



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

CHILD PROTECTION (CHILD SEX OFFENDER REGISTER) BILL

28/10/2015

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1. Summary

- 1.1 The New Zealand Law Society welcomes the opportunity to comment on the Child Protection (Child Sex Offender Register) Bill (the Bill).
- 1.2 The Law Society acknowledges the important social objective the Bill seeks to advance.
- 1.3 The Law Society has reservations about the effectiveness of the proposed register in achieving the Bill's objective, and serious concerns about the manner in which the proposed register would infringe civil rights and fundamental freedoms.
- 1.4 If the Bill is to proceed, the Law Society recommends amendments to address these matters:
 - 1.4.1 a mechanism for review of the lifetime notification obligation;
 - 1.4.2 measures to minimise the extent to which the Bill applies retrospectively;
 - 1.4.3 a more limited requirement to provide online account details and to notify travel;
 - 1.4.4 a consistent provision to deal with emergencies; and
 - 1.4.5 clarification of the restrictions on accessing the register.
- 1.5 However the Law Society recommends that the Bill not proceed and suggests an alternative model for achieving the Bill's objective that reduces the infringement of civil rights and freedoms. The alternative model would allow the sentencing judge or Parole Board to impose a registration and reporting requirement in individual cases which warrant it.

2. Objective of the Bill

- 2.1 The Law Society acknowledges the important social objective the Bill seeks to advance, namely the protection of children from the risk of sexual offending by known child sex offenders.
- 2.2 Children are amongst the most vulnerable of all victims of crime and the effect of sexual abuse tends to be particularly harmful and long-lasting.

3. Effectiveness of the proposed register

- 3.1 The Law Society supports effective and proportionate measures to reduce the risk of sexual offending against children. However, the Law Society has reservations about the effectiveness of the proposed register as a means of achieving the Bill's objective of protecting children from the risk of sexual offending.

3.2 Offender registers have been implemented in a number of overseas jurisdictions. The Regulatory Impact Statement (RIS) for the Bill identifies that “there is limited research evidence available from other jurisdictions about the effectiveness of sex offender registers and the best practice for long-term monitoring of high risk sex offenders in the community after their sentences end”.¹ The Attorney-General's report on the Bill also refers to the fact that numerous studies have noted the scarcity of evidence that child sex offender registers deliver significant benefits in terms of improved public safety.²

3.3 The RIS goes on to record that the literature identifies significant adverse impacts arising from registers, which undermine their effectiveness.³ In particular:

3.3.1 Registers perpetuate the view that it is strangers who commit sexual offences, whereas sexual offending is most often committed by people known to the victim.

The Law Society is concerned that the protection of children from the risk of sexual offending is undermined by a mechanism which contributes to the misvaluation and mismanagement of that risk by those who care for children and accordingly primarily protect them from offending.

3.3.2 Registers stigmatise sex offenders, which may have the perverse effect of increasing their propensity to re-offend by reducing their opportunities for reintegration.

The Law Society is concerned that the proposed register will undermine sex offenders' rehabilitation by contributing to their social isolation and requiring them to confirm persistently to society their central identity as being that of a sex offender.

3.3.3 Registers classify sex offenders as a homogeneous group, whereas their characteristics vary greatly, including their risks of re-offending.⁴

The Law Society is concerned that the blanket nature of the proposed register is at the expense of a more targeted approach directed at the identification of individual offenders with a high potential to re-offend.

¹ New Zealand Police and Department of Corrections *Regulatory Impact Statement: Child Protection Offender Register and Risk Management Framework Agency Disclosure Statement* (6 June 2014) at page 1.

² *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) at [33].

³ RIS above n 1 at [38].

⁴ RIS above n 1 at [84] relies on statements made in a Corrections report (*Reconviction Rates of Sex Offenders Five year follow-up study: Sex offenders against children vs offenders against adults*, January 2011) which relate to sex offenders generally, to estimate the benefits of a child sex offender register. However the Corrections report shows that there are differences between the characteristics of child sex offenders and sex offenders generally, and indicates that recidivism among child sex offenders generally appears to be relatively low: see pp 7, 10 and 11.

4. Proposed register offends against fundamental civil rights and freedoms

- 4.1 The Law Society has serious concerns about the manner in which the proposed register infringes rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990. If the Bill is to proceed, the Law Society recommends amendments to address these matters.
- 4.2 The Attorney-General has reported to the House under section 7 of the Bill of Rights Act, concluding that the Bill is inconsistent with section 9 (disproportionately severe treatment or punishment) and section 26 (double jeopardy), and cannot be justified under section 5 of the Act. The Law Society shares these views and has further concerns about the Bill's inconsistency with the Bill of Rights Act.

Section 9: Disproportionately severe treatment or punishment

- 4.3 In terms of section 9, the Attorney's concern is with the absence of any means which enables registrable offenders to seek a review of their reporting obligations on the grounds that they no longer pose a risk to the sexual safety and lives of children. The concern is particularly pronounced for those who have committed category 1 offences and are required to comply with reporting obligations for the rest of their lifetimes regardless of whether they pose any risk.⁵
- 4.4 In his report, the Attorney-General makes reference to the decision of the United Kingdom Supreme Court in *R v (F) v Secretary of State for the Home Department*,⁶ where it was held unanimously that the lifetime notification requirements under the Sexual Offences Act 2003 (UK) constituted a disproportionate interference with offenders' right to private life under Article 8 of the European Convention on Human Rights.
- 4.5 The Attorney-General notes that the consequence of the United Kingdom Supreme Court's decision was that a review mechanism was introduced, allowing the lifetime notification obligation to be removed on application to the relevant chief officer of police, with a right of appeal to a magistrate.⁷
- 4.6 It is surprising that the Bill does not contain a review mechanism, in light of the United Kingdom experience. The ability of offenders subject to indefinite registration to apply to be deregistered is also a feature of the register regimes in Victoria and Western Australia.⁸ The United Kingdom Supreme Court's decision also refers to the registration requirements in France, Ireland, Canada, South Africa and the United States, commenting that almost all of them have provisions for review.⁹
- 4.7 Clause 35 of the Bill does allow the Commissioner of Police to suspend the reporting obligations of a registrable offender in certain circumstances. Clause 35 does not meet the Bill of Rights Act objection to the Bill, for these reasons:

⁵ Report above n 2 at [14] to [24].

⁶ *R v (F) v Secretary of State for the Home Department* [2010] UKSC 17.

⁷ Report above n 2 at [22].

⁸ The other states and territories of Australia only have lifetime reporting obligations for recidivists.

⁹ Above n 6 at [57].

- 4.7.1 The mechanism is only concerned with the suspension of the obligation, and does not allow for the removal of the obligation completely. The Commissioner can revoke the suspension at any time.¹⁰
- 4.7.2 The mechanism is only directed at those offenders who are unable to fulfil their reporting obligations due to terminal illness or a significant cognitive or physical impairment,¹¹ rather than those who are able to demonstrate that they do not pose any risk.
- 4.7.3 The role of the Commissioner of Police as decision-maker and the absence of any process available to the offender to have input on or seek review of the reinstatement of the reporting obligation are inconsistent with the natural justice requirements of section 27 of the Bill of Rights Act. The Commissioner would not be seen by a reasonable person as a sufficiently neutral decision-maker, given his or her other functions, and the offender should have the opportunity to be heard on a determination affecting his or her rights, obligations or interests.
- 4.8 The Law Society considers that the availability of provisions for review in other jurisdictions demonstrates the practicability (as well as the desirability) of a review procedure. The Attorney notes in his report that he has not been provided with any evidence that a review exercise would be impracticable in New Zealand.¹²
- 4.9 The RIS expresses concern about the potential for abuse of process “and unnecessary costs” if a review procedure were available.¹³ Administrative convenience is not an adequate basis for not putting in place a review procedure to minimise the intrusion on rights and freedoms. The appropriate response to the concern is a provision for the management of cases involving abuses of process, such as empowering the decision-maker with the ability to set a minimum time period for re-application.

Recommendation

- 4.10 If the Bill is to proceed, the Law Society recommends amendments that:
- 4.10.1 provide a registrable offender with the ability to apply for suspension or removal of a reporting obligation or for removal from the register on the grounds that the offender no longer poses a risk to the sexual safety or lives of children;
- 4.10.2 confer on the Parole Board the power to make decisions on applications, as well as act on its own motion; and

¹⁰ Clause 36.

¹¹ It is a necessary but not sufficient condition for suspension that the Commissioner is satisfied on reasonable grounds that the offender has a terminal illness or a significant cognitive or physical impairment that it makes it difficult or impossible for the offender to fulfil his or her reporting obligations: clause 35(2)(b).

¹² Above n 2 at [22].

¹³ Above n 1 at [57].

- 4.10.3 provide the offender and the Commissioner with the right to be heard before decisions of the Parole Board are made.

The Law Society suggests that the Commissioner should also have a right of appeal.

Section 26(2): Double jeopardy

- 4.11 The Attorney-General's report also concludes that the Bill is inconsistent with section 26(2) of the Bill of Rights Act, which affirms that no one who has been convicted of an offence should be punished for it again. The Attorney concludes that the Bill cannot be justified under section 5 of the Act.¹⁴
- 4.12 The Law Society agrees with the Attorney's conclusions in this respect.

Recommendation

- 4.13 If the Bill is to proceed, the Law Society recommends that:
- 4.13.1 retrospectivity should only apply to offenders who are currently in custody serving a custodial sentence or currently subject to an extended supervision order (ESO); and
- 4.13.2 offenders affected by the retrospectivity provisions should have the ability to apply to the Parole Board for suspension or removal of the reporting obligation or for removal from the register at the conclusion of their sentence or expiry of the ESO.

Other inconsistencies with the Bill of Rights

- 4.14 The Bill contains other inconsistencies with the Bill of Rights Act that cannot be justified under section 5:¹⁵
- 4.14.1 The requirement to provide online account details contravenes the right affirmed in section 14 to receive and impart information. As it stands, clause 15(1)(o) is too broad. It would cover online banking, RealMe and IRD account login details, as well as accounts to purchase innocuous goods or services. It is wrong to allow the State – absent any just cause and appropriate safeguards – to have the ability to carry out this level of surveillance over everyday activities that pose no risk to children.
- 4.14.2 The clause 20 requirement to notify travel is inconsistent with the right to freedom of movement affirmed in section 18 of the Bill of Rights Act. The scope of the obligation to report whether a child "generally resides" at any address at which the offender intends to stay is uncertain. The phrase is not defined in clause 20 but has a very broad definition in clause 15(2)(b) and indicates that a child usually resides at an address if the child spends two days at the address in a 12 month

¹⁴ Report above n 2 at [25] to [40].

¹⁵ New Zealand Bill of Rights Act 1990, s5: "... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

period. Any motel, hotel or other form of public accommodation will meet that test. Notification of the intended address should be sufficient. The requirement to identify whether a child generally resides at an address should be confined to residential accommodation.

Recommendations

4.15 The Law Society recommends that:

- 4.15.1 to comply with the section 5 threshold, the category of relevant personal information should be confined to specific categories of online accounts that may be associated with potential for sexual offending against children, such as social network accounts or accounts that enable access to sexual content; and
- 4.15.2 the clause 20 requirement should be limited to notification of the intended address of residential accommodation.

Need for a consistent emergency provision

4.16 The Bill lacks a consistent provision to deal with emergencies. There is a good model in clause 20(5) which relates to the reporting of travel plans.

Recommendation

4.17 The Law Society recommends that, if the Bill is to proceed, a provision similar to clause 20(5) should be incorporated in clauses 19, 21, 22 and 23 to deal with reporting requirements.

5. Restriction on access to the proposed register

5.1 If the Bill is to proceed, the Law Society supports the Bill's restriction on access to the register in clauses 39 to 45, including the offence provisions in clause 45. The RIS notes increased risks of vigilante attack on offenders in jurisdictions where the public have access to information on a register.¹⁶ Serious concerns arise for the rule of law if vigilantism were to be facilitated by the existence of a register to which the public had access.

5.2 The Law Society also notes that:

- 5.2.1 The scope of clause 39(4) is unclear and potentially too broad. Clause 39(4) provides that "... *the register includes any information from any register maintained under a corresponding law that is accessible by the Commissioner, regardless of whether that information is physically part of the register*". It is uncertain what is meant by a "corresponding law that is accessible by the Commissioner". The expression may be a drafting error and the word "law" should be "Act", in which case the definition of "corresponding Act" would be engaged. Otherwise, these words are uncertain and, if read broadly, the clause could have

¹⁶ Above n 1 at [38].

the effect of substantially expanding the information-sharing regime proposed by the Bill.

- 5.2.2 Care needs to be taken about the disclosure of information in reliance on clause 44 when suppression orders are in place. Suppression orders are typically made to protect victims of sexual offending against children. The clause should be amended to require that notice of the suppression order must accompany disclosure of information about the offender and that the recipient of the information is obliged to observe the suppression order. If notice of the suppression order is not given, there is potential to cause harm to the victim that the suppression order was intended to protect.

Recommendations

5.3 The Law Society recommends that:

5.3.1 the scope of clause 39(4) be clarified; and

5.3.2 clause 44 be amended to require that notice of any suppression order accompany disclosure of information about the offender and that the recipient of the information is obliged to observe the suppression order.

6. Alternative model for achieving the Bill's objective

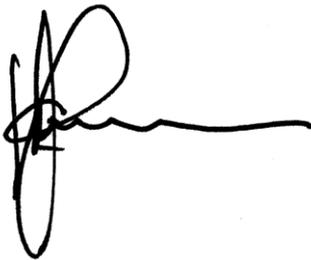
- 6.1 Given the lack of evidence about the effectiveness of sex offender registers and the Bill of Rights problems with the approach taken in the Bill, the Law Society recommends an alternative model, where registration of qualifying offender is one of the sentencing options open to a judge at sentencing and may be imposed by a judge or the Parole Board at the conclusion of an offender's sentence. Rather than the blanket approach taken in the Bill, the judge or Parole Board would make an order for registration as necessary in individual cases.
- 6.2 The Bill already recognises that the judiciary are competent to make such an assessment: clause 8 provides that a judge imposing a non-custodial sentence on an offender convicted of a qualifying offence may make an order placing the offender on the register, on the grounds of risk to the lives or sexual safety of children. Judges may also in serious cases of offending impose a sentence of preventive detention.
- 6.3 If this approach were to be adopted, the approach taken in clause 8 could stand largely unchanged.¹⁷ The same grounds for ordering registration could be available at sentencing in cases where an offender convicted of a qualifying offence was sentenced to a term of

¹⁷ The Law Society also notes a drafting anomaly with clause 8: the clause contemplates a court making a registration order if the court is satisfied, inter alia, that the person poses a risk to the lives of one or more children, or children generally – irrespective, it seems, of any sexual aspect to the risk. There is a lack of connection in this respect with the purpose of the Bill, as stated in clause 3.

imprisonment of two years or less, where parole is automatic and no conditions would otherwise be imposed.

- 6.4 More serious offences and more serious offenders would be dealt with by the sentencing judge either ordering registration following completion of the sentence or deferring the issue and ordering that the Parole Board may impose registration at completion of the sentence. The Parole Board evidently has expertise in the area of risk assessment, given its current powers to impose special conditions or ESOs.
- 6.5 As part of the model, appropriate procedures would be needed to ensure that the requirements of natural justice are met for the offender.
- 6.6 This model would ensure that measures appropriate for those offenders who may pose a significant risk of future sexual offending against children are not extended automatically to those who pose no such risk. It would place the punitive elements inherent in the requirement to register and comply with the obligations under the registration system where they should be placed – in the hands of a judicial officer or the Parole Board. It would also reduce the impairment of rights and freedoms affirmed by the Bill of Rights Act.

The Law Society wishes to be heard.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a long, horizontal, wavy line.

Chris Moore

President

28 October 2015