its seriousness as appears from the nature of the sentence, that is important. It will also be apparent that the reporting periods are generally longer in the New Zealand regime.

In *R (F and Thomson) v Secretary of State (R (F))*,¹⁶ the UK Supreme Court found that the indefinite restriction was a disproportionate interference with the right to privacy under art 8 of the European Convention on Human Rights¹⁷ and so granted a declaration of incompatibility under s 4 of the Human Rights Act 1998 (UK). This led to the Sexual Offences Act 2003 (Remedial) Order 2012,¹⁸ which inserted into the 2003 Act provisions allowing an offender to seek a review of the need for the ongoing application to them of the notification requirements: this can be made after 15 years in the case of someone 18 or over when placed on the Register or eight years if they were under 18; any further application can be made every 8 years. The basis for the application, found in s 91C(2), is that it is "not necessary for the purpose of protecting the public or any particular members of the public from sexual harm for the qualifying

¹⁵ Sexual Offences Act 2003 (UK), section 82. If the order made is a conditional discharge, which is roughly the same as an order to come up for sentence if called upon, under s110 of the Sentencing Act 2002, then the notification requirement lasts for the length of the conditional discharge.

¹⁶ *R (F and Thomson) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331.

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953), art 8 [European Convention on Human Rights].

¹⁸ Sexual Offences Act 2003 (Remedial) Order 2012 (SI 2012 No 1883, 30 July 2012).

relevant offender to remain subject to the indefinite notification requirements".¹⁹ This is similar to the regime found in the New Zealand statute to apply to suspend the reporting requirements.

For the purposes of this article, it is important to understand the reasoning of the UK Supreme Court. It was accepted that privacy rights were implicated,²⁰ that it was provided for by law and that it was aimed at a legitimate object, namely preventing crime and protecting the rights of others. The key issue was proportionality in the absence of a review, which in turn involved assessing the extent of the interference with of privacy rights, the value of notification in securing the legitimate aims, and the reduced efficacy of the scheme if there was a review.²¹ The extent of the interference was found to be significant in light of the fact that the information could be conveyed to third parties (including when that was not necessary and perhaps by mistake) and involved requirements to provide information in person as to matters such as travelling plans.²²

Turning to the value of notification in preventing further offending, two areas were examined. First, there was the fact that various other powers and mechanisms existed to deal with the risk of further sexual offending, including the conditions that could be imposed as part of parole release, the making of a sexual offences protection order (under s 104 of the 2003 Act) or a foreign travel order (under s 114), and the regime that exists under the Criminal Justice Act 2003 whereby police, probation and prison authorities have to make Multi-Agency Public Protection Arrangements to manage the risk of sexual and violent offenders.²³ It was concluded that the notification requirements played an important role in helping the authorities "to keep tabs on those whom they are supervising and managing":²⁴ but that if the other tools were no longer necessary, which would turn on the lack of risk posed by the offender, then the notification requirement would serve no purpose but instead merely be "an unnecessary and unproductive burden on the responsible authorities".²⁵

¹⁹ The review is carried out by the police. Section 91D sets out the many factors that have to be taken into account.

²⁰ *R (F and Thomson) v Secretary of State for the Home Department*, above n 16, at [41], per Lord Phillips. Reference was made (at [30]-[31]) to established case law relating to the retention of fingerprints and DNA from those arrested but not convicted, which was found to be disproportionate in part because there was no review process: *S and Marper v UK* (2009) 48 EHRR 50. Note that there is also a human-rights based duty to protect victims: Lord Phillips referred briefly (at [24]) to the general proposition that there is a duty to deter sexual abuse, set out in *Stubbings & Others v United Kingdom* (1997) 23 EHRR 213. This extends to a more specific duty to take protective action if there is an identifiable risk (ie not merely relying on deterrence): this has arisen in relation to homicide (for example, *Paul and Audrey Edwards v UK* (2002) 35 EHRR 19, [2002] Inquest LR 27), conduct that is inhuman and degrading (eg *Dordevic v Croatia* (41526/10) Section I, ECHR 24 July 2012, [2013] MHLR 89), modern day slavery or forced labour (eg *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1), or a more simply assault and hence breach of the right to autonomy (eg *MS v Croatia* (36337/10) Section I, ECHR 25 April 2013, [2015] MHLR 226).

²¹ At [41].

²² At [42]-[44].

²³ At [45]-[50].

²⁴ At [51].

²⁵ At [51].

Secondly, however, there was the suggestion that, even if there was no particular positive risk, there was a residual risk arising from the nature of sexual offending. As the government's counsel submitted, "Either all sexual offenders had a (possibly) latent predisposition to commit further sexual offences or, if some did not, it was impossible to identify who these were".²⁶ However, the evidence before the judges, which was of a 21 year study and involved a reconviction rate of 25 per cent and hence a non-reconviction rate of 75 per cent, left them unconvinced that it was not possible to identify people whose risk of reoffending did not justify ongoing monitoring.²⁷ The lack of clear evidence that allowed firm conclusions as to this did not justify applying a precautionary approach of allowing indefinite monitoring without review.²⁸ It was also commented that other jurisdictions had review processes.²⁹

The Supreme Court referred to the fact that registration systems also exist in France, Ireland, Australia, Canada, South Africa and the United States (and invariably have review systems). The existence of these systems may also mean that there is scope for consulting case law as to the substantive points arising under the New Zealand regime.

The UK has added a non-statutory process whereby parents, guardians and carers can seek information from the police as to whether someone is a sex offender against children: the Child Sex Offender (CSO) Disclosure Scheme was established in October 2010, after a pilot.³⁰ The approach in the New Zealand process is that the Police can decide to release information: a decision on this may no doubt involve the relevant person asking the Police for the disclosure (which would raise a question as to whether there had been a breach of confidentiality).

It is also worth noting that the registration requirements in the UK have been found to be preventive risk reductions processes rather than punitive measures against those on the register. In *Ibbotson v UK*,³¹ the complaint related to the required registration under the Sex Offenders Act 1997: it applied to those convicted after it came into effect but also those serving a custodial sentence at the time and so was partly retrospective. The former European Commission on Human Rights determined that the complaint was inadmissible because the registration requirement did not amount to a penalty within the criteria adopted in case law:³² although registration followed a conviction (albeit that it was not a discretionary matter for the judge) and the applicant no doubt perceived it as a penalty and there was a criminal penalty for non-

²⁶ At [52].

²⁷ At [53]–[57].

²⁸ At [56].

²⁹ At [57].

³⁰See Gov.uk "Child sex offender disclosure scheme guidance" (29 October 2010) <<https://www.gov.uk/government/publications/child-sex-offender-disclosure-scheme-guidance>>. See also Parents Protect "Keeping children safe – your right to ask" <https://www.parentsprotect.co.uk/police_disclosure_scheme.htm>, which is operated by a charitable foundation.

³¹ *Ibbotson v UK* (1999) 27 EHRR CD332. See also *Adamson v UK* (1999) 28 EHRR CD209.

³² The leading case at the time was *Welch v UK* (1995) 20 EHRR 247, in which it was determined that confiscation of the proceeds of crime was a penalty and should not be applied retrospectively in light of the prohibition of retrospective penalties in art 7 of the ECHR.

compliance, it was preventive in its aim, the potential criminal penalty required separate proceedings (unlike the term in default set in the regime considered in *Welch*) in which culpability could be assessed, and it was not of such severity to amount to a penalty.³³

III. THE POLICY BACKGROUND TO THE NEW ZEALAND REGISTER

The New Zealand version of the registration requirement joins the already extant preventive detention regime for those who pose a high risk of further sexual or violent offences, under the Public Safety (Public Protection Orders) Act 2014, and the ongoing supervision of released child sex offenders through Extended Supervision Orders, set out in Part 1A of the Parole Act 2002. What was then called the Child Protection (Child Sex Offender Register) Bill was introduced by the government to Parliament in 2015. The New Zealand Police provided a Departmental Disclosure Statement of 30 April 2015,³⁴ and a Regulatory Impact Statement of 6 June 2014.³⁵ The latter gives a lengthy account of the policy-making process and of the regimes abroad that were in essence copied.

The chronology of the proposal is described as having been initiated by the Minister of Corrections and Police after a 2012 visit to the UK.³⁶ It is to be hoped that this is not the first time that there was any consideration at Ministerial level of promoting the idea, given its long standing in other jurisdictions, including across the Tasman (for example, the Child Protection (Offenders Registration) Act 2000 (NSW)).³⁷ Various research statistics are quoted, though with caveats as to the lack of certainty in light of the under-reporting of sexual offending: this includes that the rate of sexual offending against children is more than 20 per cent higher than a decade previously,³⁸ and that the reconviction rates are relatively low.³⁹ Naturally, the deleterious effects of sexual offending against children are noted.⁴⁰ The problem identified is the difficulty of planning strategies to deal with recidivist offenders when there is no comprehensive record of where they are:⁴¹ the existing measures such as Extended Supervision Orders are said to be inadequate in this regard.⁴² Accordingly, it is said:⁴³

³³ The Commission specifically rejected the difficulties caused by public reaction.

³⁴ New Zealand Police *Departmental Disclosure Statement* (30 April 2015). Available at <<http://disclosure.legislation.govt.nz/bill/government/2015/16>>.

³⁵ New Zealand Police, above n 5. Available at <<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-police-cpor-aug15.pdf>>.

³⁶ At [22].

³⁷ The various other regimes are usefully summarised at [35] of and Appendix 3 to the Regulatory Impact Statement.

³⁸ New Zealand Police, above n 5, at [23]. It is not clear whether this takes into account population growth in the period.

³⁹ At [27]. The figure quoted is 8 per cent within 10 years for further offences involving children and 11 per cent if adult victims are included.

⁴⁰ At [24]–[26].

⁴¹ At 30].

⁴² At [32]–[33].

⁴³ At [34].

There is an opportunity to further improve public safety and crime resolution rates through introducing a mechanism that would enable better (and better co-ordinated) monitoring of a wider range of child sex offenders in the community – during and after the end of their sentences.

The objectives are identified as (i) reducing sexual re-offending and the obvious harm it creates, (ii) improving public confidence that the authorities can monitor sex offenders, and (iii) providing up to date information that might assist the police to resolve cases more rapidly.⁴⁴ Laudable though these objectives are, there are also some clear problems. The third objective has at least a flavour of suggesting that the police should inevitably look first to past offenders to solve fresh cases, which runs the risk of prejudging an investigation, may well undermine efforts as to reintegration, and indeed suggests that the register does not reduce offending but simply provides a ready store of obvious suspects in relation to further offending. At the same time, the first two objectives raise the question of why the regime is limited to child sex offenders. When the matter passed from policy to legislative drafting, as has been noted above, the purposes set out in section 3 of the statute include the third objective and also refer to the need for monitoring (without going further as to the reason for the monitoring).

In relation to the point of why the Register is limited to child sex offenders (not a limitation in the UK), the Regulatory Impact Statement switches between sex offenders and child sex offenders with no rhyme or reason. In the summary of the options available,⁴⁵ the first rejected option is maintaining the status quo, which is unacceptable because of the information gaps about sex offenders (note, not limited to child sex offenders). The second rejected option is extending the existing protective mechanisms which are said to apply to sex offenders more generally, which is rejected because they are thought to be disproportionate to extend to lower risk offenders. The third option is of adding to the funding of NGOs that seek to manage child sex offending: it is rejected because it would not provide a single source of monitoring information for use by the police and corrections. There is no reason given for suddenly switching the concentration to child sex offending; and the conclusion is predicated on the policy aim of monitoring being the core aim. Hence, not surprisingly, the option recommended is of having a monitoring process.

It might be thought that the most sensible policy aim to deal with the problem of sexual offending is to focus on its reduction (whether against children or adults). The Regulatory Impact Statement has estimates as to the impact of the registration provisions on this. Over a 10-year period, it is suggested that between 4 and 34 offences will be prevented:⁴⁶ again, the reference is now to sex offences not child sex offences. The major variation between the upper and lower figures suggests that these estimates are given with very little confidence. It is added that “many additional offences are also likely to be prevented” because of the underreporting of cases and the fact that not all lead to convictions: this is necessarily speculative.⁴⁷ However, it is

⁴⁴ At [31].

⁴⁵ At [39].

⁴⁶ At [73].

⁴⁷ At [84]. It is assumed that other offences, non-sexual in nature, will be deterred.

also recognised that there might be a perverse effect, namely an increase in the propensity for reoffending by reduced reintegration in the community.⁴⁸

The figures as to the cost of the system over the same 10-year period is given with more certainty: capital and operating costs will be \$146.054 million.⁴⁹ An inevitable question arising is whether that level of expenditure could be used in other ways that would result in a better reduction in offending. The authors of the Regulatory Impact Statement decline to reach any conclusion as to the cost-benefit analysis of the scheme,⁵⁰ and the final statement of recommendation is one that does not stress its actual benefits in reducing crime. Rather, the comment made is as follows:⁵¹

To respond to public concern about the risk of harm caused by known child sex offenders living in the community, it is recommended that a Child Protection Offender Register and offender risk management framework be established in New Zealand.

In short, this suggests a political motive of responding to public perceptions rather than of relying on proper evidence. This is all relevant because when one considers the operation of the scheme and any points of ambiguity that might call for interpretation, including on human rights grounds, evidence-based confidence in the efficacy of the measures will be a part of any proportionality assessment. This, and further matters of analysis, are set out in the next section.

IV. ANALYSIS AND COMMENTARY

A number of points will no doubt be taken in relation to the operation of the Register. What follows is an analysis of some of the obvious ones arising from a review of the statute and the materials prepared for Parliament. In addition to the Regulatory Impact Statement, to which reference has already been made, there was a Report from the Attorney-General which concluded that the Bill as introduced was problematic under the New Zealand Bill of Rights Act 1990 (NZBORA).⁵² Hence, the first is the NZBORA issues.

A. New Zealand Bill of Rights Act 1990

In the Regulatory Impact Statement, it was accepted that there were human rights and privacy concerns (and, indeed, prospects of increasing offending, as noted above). Specifically referred to are the rights to privacy, the problems of double

⁴⁸ At [38].

⁴⁹ At [74]. It is noted at [75]–[81] that this will require \$60.921 million of new funding, and the rest will have to be achieved through more efficient working.

⁵⁰ At [82].

⁵¹ At [91].

⁵² Christopher Finlayson, above n 2.

jeopardy, the risks of vigilante attacks;⁵³ more general policy concerns are noted as well, namely continuing the perception that sexual offending is committed by strangers, whereas it is mainly perpetrated by people who know the victim, and erroneously treating sex offenders as a homogeneous group.⁵⁴ However, balancing features as to the efficacy of registers were also noted, namely the incentives for sex offenders to implement strategies to manage risk, the enhanced powers given to law enforcement agencies to resolve crimes, the deterrence effect and the enhanced abilities of communities to protect themselves.⁵⁵

The conclusion was that the human rights concerns did not prevent the legislation proceeding, and indeed it was suggested that limiting registration to those sentenced to imprisonment or made subject to a Registration Order solved any concerns.⁵⁶ The idea of allowing people to seek to come off the register was rejected on the basis that it would encourage pointless applications and should not involve police decision-making because of the risks of inconsistency and lack of scrutiny as in the case of court decisions.⁵⁷ It is worth repeating that the balancing features to which reference is made were not expected to prevent a significant number of crimes, and seem relevant only to controlling crimes by strangers rather than those known to the victims, who are accepted to be the main source of sex offending.

In any event, the government decided that there should be a form of review. The Bill that was introduced in 2015 had in cl 35 the power of the Commissioner to suspend reporting on the basis of the absence of risk and the illness that prevented the reporting (which became s 36 in the Act). Added to the Bill that emerged from the Social Services Committee was the power of the District Court to lift the lifelong reporting (which became s 38).⁵⁸ This was designed to alleviate concerns of the Attorney-General.⁵⁹

Those concerns were expressed in the Section 7 report in the following terms, the focus being on the right not to be subject to disproportionately severe treatment or punishment (s 9 of the NZBORA):⁶⁰

- (i) the obligations imposed on offenders are similar to those arising under the Extended Supervision Order, which amounts to an extra penalty;⁶¹
- (ii) they limit freedom of movement (guaranteed by s 18 of NZBORA) and freedom of expression by compelling speech (guaranteed by s 14);
- (iii) the finding in *R (F)* that the lack of a court review for a lifelong reporting requirement was a disproportionate interference with privacy rights would sound under the NZBORA as potentially disproportionate treatment for someone for whom the restriction was no longer necessary:

⁵³ New Zealand Police, above n 5, at [38].

⁵⁴ At [38].

⁵⁵ At [37].

⁵⁶ At [59].

⁵⁷ At [59].

⁵⁸ Child Protection (Child Sex Offender Register) Bill 2015 (16–2), cl 36A.

⁵⁹ Child Protection (Child Sex Offender Register) Bill 2015 (16–2) (select committee report) at 4.

⁶⁰ Christopher Finlayson, above n 2, at [9]–[24].

⁶¹ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507.

(iv) a breach of s 9 cannot be saved by an assessment of whether it is a reasonable limit for the purposes of s 5 of the NZBORA.

The introduction of the review process, replicating what happened in the UK when the human rights problem there was identified, is something that one suspects would satisfy the Attorney-General that the New Zealand regime is now rights-compliant. However, there are other concerns. In particular, there is no prospect of a review for someone whose reporting obligation is finite (ie 15 or eight years), except the police review which turns on there being both a reduced risk and severe ill-health. And yet, those who are subject to the finite term are so-subject because they have been convicted of what is viewed as a less serious offence that involves a reduced obligation to report: that surely enhances the prospect that they will be able to demonstrate the lack of a need for reporting, and yet they cannot make an application at all. Additional reasons support more extensive review provisions, both for those subject to lifelong reporting (an earlier review for them) and the others (who currently have no review): the limited material that the Register will have any significant effect on reducing offending; and the contrast with the UK regime that ties time on the register to the seriousness of the conduct as reflected in the sentence imposed. The lifelong requirement, for example, could flow from a short sentence of imprisonment for a class 3 offence, for whom a 15-year wait may be disproportionate.

The initial conclusion of the Attorney-General is predicated on the view that the Registration requirement is a penalty. This led to a second NZBORA problem for the following reasons:⁶²

- (i) Section 26 of the NZBORA prohibits a second punishment for the same offence;
- (ii) The application of the regime to those who were already serving a sentence or subject to an ESO (who were not subject to registration at the time of sentencing) was an additional punishment;
- (iii) This engaged s 26, and so it had to be assessed whether it was justified and proportionate under s 5;⁶³
- (iv) The protection of children from sexual offending is clearly an important objective; albeit that there is limited evidence of the success of registration schemes, there was a sufficient rational connection with the objective, though the focus was on "the immediate risks presented by qualifying offenders as they move into the community";⁶⁴
- (v) However, in the absence of a review that allowed those affected by the retrospective application to seek de-registration or suspension of the reporting obligation, the impairment to the right was greater than reasonably necessary and so did not meet the s 5 test.

The review process now introduced will not have solved this concern because, particularly given the context of the limited evidence of the value of registration schemes and the view expressed that their value was mainly in relation to short-term risks during a transitional period, it does not go as far as the Attorney-General suggested was necessary. This conclusion inevitably applies to the proportionality of the situation of those not affected by the retrospectivity provisions, and so reinforces the view noted above that the review process is not adequate.

⁶² Christopher Finlayson, above n 2, at [25]–[40].

⁶³ This involves applying the approach set out in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

⁶⁴ Christopher Finlayson, above n 2, at [34].

Of course, there is the point that the equivalent process in the UK is not viewed as a penalty, which in turn means that the Attorney-General's starting point would not be replicated in the UK. For the purposes of international human rights law, a matter is criminal - such that the rights to a fair trial under art 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR), and the protection against retrospectivity in art 15, apply – if:⁶⁵ (i) the domestic classification of the matter is criminal; and (ii) if the domestic classification is not criminal but the nature of the allegation and the penalty is in substance criminal.⁶⁶ Since the NZBORA indicates in its preamble that it is designed to give effect to the obligations arising under the ICCPR, it can be seen that the domestic case law that classifies the matter as criminal is the end of the debate.

This classification of registration as a criminal penalty brings with it a further rights-based problem, namely that it is a sentence that is imposed by the legislature consequent upon the making of a custodial sentence. The right to a fair trial in relation to a criminal matter requires that criminal charges be determined by courts: see art 14(1) of the ICCPR. This has been found to be breached by mandatory death sentences because the court is deprived of assessing whether the facts merit the sentence: see *Kennedy v Trinidad and Tobago*.⁶⁷ In *R (Anderson) v Secretary of State*,⁶⁸ Lord Bingham – en route to a conclusion that the minimum term to be served under the still mandatory life sentence for murder in England and Wales had to be fixed by a judge rather than the Home Secretary – accepted that the jurisprudence arising under art 6 of the ECHR meant that the sentencing decision was part of the trial and so it was the function of the court to fix it.⁶⁹ This reflects the core principle of the separation of powers, and will apply equally to any other penalty in relation to which the judge has an administrative (ie simply announcing what Parliament has directed) rather than determinative role.

There are two possible solutions. The first is to make use of section 6 of the New Zealand Bill of Rights Act 1990, the duty to secure a rights-consistent interpretation of a statute, to read the mandatory sentence as subject to an implied condition that the order is to be made unless the courts find it inappropriate. This would retain the judicial role. By analogy, the English Divisional Court was able to read a requirement that the High Court fix minimum terms for existing life sentence prisoners “without an oral hearing” as subject to the implied condition “unless the judge considers that an oral hearing is necessary to secure a fair trial”: see *R (Hammond) v Secretary of State*.⁷⁰ However, it is known that the New Zealand courts have been less creative than the UK courts in using their interpretive obligations under human rights

⁶⁵ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 14–15.

⁶⁶ See *Janosevic v Sweden* (2004) 38 EHRR 22 and *Ezeh and Connors v UK* 39 EHRR 1, [2004] Prison LR 95, which related to the equivalent fair trial provisions under European Convention on Human Rights, above n 17, art 6.

⁶⁷ *Kennedy v Trinidad and Tobago* (CCPR/C/74/D/845/1998 Views) Human Right Committee, **26 March 2002** at [7.3].

⁶⁸ *R (Anderson) v Secretary of State* [2002] UKHL 46, [2003] 1 AC 837.

⁶⁹ At [20]–[23], citing various ECHR decisions.

⁷⁰ *R (Hammond) v Secretary of State* [2004] EWHC 2753, [2005] 4 All ER 1127, [2005] 2 Prison LR 218. The case proceeded to the House of Lords, but not on this issue.

legislation,⁷¹ and might therefore find this a step too far. It is clear from the policy documents that the legislation is designed to capture all who receive a sentence of imprisonment.

The second possible solution is that courts should retain control over the total of the penalty by accepting that the Parliament's designation of part of the punishment if a custodial sentence is imposed, namely registration, requires the courts to adjust the other punitive elements – most obviously the length of the custodial sentence – in order to maintain control over the totality of the punishment imposed. There has been consideration in early cases of the question of the impact of the registration on the length of the sentence otherwise imposed, though without this supplemental point of interpretation as to the need to avoid a breach of the separation of powers. In *Bell v R*,⁷² the Court of Appeal was addressed on the suggestion that the retrospective application of the legislation should be taken into account on an appeal against a sentence imposed before the legislation was passed. The Court declined to do this. It noted that the legislation was punitive, though its main purpose was protective, which explained its retrospectivity. The conclusion was that a Parliamentary intention to discount the custodial element of a sentence was "entirely unlikely" and would be contrary to the underlying purpose.⁷³ The broader question, however, is whether Parliament intended to remove from the courts the task of setting the punitive sentence to be imposed.⁷⁴ In the absence of any such indication, which would also involve an intention to breach the separation of powers, the courts should be able to discount the sentence to reflect the ongoing penalty of registration.

B. The Discretion to Make a Registration Order in the Event of a Non-Custodial Sentence

If a non-custodial sentence is imposed, there is a discretion to make a registration order, which turns on "a risk" being posed by the offender to the lives or sexual safety of children: s 9(2). As has been noted, anything can be taken into account, but various factors set out in s 9(3) must be considered. But what is "a risk" in this context? This is far too vague a term to appear in a criminal sentencing statute, and so will have to be rescued by being given meaning. It can be contrasted with other risk-assessment based statutory tests: preventive detention requires that the person be "likely to commit another qualifying sexual or violent offence" if released because of a finite term (s 87(2) of the Sentencing Act 2002; an extended supervision order requires a "high risk" of a future relevant sexual offence or a "very high risk" of a relevant violent

⁷¹ A criticism of the approach of the New Zealand courts and support for the position of the UK judges can be found in Kris Gledhill "The Interpretive Obligation: the Duty to Do What is Possible" [2008] NZ L Rev 283; and Kris Gledhill "The Interpretive Obligation: The Socio-Political Context" (2013) NZJPIL 103.

⁷² *Bell v R* [2017] NZCA 90. (*Bell*).

⁷³ At [26]. See also the reference at [20] to it being "most unlikely" that an Extended Supervision Order would justify reducing a finite sentence.

⁷⁴ See also *Bird v New Zealand Police*, above n 8, at [28] per Ellis J that there had not been full argument and that Australian authority supported the view that the impact of "extra-curial punishment" could be taken into account.

offence (s 107I(2) of the Parole Act 2002); and a public protection order requires “a very high risk of imminent serious sexual or violent offending” (s 13(1) of the Public Safety (Public Protection Orders) Act 2014). These reflect a more suitable level of precision as should be found in relation to a criminal penalty provision.

In *Bird v New Zealand Police (Bird)*,⁷⁵ Ellis J declined to make a registration order after setting aside a sentence of imprisonment and imposing home detention. However, Her Honour did not have to determine the level of risk that required an order because the Crown conceded that it was not necessary to make one.⁷⁶ She endorsed this, focussing on whether the factors in s 9(3) suggested a future risk of offending (and concluding that they did not). Subsequently, in *Johnston v New Zealand Police*,⁷⁷ Dobson J held that it was also necessary to have regard to the purpose of the Act, set in s 3 as providing protection against “serious child sex offenders”, such that the risk that was necessary for s 9(2) to apply was that the offender was a serious child sex offender.⁷⁸ This does not answer the question of “how much” of a risk is necessary. However, Dobson J, as had Ellis J, reviewed the factors, using s 9(3) as a guide, and concluded that the risk of the repetition of offending was “sufficiently modest” that the order should not be made.⁷⁹ It is suggested that it will be necessary for a court to grapple with what level of risk is unacceptable and so justifies the making of an order.

Dobson J was also of the view that even if there was a relevant risk, there was a further question relevant to the decision, which was whether it was proportionate to make an order, “balancing ... the utility of the details of a convicted person being on the register, against the impacts of this additional punishment on the defendant”.⁸⁰ This is consistent with the view expressed above that human rights must feature in the process, the proportionality assessment being typical in relation to interferences with privacy and autonomy rights (as reflected in art 17 of the ICCPR). It should be noted that His Honour’s starting point was that the “implicit assumption” behind the register was that those who commit child sex offences have “sufficiently recidivist tendencies”:⁸¹ as has been noted above, however, the policy makers behind the registration scheme did not suggest that there was a significant prospect of success as a result of registration.

One additional question is the status of community detention or home detention for the registration requirements? In *Bird*, a custodial sentence was set aside and replaced by home detention: all worked on the basis that this gave rise to a discretion to make a registration order (which Ellis J declined to do for the reasons noted above). The statutory language in place is as follows. In the hierarchy of sentences in s 10A of the Sentencing Act 2002, home and community detention are clearly distinguished from

⁷⁵ *Bird v New Zealand Police*, above n 8.

⁷⁶ At [30].

⁷⁷ *Johnston v New Zealand Police* [2017] NZHC 1718.

⁷⁸ At [30]–[31].

⁷⁹ At [54].

⁸⁰ At [22]. See also [55].

⁸¹ At [13]. Note also that the Court of Appeal in *Bell*, above n 72, had a view that the register was primarily protective: this is no doubt correct, but does not reflect the material discussed above that reveals the limited protective value expected to be achieved.

imprisonment, as they are in ss 69B and 80A. At the same time, they are sentences that involve “detention”, and so do not fit easily within the idea of a “non-custodial sentence” as referred to in ss 7(1) and 9(1) of the 2016 Act. Since that would mean a significant gap in the legislative scheme, one suspects that courts will construe the legislation so as to cover these sentences, and since they are clearly not sentences of imprisonment, they will come within the definition of “non-custodial”, which will be construed as “any sentence that does not involve imprisonment”.

This does mean that if such sentences are imposed by the sentencing judge, the court will have to be reminded to consider making a registration order. This will mean that there is a further ground of disproportionality in relation to those who are excluded from home detention in particular because of grounds such as not having a suitable address.⁸² Similarly, there will be questions of what should happen if imprisonment is accompanied by leave to apply for home detention under s 80I of the Sentencing Act 2002: given that a successful application to convert the sentence means that the sentence of imprisonment is cancelled (that being the effect of s 80K), does that mean that the registration order is likewise cancelled and consideration will have to be given to whether to make a Registration Order? The answer seems to be that this is so, though the statutory language could be clearer. Section 7(4) indicates that a person ceases to be a registrable offender if the relevant conviction is quashed or “the sentence ... is reduced or altered so that he or she would not have fallen within the definition of registrable offender ... had the amended sentence been the original sentence”. This can no doubt be read together with s 9 to allow the court that substitutes the home detention sentence to go on to then make a registration order in its discretion.

At the other end of the scale, the Sentencing Act 2002 does not count all orders as sentences: in particular, fines and upwards are sentences, whereas there is also a discharge or an order to come up for sentence if called on (s 10A(2)(a) and ss 106-111). Since s 7 of the 2016 Act requires a sentence, the latter do not count and so cannot be accompanied by a registration order.

C. The Offences

There are several offences under the statute,⁸³ namely:

- Section 39(1): “A registrable offender ... fails to comply with any of his or her reporting obligations without reasonable excuse” (which carries 1 year or \$2000 or both);

⁸² In *Bird v New Zealand Police*, above n 8, at [25] per Ellis J that the difference in the length of reporting requirements and the existence of the discretion in relation to a non-custodial sentence meant that the “choice between home detention and imprisonment ... assumes particular importance”.

⁸³ The first two will be charges against someone who is a sex offender: the s 40 charge will be a category 3 offence and hence involve a right to involve a jury trial. However, since it will necessarily involve revealing the defendant’s previous character as a sex offender, there will be interesting tactical questions of whether to seek a jury trial.

- Section 40(1): "A registrable offender ... in purported compliance with this subpart, provides information that the offender knows to be false or misleading in a material particular" (which carries 2 years or \$4000 or both);
- Section 47(3): "contravenes subsection (1) or ... without reasonable excuse contravenes subsection (2)" (which carries 6 months' imprisonment or a fine of \$50,000 for a body corporate).⁸⁴

To explain further the elements of the last offence, it has been noted above that parents, guardians, teachers or carers may be given information about a Registered Offender under s 45 if there are specific risks. However, s 47(2) indicates that "A person to whom personal information about a registered offender is disclosed under this subpart must not disclose that information to any other person" unless the Commissioner of Police gives consent (which can be given generally or on particular facts and must be for the purpose of protecting a child or children generally) or the disclosure is permitted under any other statute or law. In addition, s 47(1) indicates that a person who has authorised access to the Register "must not disclose any personal information in the register" unless authorised to do so by the Commissioner of Police or under some other statute or law.

The offence contrary to s 40(1) is expressly a mens rea offence: the need for knowledge of the falsity or misleading information indicates that the registrable offender must know what their obligations are (even though it is a matter of law) and knowingly provide erroneous information. Indeed, it has to be erroneous in relation to "a material particular": this allows an argument that something that is false but has no impact on the reasons for which the information is collated (because it does not impact on the ability of the authorities to monitor the offender or to resolve cases, those being the purposes set out in section 3) is not a material particular.

The need for knowledge of the falsity or misleading nature will no doubt also produce the debate as to what level of understanding amounts to knowledge, and whether it includes a belief. In *R v Kerr*, the Court of Appeal noted that the standard approach in New Zealand case law was to equate "knowing" to "believing":⁸⁵ however, it is to be noted that Parliament is perfectly able to specify belief as a mens rea if it does not want to go as far as requiring knowledge (see, for example, s 186 of the Crimes Act). There is also the idea of "wilful blindness", in essence not seeking confirmation of what is believed because of the understanding that it would produce knowledge. See *Soles* for a discussion of this,⁸⁶ including the importance of differentiating it from recklessness, namely taking an unreasonable risk that something is false: this is clearly a different standard (as, for example, is recognised by the reference to knowledge or recklessness in relation to receiving contrary to s 246 of the Crimes Act). Accordingly, someone who provides information in a situation of some uncertainty may be reckless, but that will not be sufficient.

⁸⁴ There is no specified fine in relation to an individual offender: but section 39(1) of the Sentencing Act 2002 will allow a fine to be imposed.

⁸⁵ *R v Kerr* [2012] NZCA 121 at [14].

⁸⁶ *R v Soles*, above n 41. The substantive holding in this case has been overturned in *Cameron v R* [2017] NZSC 89 in relation to drugs offences, but the analysis as to the difference between knowledge and recklessness remains valid.

In relation to ss 39 and 47, should a mens rea be implied? This is a statutory interpretation question, the choice essentially being between having an implied mens rea that the prosecution have to prove or an absence of fault defence that the defendant has to prove (since offences of absolute liability are uncommon and require a fairly clear legislative intention).⁸⁷ In *Stevenson v R*, the Court of Appeal noted that:⁸⁸

the presumption that proof of mens rea or a guilty mind is an element of any crime can only be displaced by clear or necessary implication if the statute creating an offence is aimed at an issue of social concern such as public safety; even then, it must be shown that imposition of strict liability will be effective to promote the statutory objectives by encouraging greater vigilance to prevent the commission of the prohibited act.

In this context, it should also be noted that since the Court of Appeal in *Millar v Ministry of Transport*⁸⁹ confirmed that New Zealand criminal law recognised that judges could construe an offence to be one of strict liability and so with a general absence of fault defence, the legislature has been able to assert its power to control this by express labelling of offences. See, for illustration, s 65F Civil Aviation Act 1990 (endangering the safety of an aircraft is labelled strict liability, which no doubt avoids any argument to the contrary arising from its maximum sentence of two years' imprisonment); ss 143 and 143A Tax Administration Act 1994 indicate what offences are absolute liability and what are "knowledge offences"; ss 13 and 30 Animal Welfare Act 1999 make clear that the offences against ss 12 and 29(a) are strict liability, and ss 54 and 55 Walking Access Act 2008 set out various strict liability offences and specify the absence of fault defences.

It is a credible argument that the ability and practice of Parliament to specify that something involves strict or absolute liability reinforces the presumption that otherwise applies (of which Parliament is taken to be aware); to this can be added the features that there will no doubt be stigma attaching to any conviction and a real prospect of custody. This will not prevent arguments that the offence is impliedly one of strict liability, and it can no doubt be argued that the matter is aimed at a matter of social concern involving public safety (albeit in the context of the limited evidence as to efficacy in this regard) and will provide a deterrence and hence perhaps encourage better compliance.

Irrespective of whether there is a no fault defence, there is in relation to s 39 a reasonable excuse defence. It is suggested that this will lead to arguments as to the relationship with the notification requirements, and will provide an alternative way in which lack of knowledge, this time as to having the obligation to report, will be relevant. Firstly, the obligation to report turns on a matter of status, namely being a

⁸⁷ *Millar v Ministry of Transport* [1986] 1 NZLR 660 at 668: Cooke P noted that the endorsement of the general applicability of the strict liability position, ie with the absence of fault defence, meant that there was "a good deal less room" for absolute liability.

⁸⁸ *Stevenson v R* [2012] NZCA 189 at [16]; the Court relied on *Gammon (Hong Kong) Ltd v Attorney-General (Hong Kong)* [1985] AC 1, and its endorsement in *Millar v Ministry of Transport*, above n 87.

⁸⁹ *Millar v Ministry of Transport*, above n 8487.

registrable offender. Secondly, however, the various obligations as to giving notice, set out in ss 12–15, are obligatory in relation to court Registrars, Corrections in relation to those in custody and the Police in relation to those entering the country; it is only in relation to the obligation of Judges that there is express provision in s 12(3) that the failure of the Judge to mention the obligation of the offender as part of the sentence is expressly noted not to affect the reporting obligations. Thirdly, there is also a discretion on the part of the Police to give notice to anyone suspected to be unaware of their reporting. Finally, it is to be noted that in relation to those who are covered by the retrospectivity provisions, their obligation to report rests on the receipt of the notice of the obligation (clause 3 of sch 1).

The obvious argument from the perspective of the prosecution is that the expressly different treatment of those to whom the retrospectivity provisions apply should be contrasted with the obligations applicable to other offenders. However, there are clear arguments the other way. In the first place, the effect of clause 3 of sch 1 is that there is no reporting obligation until the notice has been served: hence, non-service does not amount to a reasonable excuse for non-reporting, but instead means that there is no obligation. Accordingly, it cannot govern the situation of others. For those, the fact that the notification obligations are clear indicates that they should have a consequence in the case of default and one obvious way of giving this impact is to allow a reasonable excuse defence if there has been no notification.

In relation to s 47(3), if there is strict liability in relation to s 39, it is a fortiori in relation to this offence given its lower penalty and arguably stronger reasons for having strict liability (protecting those required to register from breaches of their rights, including from the risk of misplaced vigilante action against them). In addition, the information will be provided in the context of a clearly expressed obligation of confidentiality (at least one would expect so) that the duty to take care that arises under s 47(2) will be emphasised. This in turn will mean that a positive defence of taking care not to reveal the information, the consequence of it being strict liability, will be appropriate. This can be seen as particularly proportionate in light of the reasonable excuse defence, which will allow information to be passed on if that is necessary⁹⁰ for the purposes of protecting children and it is not possible to get the permission of the police in advance.

D. Drafting Points

Finally, there are a number of miscellaneous points that arise from the drafting of the legislation, which are set out in no particular order.

(i) Since a conviction is required, it appears not to cover anyone found unfit to stand trial but probably to have committed the act (under the Criminal Procedure (Mentally Impaired Persons) Act 2003) or found not guilty by reason of insanity; this is unlike the situation in the UK. This is explicable by the fact that registration is not viewed as

⁹⁰ Objectively so, rather than on the basis of it being believed to be necessary, given that a reasonable excuse is an objective formulation.

a penalty there but is here, meaning that it cannot follow from either such finding. Hence, placement on an overseas register without a conviction means that someone is outside the definition of a corresponding registrable offender (since that requires a conviction, as is expressed in the language of s 8 of the 2016 Act). The position of those who receive a caution as an alternative is also to be contrasted: they are registrable under the UK scheme but not the New Zealand scheme.

(ii) The Act's definition of a "corresponding offence" refers to an offence abroad that involves "the same or substantially similar conduct as a qualifying offence".⁹¹ This may give rise to an issue if the overseas offence is constructed in a way that involves no mens rea or a lesser mens rea than the equivalent offence in New Zealand. Does the reference in the definition to "conduct" encompass only the actus reus aspect of the offending?

(iii) Section 45, the power to make disclosure to parents, guardians, carers and teachers in relation to a registrable offender who "poses a threat to the life, welfare, or sexual safety of a particular child or particular children", may give rise to questions if it is not exercised and an attack occurs. This is because s 51 excludes liability in relation to good faith conduct under the Act. However, there are clear duties arising in human rights law for the police authorities to protect life and bodily integrity from the actions of third parties when they know or ought to know of a real and immediate risk to life;⁹² and failures in relation to such duties require effective redress, including compensatory remedies.⁹³ These should be translatable to remedies under the NZBORA, given its stated purpose of giving effect to international human rights standards. But if s 51 evinces an intention to breach the NZBORA and the obligations arising under international human rights law, the declaration of inconsistency jurisdiction may be exercised.

(iv) Section 50(4) provides that there is no further appeal from the District Court's decision on appeal from a decision by the Commissioner of Police when an application made to review placement on the register or the identified reporting period is rejected by the Commissioner (under s 49). Since this will invariably turn on a point of law, it would leave the matter at the level of the District Court if the matter were not reviewable by way of judicial review. However, it seems that judicial review is available. In *AH v Commissioner of Police*,⁹⁴ Faire J ruled that the amending provisions designed to add to the retrospective coverage of the regime, specifically an amendment to clause 1(1)(e) to include those subject to release conditions post release from a custodial sentence, did not cover AH. It was AH's action in taking a s 49 review in relation to his original placement that led to this being revoked (and to

⁹¹ Section 4, definition of "corresponding offence".

⁹² For example, *Tomašić and Others v Croatia* (46598/06,) Section I, ECHR 15 January 2009, [2012] MHLR 167; *Opuz v Turkey* (2010) 50 EHRR 28. These both arise under the equivalent provisions in European Convention on Human Rights jurisprudence. See also above n 20 above as to the clearly established duty to protect victims.

⁹³ For example, *Umetaliev v Kyrgyzstan* (CCPR/C/94/D/1275/2004 Views) Human Rights Committee, 20 November 2008 at [11]; *Agiza v Sweden* (CAT/C/34/D/233/2003 Views) Committee Against Torture, 20 May 2005.

⁹⁴ *AH v Commissioner of Police* [2017] NZHC 930.

the amending legislation). This challenge was all done by way of judicial review of the placement on the order (without any review and appeal to the District Court): no point seems to have been taken that judicial review was not available. In consequence, it should be available before or after a District Court decision.