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The name game - the Registrar-General of Births, Deaths, and Marriages and the unwarranted state intervention in naming

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Abstract

This paper examines the Registrar-General of Births, Deaths and Marriages ability to reject the registration of names under the Births, Deaths, Marriages, and Relationships Registration Act 1995, and examines it through the lens of whether the exercise of that power is a justifiable limitation on the freedom of expression.

This paper suggests that the limitation on the freedom of expression is unjustifiable for a number of reasons. In particular, the harm alleged to be caused from undesirable name registration is fanciful, the process used to implement the rejection decision is non-transparent, and ultimately the exercise of the power does nothing to mitigate any of the harms that might potentially exist.

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New Zealand Bill of Rights Act 1990.

I Introduction

The Registrar-General of Births, Deaths and Marriages (the Registrar-General) likes to reject names. In 2020, 44 names were rejected by the Registrar-General.[1] Similar numbers are found every year when, usually early in January, the Registrar-General releases a media statement containing a list of the most common given names that have been rejected in the given year, as well as the overall number of declined? names.[2] It is all terribly funny, and in the early weeks of the year provides some water-cooler-worthy fodder as we all gather round and marvel at the stupid names people have chosen for their children and the Registrar-General who had the courage to intervene. We never stop to question if the State's intervention was warranted. This paper argues that the actions of the state in intervening in the choice of names is wrong in terms of the unfair process it uses to intervene, misguided in terms of the minor harm it inadequately fails to prevent, and an unjustified limitation on the freedom of expression.

This paper concludes that, while in theory there may be a justifiable use of state power in limiting the freedom of expression in naming, either by the new parents or a person who chooses to change their own name (the name choosers), there should be a high-bar for intervention and that there should be institutional safeguards to avoid the current situation where frivolous and unsubstantiated intervention in the freedom of expression is made. I conclude that, while there may be a case for the Registrar-General's rejection of names to be a justifiable limitation of the freedom of expression in terms of section 5 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), almost the totality of the current practice is both unnecessary and unjustifiable.[3]

I will set out the current way in which names are chosen, the power of the Registrar-General to reject a chosen name from registration, and the scant case-law that has placed some limits around this power of rejection. I then question whether the purpose behind allowing the state to reject a chosen name has merit, briefly traverse the main philosophical arguments regarding the importance of names, to establish that while the current system

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[1] "https://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/abb662eb6c988a78cc25866a000f3be4!OpenDocument" (27 January 2021) *Department of Internal Affairs* <https://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/abb662eb6c988a78cc25866a000f3be4!OpenDocument>.

[2] Ditto.

[3] New Zealand Bill of Rights Act 1990, s7.

allowing for rejection of names is predicated on there being a harm that can be caused by names, that no harm directly caused by names themselves has ever been established either in antiquity or in the modern era.

I conclude that, apart from objectionable names, the Registrar-General's power to reject names is an unjustified limitation on the freedom of expression and should not be exercised.

II The current regime governing the registration of names

The current process allows too much subjective opinion, without substantiation on the part of the Registrar-General or their delegates. The provisions that were intended to be narrow and seldom used, are now routinely used by the Registrar-General to reject names, and the institutional safeguards are insufficient in that they allow rejection of names without justification. It is important first to have an understanding of the current process and the considerations the Registrar-General (or a delegated Registrar) makes when accepting or rejecting names from registration.

The Birth, Deaths, Marriages and Relationships Registration Act 1995 (the Registration Act) outlines the process for the registration and acceptance of names.[4] There are two ways that a name is registered: either through birth notification,[5] or through the registration of a name change.[6]

Birth registration is primarily the responsibility of both parents of the child.[7] The parents of a child born in New Zealand must, as soon as reasonably practicable, notify a Registrar of the birth.[8] Section 11 outlines the manner in which that notification must occur on a "standard form".[9] The standard form itself is determined by the Registrar-General, but would be expected to contain the information set out in the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995, being information outlined in clauses 3A and 6.[10]

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[4] Births, Deaths, Marriages and Relationships Registration Act 1995, ss 12 & 18-22.
[5] Section 12.
[6] Section 21B.
[7] Section 9.
[8] Section 9(1).
[9] Section 11.
[10] Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995.

When the Registrar receives the notification, section 12 provides that they must then send the notification to the Registrar-General (or an authorised Registrar) to register the birth.[11] The Registrar will then consider whether to accept the proposed name in terms of section 18 of the Registration Act.[12]

Similarly, where a person seeks to change their name, the person is required to submit an application to the Registrar-General under section 21A of the Registration Act.[13] Section 21B outlines obligations on the Registrar-General to register the name,[14] but that is also subject to the considerations under section 18 of the Registration Act.

The Registrar-General has the ability to refuse to register a name when they consider that it is undesirable in the public interest for the person to bear the name for a limited number of reasons.[15] The reasons in section 18(8) are:[16]

> (8) For the purposes of this section, it is undesirable in the public interest for a person to bear a name or combination of names if, and only if, —
>
> (a) it might cause offence to a reasonable person; or
>
> (b) it is unreasonably long; or
>
> (c) without adequate justification, it is, includes, or resembles, an official title or rank.

The ability for the Registrar-General to reject the acceptance of names is a relatively new power with a seldom utilised in-built right of appeal for those affected by any decision of the Registrar-General.[17] There was no legislative ability for the Registrar-General to refuse to register an undesirable name until the Registration Act.[18]

Prior to the Registration Act the law regarding the Registrar-General's powers in relation to the registration of names was mostly set out in the Births and Deaths Registration Act

[11] Births, Deaths, Marriages and Relationships Registration Act 1995, s12.
[12] Section 18.
[13] Section 21A.
[14] Section 21B.
[15] Section 18(4).
[16] Section 18(8).
[17] Section 18(5)
[18] Or as it was then the Births, Deaths and Marriages Act 1995.

1951,[19] and the Marriage Act.[20] In particular the Births and Deaths Registration Act 1951 only governed the requirements for the names to be registered – no ability was given to the Registrar-General to reject names submitted for registration.[21] The 1951 Act was amended to allow name change by way of deed poll. [22] The deed poll process continued up until the Registration Act was enacted.

The Registration Act had a lengthy passage through Parliament. The Bill that would become the Act (albeit with a title change) was introduced in 1989, before the commencement of the Bill of Rights Act which introduced the requirement for a section 7 report to be reported to Parliament.[23] As stated above, the 1951 Act, did not provide for the ability for the Registrar-General (or Registrar) to refuse to accept a name once registered by the parents at birth, nor to refuse to register a name change once the appropriate deed poll had been filed at the (then) Supreme Court.[24] The Bill as introduced contained the ability for the Registrar-General to decline. It stated:[25]

> (3) The Registrar-General shall include a name or combination of names in the information recorded under this Act or a former Act relating to a person's birth (or direct a Registrar to do so) unless, in the Registrar-General's opinion, it is undesirable in the public interest for the person to bear it.

The specific categories of what 'undesirable in the public interest' means were introduced through a supplementary order paper during the Committee of the Whole House stage that occurred in 1991.[26] The Bill itself was then referred back to the Select Committee[27] followed by somewhat of a hiatus before eventually being passed in 1995. The particular categories of what would become sections 18(4) and (8) were not discussed at any stage in Parliament. This therefore leaves room for interpretation as to what the Government's intent was when enacting what would become section 18 into law. It seems likely that the

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[19] Births and Deaths Registration Act 1951.

[20] Marriage Act 1951.

[21] Births and Deaths Registration Act 1951, ss10-11.

[22] Births and Deaths Registration Act 1951, s 17A, as amended through the Births and Deaths Registration Amendment Act 1953, with further clarifications in the 1959 and 1969 amendment acts.

[23] New Zealand Bill of Rights Act 1990, s7.

[24] Births and Deaths Registration Act 1951, s17A (as amended by the Births and Deaths Registration Amendment Act 1953).

[25] Births, Deaths, and Marriages Registration Bill 1989 (193-1) at cl 14.

[26] Supplementary Order Paper 1991 (45) Births, Deaths, and Marriages Registration Bill 1989 (193-1).

[27] (25 July 1991) 516 NZPD (Births, Deaths and Marriages Registration Bill S.O.P 45, Douglas Graham).

section 18(8) categories were an attempt to restrict the Registrar-General's broad discretion as proposed in the original Bill.

Any decision by the Registrar-General to exercise their power to refuse to register a name may be appealed to the Family Court under section 18(5) of the Registration Act. Section 18(6) outlines the Court's obligations:

> On an appeal under subsection (5), the Family Court shall, unless satisfied that it is undesirable in the public interest for the person concerned to bear the name or combination of names concerned, direct the Registrar concerned to include the name or combination of names in the information recorded under this Act or a former Act in respect of the person's birth.

That appeal right is therefore to a different standard than what the Registrar-General applies when making the decision to reject a name submitted for registration. The Registrar-General generates the appeal right by making a decision under section 18(4) that is reflective of the "Registrar-General's opinion",[28] whereas the Family Court must be "satisfied that it is undesirable in the public interest for the person concerned to bear the name or combination of names concerned."[29] That the Registrar-General's opinion can be provided without reasons creates an issue for anyone considering whether to appeal, given that they likely do not know the basis of the Registrar-General's opinion. This creates a litigation risk to any name-chooser, as well as provides a barrier to the exercise of any meaningful appeal of the Registrar-General's subjective decision.

III The Case Law

In spite of the Registrar-General not having to provide reasoning for a decision, when decisions to reject are challenged, the Court has usually found in favour of the name choosers. It is easier to understand an intervention to allow a name change under the Care of Children Act when the decision is focused on the best interests of the child, than when a decision under the Registration Act is made about whether a name chooser has established enough of a connection to a rank or title or not. A key finding of the Court in litigation is that ultimately the registration of a name, and rejection of it, in no way prevents the child being called the rejected name. This undermines any argument that the Registrar-General's rejection mitigates any harm to the child from a name.

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[28] Births, Deaths, Marriages and Relationships Registration Act 1995, s18(4).

[29] Section 18(5).

There is limited case law that considers a decision in relation to a refusal to register a name and this therefore offers little guidance about how the Courts believe the public interest should be determined. We know from the 'top ten' lists released by the Registrar-General each year that there are a number of potential rejection decisions that could be challenged,[30] but for the most part they are not. In the last year there was one instance of potential litigation but ultimately no decision was placed before the Courts.[31] Presumably the limited number of appeals against decisions is because the applicants are prepared to compromise over their name choice, or are reluctant (or unable) to bear the cost of litigation against the Registrar-General, or have more important things to worry about given the recent birth of their child than having to litigate against the Registrar-General. The limited cases which have been considered by the courts, have been dominated by decisions made under section 18(8)(c) whereby they have selected a name that the Registrar-General considers resembles or is a rank or title.

Ojstersek v Registrar-General [1997] NZFLR 1006 involved a refusal by the Registrar-General to register the name "Sir" on the grounds of section 18(8)(c) of the Registration Act. Judge MacCormick did not consider the matter at length, but did consider whether the appellant's justifications for seeking to register the name were 'adequate'. They stated:[32]

> Departure from the basic position that registration of such names is not in the public interest had to be not only justified, but adequately justified. I do not consider that the word "adequately" derogates from the word "justified". I consider it indicates a level to which it must be justified, and that this must be a sufficient level of justification to override the perceived public interest.

Judge MacCormick did note that ultimately there is nothing to stop the family from calling the child 'Sir' if those are their wishes,[33] as the discretion to refuse only concerns the registration of the name, not the use of a name in itself.

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[30] <https://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/abb662eb6c988a78cc25866a000f3be4!OpenDocument>.

[31] Letter from J Taylor (Department of Internal Affairs) to Mark Scott regarding OIA request 20/21 0455 Request for information relating to rejected baby names, 17 March 2021.

[32] *Ojstersek v Registrar-General* [1997] NZFLR 1006 at 1008.

[33] At 1008.

In *Naidu v Registrar-General* [1998] NZFLR 141 the Registrar-General had declined to register the name "Emperor" on the grounds that it was not in the public interest under section 18(8)(c) of the Registration Act, in that without adequate justification the name resembled an official title or rank.[34] Judge Adams set out a non-exhaustive list of factors that would be required to be balanced in order to determine whether there had been "adequate justification" so as to allow the name "Emperor" to be registered. These factors included:[35]

1) Whether the official title or rank is likely to cause confusion in New Zealand.
2) Whether the use of the name is likely to cause embarrassment or confusion overseas.
3) The degree of probability that the name may be used for mischievous or fraudulent purposes.
4) The personal reasons advanced for registration of the name.

Judge Adams decided because there was no real likelihood that the name would cause confusion, with the only known Emperor in the world (being at that time the Emperor of Japan) that the name could be registered. The Judge stated:[36]

> Accordingly I hold the maternal whimsy of the appellant, based upon her fulfilment of her dream with regard to her son, amounts to adequate justification for registering the first name "Emperor" notwithstanding that it is an official title or rank. Weighing the relatively light justification against the even fainter public interest in the use of this particular name, I hold that the appeal succeeds.

F v Registrar-General of Births, Deaths, and Marriages involved a refusal to register the name of "Justice". [37] Judge Johnston noted that despite potentially appearing to be an official rank or title, "Justice" also has a more abstract meaning beyond that title.[38] The judge also considered and applied the Naidu balancing factors,[39] noting that the applicants' sincere beliefs regarding the name "Justice"; that the more common use of the word

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[34] *Naidu v Registrar-General* [1998] NZFLR 141.

[35] At 144 per Judge Adams.

[36] At 144 per Judge Adams.

[37] *F v Registrar-General of Births, Deaths & Marriages* [2006] NZFLR 550.

[38] At [37].

[39] At [33].

"justice" was in the abstract sense and not as applied to the official rank or title of a judge; that the name "Justice" had been registered in New Zealand previously; and:[40]

> That each case should be considered on its individual merits and while there may be confusion the likelihood in this case is not such that it should outweigh the other reasons for permitting it.

The appeal was allowed and Judge Johnston was able to accurately assert "Justice in this case will prevail." [41]

It is unfortunate that the only case law regarding the non-acceptance of names has been about refusals under section 18(8)(c) in regards to names that resemble ranks. Considering such cases invariably involves the Family Court weighing the adequacy of the justifications provided against the potential confusion caused by someone having the name that resembles a rank. In contrast, an appeal considering a refusal made on the basis of section 18(8)(a) grounds would provide much meatier considerations as to the nature of what the state finds offensive, and whether the state is therefore satisfied the name itself is undesirable in the public interest.

There have been some considerations in the Family Court that approach some reasoning as to what the Courts might consider offensive. These have been in the context of guardianship decisions involving disagreements over the intended name for a child. The limited ability of the Registrar-General to decline to register names was considered in obiter comments in the case of *CMG v TOKGK*.[42] The name that the child had been given (albeit not registered) by her parents was "Talula does the Hula from Hawaii". Judge Murfitt noted that:[43]

> The Registrar-General has only a very limited discretion to refuse registration of a name presented for a child on registration of that child's birth.

In that case the child's lawyer was seeking the child to be placed under the wardship of the Court for the primary reason of allowing someone other than the child's parents to register

[40] At [44].

[41] At [45].

[42] *G v K* [2008] NZFLR 385.

[43] At [11].

the child's name. The strong inference is the belief, not contradicted by the Judge, that the Registrar-General would have no grounds on which to refuse the name "Talula does the Hula from Hawaii". This is despite the Court's acceptance that it would be injurious for a child to have that name.[44] It would have been interesting to see if, having accepted that the name would bring harm to the child, the Court could have opined on how the Registrar-General might apply section 18(8)(a) of the Registration Act, as arguably any name that would bring harm to a child must also be a name that would cause "offence to a reasonable person".[45]

Freedom of expression of an original parent was contrasted against the freedom of religion and best interests of a child who had been placed in a foster family in a Family Court case regarding the name 'Pagan' in the case of *ACP v TJOM*.[46] In that case a child was to be fostered into a religious family, and the proposed new parents sought leave of the Court to have the child's name changed. The name change request was made on the grounds that as a religious couple they found the name offensive and that it would be in the best interest of the child for the child not to bear the name 'Pagan'. While the test being applied here was the best interests of the child and not the Registrar-General's test of reasonable offence, the Court did provide some guidance.

In the case of *C v T* Gendall J stated:[47]

> Names of children belong to the child and not to the parent. If, for whatever reason, a child's name is likely to cause him/her distress and disturb his/her welfare in some significant way (that will always be a matter of evidence and depend on an infinite variety of circumstances), then the paramount consideration that the welfare of the child must be protected and advanced, will determine the outcome of a name change.

In *ACP* Burns J accepted Gendall J's views of the ownership of names above and also considered and to a limited extent applied the surname assessment criteria from the case of L v C (1988) 5 NZFLR 193 towards the assessment of suitability of a first name. These criteria are:

> To summarise, the factors to which the Courts should have regard in determining whether there should be any change in the surname of a child include the following:

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[44] At [8].

[45] At [11].

[46] *ACP v TJOM* [2011] NZFLR 897.

[47] *C v LT* [2009] NZFLR 1098 at [66].

(a) the welfare of the child is the paramount consideration,
(b) the short and long term effects of any change in the child's surname,
(c) any embarrassment likely to be experienced by the child if its name is different from that of the parent with custody or care and control,
(d) any confusion of identity which may arise for the child if his or her name is changed or is not changed,
(e) the effect which any change in surname may have on the relationship between the child and the parent whose name the child bore during the marriage,
(f) the effect of frequent or random changes of name

The main difference between the Family Court's judgments above, is that the child's best interests must be factored into the consideration. In both cases the Court made this assessment and reasoned that it would be in the child's best interests to change the child's name. Neither however considered whether the names in and of themselves would cause offence to a reasonable person. *ACP* decided that in the particular circumstances of that case, involving a foster child being raised in a Catholic family, that 'Pagan' was a name that was, in that particular family, going to cause some offence. However, the Court did not go so far as to decide that the name 'Pagan' was inherently offensive to a reasonable man – and it would be imagined that those who have the surname 'Pagani' might take issue were the Court ultimately to do so.

Nevertheless, clearly in these cases the Court's name assessment criteria were focused on the effect of name changes, particularly on children who are too young themselves to express a view or understand the potential long-term consequences of a name change.

IV The public interest test for names

A 'public interest' test requires greater reasoning and transparency than is currently given to it by the Registrar-General. Legislating for an ability for the state through the Registrar-General, to intervene in the exercise of the freedom of expression indicates that the state believes there is a public interest in the acceptance of names by the individual members of society. As noted above there is little guidance on the threshold to be applied from statutory interpretation of the provisions, their legislative history or the way in which the Court has applied their judgment. Implicitly however, in order to justify state intervention on the freedom of expression, there must be a high threshold applied in terms of assessing what exactly is undesirable in the public interest.

I am not alone in considering a limitation on the freedom of expression that prevents an individual from choosing a name is unjustified: the Attorney-General has previously had the same view. When the Crown was considering further limiting the ability of some individuals to change their name, it found that in that particular circumstance the limitations on the freedom of expression were unjustified.[48] If a limitation on the freedom of expression was declared unjustifiable in that context it raises a question as to whether the Registrar-General's powers are themselves justifiable limitations on the freedom of expression in any context.

When a state creates a law where chosen names can be rejected on the basis that they are undesirable in the public interest, there could be many reasons why or how that undesirability is assessed. As noted above, a previous Attorney-General has acknowledged the exercise of freedom of expression in having a choice of name.[49] Any state intervention into the choice of a name for registration must therefore be treated seriously, and with procedural fairness as encompassed by the principles of natural justice that must apply when any determination is made that impacts on an individual's rights.[50]

However, no indication has been given as to what importance the state places on names, or why the state believes that it is in the public interest to intervene through rejection of registration. In order to justify state intervention in the choice of names the state must believe that there is some harm that can be *caused* by the registration of a name. This intervention to prevent harm can only be for one of two purposes, to either prevent harm to an individual person who bears the undesirable name, or to prevent harm to the wider society caused by the imposition of that name. Either of those assertions necessarily requires some sort of evidence to substantiate those claims, and that substantiation does not currently exist. That registration of a name 'causes' harm, either against an individual or to society as a whole, so as to justify rejection on the grounds of undesirability in the public interest for someone to bear it, is such an extreme claim that it must be a requirement for anyone to assert that claim to have reasons that justify it beyond a mere assertion of undesirability.

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[48] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) Amendment Bill* (20 November 2015).

[49] At [9].

[50] New Zealand Bill of Rights Act 1992, s27(1).

It is hard to understand any causality argument that might be able to be proposed by the state that does not amount to 'victim blaming'. For example, were someone to be given a name that provokes bullying, but the name itself is not inherently or obviously offensive, presumably state intervention would not be justified. A boy named Marion Morrison, may very well wish to change his name to John Wayne before beginning his movie career[51] but it would not have been justified for the state to refuse to register his given name of Marion on account of the likelihood he would be bullied for having an anachronistic and/or effeminate name.

Similarly, a singer named John Hore may wish to change his name to John Grennell before printing his first vinyl album,[52] but it would not be proper for the state to intervene and prevent registration of his surname at birth just because the word is a homophone with a crude term for a prostitute. The inference must be that the state believes the 'cause' of undesirability stems *from* the name itself, and not from the ways in which a bearer of that name is perceived by the wider society. Naming your child 'Adolf Hitler' would be undesirable because the name itself causes undesirability for the bearer without even factoring in the wider society's views of the name.

To justify intervention that state must consider that endowing a child with an undesirable name directly harms the child or wider society. However, this is not established under any policy, and no argument is made by the Registrar-General that suggests a harm is directly caused by an unusual name. It should not be the case that a baseless allegation of harm justifies the state intervention exercised by the Registrar-General.

V Names and causation of negative effects

There is clearly a value in the endowing of a name on a person. However, there is no evidence to suggest that the endowing of a particular name directly causes negative outcomes for the bearer. Any exercise of the Registrar-General's power to reject registration of names is therefore the exercise of a pointless power that is an attempt to mitigate a non-existent harm.

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[51] "https://en.wikipedia.org/wiki/John_Wayne" (19 September 2021) *Wikipedia* <https://en.wikipedia.org/wiki/John_Wayne>

[52] "https://en.wikipedia.org/wiki/John_Grennell" (19 September 2021) *Wikipedia* <https://en.wikipedia.org/wiki/John_Grennell>

The Courts have seldom interfered in the imposition of names and where they have done so they have given an indication that the exercise of the Registrar-General's decision to reject a name is usually erroneous. There is some assistance that could be provided to the Registrar-General in the limited considerations of names that have come under the Care of Children Act where the best interests of the child test is considered in far more detail than the public interest test is applied under the Registration Act. Fundamentally any argument that the Registrar-General may rely on to attribute any harm to the registration of a name is undermined because historically the inherent value and purpose of a name is not about whether a name can cause harm, it is whether a name has any purpose beyond distinguishing between people whatsoever. Furthermore, there is no evidence that there is a direct causal relationship between a name and a negative outcome for the name-bearer. The Registrar-General's power to intervene in the freedom of choice regarding names is therefore an unnecessary and unjustifiable limitation on the freedom of expression.

The Courts have noted that the rejection of a registration of a name does not prevent anyone from being called the name that was rejected for registration and this calls into question the point of rejecting the name in the first place. The Court has also allowed a minimal amount of justification to be provided to satisfy the adequate justification requirement under section 18(8)(c) of the Registration Act.[53]

The endowing of a name to a child has been described as the "first and important task of parenthood."[54] The Crown should therefore be loath to intervene in the endowing of a name to an individual without good cause.

The value of a name and whether it is itself causative or descriptive has been debated in Western philosophy for thousands of years. No-one suggests that a name is causative of any particular outcome; ultimately the ancient to modern philosophers are unable to decide whether a name is *only* useful as a descriptor, or whether a name can itself gain inherent meaning. None argues that a name in and of itself causes any particular outcome for the bearer. The question therefore is whether a name's only value to society is as a descriptor of the person who bears it, or if the name itself can connote and gain its own meaning independent of the person to whom it is attached. There is no argument that states that a name causes harm to the bearer or to wider society.

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[53] Such as with 'maternal whimsy' *Naidu v Registrar-General*, above n 34 at 144.

[54] *G v K*, above n 42, at [10].

In Plato's work *Cratylus* the author presents a discourse between Socrates, Hermogenes and Cratylus on the nature of names.[55] After much discussion Socrates deduces that names have a correctness or a truth about them,[56] and that not every man has the ability to tell the correctness of a name (unlike the 'legislator' in the quote above). But even accepting that there is a naturally correct name, Socrates forces Cratylus to concede that even naturally incorrect names can become correct through usage, or convention:[57]

> The point is that even names which are not naturally correct can be made meaningful by convention. Socrates has proven that there exist names which are meaningful and correct, even if they are not naturally correct in the sense required by Cratylus.

Loosely speaking the philosophical views on names is divided into two opposing views – one is that names are connotative the other is that names are denotative.[58] Novotny has further simplified this distinction:[59]

> Historically, the role of proper names in referring has been framed in terms of meaning, namely a question, "Do proper names have meaning?"

If you were to answer 'No' to the above that would mean you believe names do not have meaning in and of themselves, or as Mill puts it:[60]

> Proper names are not connotative: they denote the individuals who are called by them; …Proper names are attached to the objects themselves and are not dependent on the continuance of any attribute of the object.

Kripke is a firm believer in a name being a rigid designator of the person that it conveys. In other words, that the name of someone is inherently true.[61]

> [F]or although the man (Nixon) might not have been the President, it is not the case that he might not have been Nixon (though he might not have been called 'Nixon').

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[55] Plato *Cratylus* (Benjamin Jowett (translator), Project Gutenberg Netlibrary, 2012) at 440c-d. at 391B.

[56] At 434E-435B.

[57] Simon Keller. "An Interpretation of Plato's Cratylus" (2000) Phronesis, vol. 45, no.4: 284-305 at 300.

[58] John Stuart Mill *A System of Logic* (8th edition, Harper and Brothers, New York, 1874) at 37.

[59] Daniel Novotny, "Proper names in reference: Beyond Searle and Kripke" (2005) Organon F, vol. 12, no.3, 241-259 at 241.

[60] Mill, *A System of Logic,* above n 58, at 37.

[61] Saul A Kripke, *Naming and Necessity* (Harvard University Press, Cambridge, 2001) at 49.

This means that if the primary purpose of a name is as a rigid designator of its bearer, then the existence of any name not being in the public interest must be reduced. It is the person to whom the name designates that would be potentially against the public interest, not the name that signifies that person. The value of a name is not as something that causes outcomes, it is as a descriptor that enables understanding, as something that designates its bearer. The Registrar-General clearly has no role in limiting the value of someone's chosen name. If the Registrar-General is exercising a power that rejects a chosen name, then that limitation is arbitrary and unjustified if done without adequate justification, and there does not appear to be any possible justification that might be sufficient to limit the freedom of choice in naming matters, when no harm has been or can ever be established.

By creating the ability for the Registrar-General to accept and reject names through legislation, and by applying this theory, the Government must have decided that, in New Zealand, names do in fact indicate or imply attributes belonging to an individual, or at least that they should, and that when they do not, this must mean the name is 'incorrect' and something that should not be allowed to be registered. Furthermore, the suggestion that a name must be changed when it has been adjudged to be 'incorrect' also goes further so as to imply that a name denoting incorrect attributes must therefore cause negative consequences for the bearer.

A German study has shown that those with particular names are more likely than not to end up in a 'name appropriate' career. [62] For example, a person with German surnames that connote nobility (such as the German translations of Emperor or King) have been shown to be more likely to end up being in managerial roles than Germans with surnames denoting an occupational role (such as Cook or Shoemaker).[63] The study suggests that while there is a definite connection or correlation between the two, there is no proof that indicates a causal connection as opposed to a correlation.[64]

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[62] Raphael Silberzahn, and Eric Luis Uhlmann. "It Pays to Be Herr Kaiser: Germans With Noble-Sounding Surnames More Often Work as Managers Than as Employees." (2013) Psychological science 24, no. 12: 2437–2444.

[63] At 2437.

[64] At 2441.

Assuming that the Registrar-General does believe a name causes negative outcomes may explain the basis for rejecting the name 'Rogue'.[65] But then that would not explain the rejection of the name 'Messiah' which presumably must be based on some sort of religious offence that might be caused by bearing that name.

If it is the case that the Registrar-General justifies intervention based on a view that particular names will be injurious to the bearers of those names, and that therefore they should correctly be refused under section 18(8)(a), or that society at large will likely be harmed through bearers having registered names that resemble a rank or a title under section 18(8)(c) then Plato through his recollection of Socrates refutes those who claim they know the true meaning and worth of names:[66]

> It's certainly possible that things are this way, Cratylus, but it's also possible that they are not. So you must investigate them courageously and thoroughly and not accept anything easily – you are still young and in your prime after all.

So while it seems unlikely that the Registrar-General does actually believe that harm is being caused that might justify state intervention, fundamentally it needs to be considered whether a belief that a name does cause harm has any merit to it.

There is no evidence that suggests that names in and of themselves have any causative relationship with negative outcomes for children, or for adults, as opposed to some sort of concomitant relationship between the name and other factors. There are studies that identify a relationship between someone's name (particularly a surname) as a predictor or indicator for whether they will have positive or negative outcomes but if there is a belief that an unusual or offensive name does indicate potential harm to a child, the rejection of the registration of that child's name will not mitigate the potential harm to the child. It would be better to use that name's registration as an indicator that further state attention to the child might be needed.

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[65] Letter from J Taylor (Department of Internal Affairs) to Mark Scott regarding OIA request 20/21 0540 Request for information relating to rejected baby names following up from OIA 20/21 0455, 15 April 2021..
[66] Plato *Cratylus*, above n 55, at 440c-d.

A study in Germany analysed the relationship between 'noble' names and positive outcomes for the bearers of those names.[67] There have been other studies where counter-stereotypical names for a person's gender are related to negative outcomes for the bearer,[68] and that the unique names that have blossomed amongst African-Americans are also related to negative outcomes.[69] There has even been a study that shows that people have worse perceptions of people whose names they find difficult to pronounce.[70] Looking in particular at the legal profession Laham et al found:[71]

> [We] examined the relationship between name fluency and position in the hierarchy separately among lawyers with Anglo-American names and foreign names. Consistent with our suggestion that this relationship is driven by fluency, rather than foreignness per se, we found that lawyers with more pronounceable names occupied superior positions in their company hierarchies regardless of whether we confined our analysis to Anglo-American names only…

It is important to note however, that all these studies indicate correlation between unique or 'different' names and negative outcomes for individuals. They do not show whether those negative outcomes are caused by the fact that a child bears a unique name any more than they might show that society is horrible to those who bear unique names. Clearly if bearing a unique name is the cause for a negative outcome for the bearer, then the Registrar-General has a good reason, and one that would be a justifiable limitation on the freedom of expression of those who endowed the name. However, it surely cannot be a justified limitation if it is society's hatred of freedom of expression in having a unique name that causes the negative outcome for the bearer. Figlio's study into teacher expectations influencing the outcomes for the students indicates that teachers do adjust expectations based on the racial stereotype they attach to names.[72]

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[67] Raphael Silberzahn, and Eric Luis Uhlmann. "It Pays to Be Herr Kaiser: Germans With Noble-Sounding Surnames More Often Work as Managers Than as Employees." (2013) Psychological science 24, no. 12: 2437–2444.

[68] David N. Figlio. "Boys Named Sue: Disruptive Children and Their Peers." (2007) Education finance and policy 2, no. 4: 376–394.

[69] Roland G. Fryer, and Steven D. Levitt. "The Causes and Consequences of Distinctively Black Names." (2004) The Quarterly journal of economics 119, no. 3: 767–805.

[70] Simon M Laham, Peter Koval, and Adam L Alter. "The Name-Pronunciation Effect: Why People Like Mr. Smith More Than Mr. Colquhoun." (2012) Journal of experimental social psychology 48, no. 3: 752–756.

[71] At 755.

[72] David N. Figlio "Names, Expectations and the Black-White Test Score Gap" (2005) at 23.

Secondly, a name may be a useful indicator that the state can use to justify intervention. Figlio has argued that a boy's name can be an indicator of their likelihood for being disruptive in class, and that the more disruptive students there are in any particular class, the worse outcomes for all students in that class.[73] There might be other name-based indicators that indicate where state-based intervention might be warranted. For example, in the *Talula Does the Hula* case, a key indicator in that example was the fact that the child had not had their name registered at all. If, instead of changing or rejecting a name considered offensive, the Registrar-General dedicated more resources to prosecuting parents who have not registered their children by the age of two, better outcomes for the child might be encouraged. If instead of waiting until a child with the name of Pagan is being fostered by two religious parents who seek to change the child's name, the state had intervened earlier to see if Pagan's mother was coping, the outcome may have been better for the child. If the potential relationship (albeit not a direct causation) between having an unusual name and negative consequences to the child is believed to exist from having an unusual rank or title as a name then it may be better to provide greater funding to parents of "Dukes" or "Emperors" than to deny the name chooser's right to the freedom of expression.

In other words, instead of the state nonsensically believing that rejection of name registration mitigates any or all harm to a child, it may be better to instead use that registration as a prompt to look for any other indicators in that child's life that might suggest further state intervention or support is needed for the name choosers or the child themselves.

VI Where State Intervention may be justified

No one, least of all the New Zealand Government, has found proof that a name actually causes harm (although I concede that it may be an indicator of harm to a child). Should this be wrong and a harm can be established, then this could be used as a basis to justify a limitation on the freedom of expression. However, even if a harm is established, the state has failed in establishing a transparent system whereby it could be proved that a limitation on the freedom of expression is justified. Furthermore, at its worst a name causes such little harm to an individual, and intervention would fail to mitigate that harm, therefore in no circumstances would a limitation on the freedom of expression be justified.

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[73] Figlio. "Boys Named Sue: Disruptive Children and Their Peers.", above n 68, at 393.

Under New Zealand law there are many areas where the state restricts the freedom of expression. Two areas will be focused on here that show a far more robust process than that afforded by the Registrar-General is available. First, in matters relating to censorship of objectionable publications.[74] The Films, Videos and Publications Classification Act 1993 (the Classification Act) shows a process where the state has legislated a more in-depth process that both requires the state to substantiate why they are intervening on the freedom of expression, as well as promotes a clear and rigorous appeal system so that any limitation decision may be adequately challenged. A second example of limitations is found in the ways the freedom of expression is restricted under various laws,[75] and also under proposed new law in the wake of the Royal Commission into the Christchurch Mosque attacks. This shows the way in which the state does take seriously any limitation on the freedom of expression in a way that was not provided when the Registrar-General's powers of intervention were created.

One area that involves similar considerations to that of registration of a name is in the context of objectionable images as determined by the process in the Classification Act. This is a much more rigorous and robust process than that available under the Registration Act.

Section 3 of the Classification Act sets up a framework to be applied in order to assess whether an image is 'objectionable'.[76] Once assessed, there is far more rigour to an appeal under the Classification Act than there is in relation to an appeal against a rejected name under the Registration Act.[77] Fundamental to the appeals process is the requirement that the Classification Office must provide the affected party with the reasons for making the decision,[78] and a similar requirement also applies to the decisions of the Board.[79]

The case of *Moonen v Film and Literature Board of Review* shows how the Courts have viewed the balancing of an individual's right to freedom of expression under s 14 of the

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[74] Films, Videos, and Publications Classification Act 1993, s3.

[75] See for example the Human Rights Act 1993, ss 61 and 131; Summary Offences Act 1981 and Harmful Digital Communications Act 2015, s22.

[76] Films, Videos, and Publications Classification Act 1993, s3.

[77] Births, Deaths, Marriages, and Relationships Registration Act 1995, s18(5); Films, Videos, and Publications Classification Act 1993, ss 47 and 58.

[78] Films, Videos, and Publications Classification Act 1993, s38.

[79] Section 55.

Bill of Rights Act against the ability of the Film and Literature Board of Review to declare something objectionable.[80] The Court ultimately found that the Board in *Moonen* had failed to do this in making their decision because they had not provided the affected party with the reasons for their decision:[81]

It is clear there is far more rigour to the process for the classification of objectionable images. Decisions (including the reasons for those decisions) must be provided to the affected individual,[82] and in cases like *Moonen* the Court is prepared to accept that procedural fairness requires those decisions to be set aside and re-made should they have failed.

The Classification Act provides for due process,[83] and creates criminal offences that support the view that the best interests of the child are required to be protected through the criminalising of provisions that exploit that child.[84] The Registrar-General's process does not.[85] For example, there were numerous classification decisions resulting from the March 15th terrorist attacks that resulted in clear decisions and an appeals process. [86] The classification system itself is fairer than the registration system with a requirement for reasons that can therefore be fully tested instead of a system that requires new parents to articulate how their freedom of expression has been infringed by a Registrar who has not articulated their reasons for rejection of the registration of a name. Although it is not accepted that the Registrar-General could establish a harm in the registration of a name, the Classification Act provides a much better process that could be followed to allow for transparent and well-articulated reasoning capable of withstanding judicial scrutiny.

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[80] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

[81] *Moonen* at [26].

[82] Films, Videos, and Publications Classification Act 1993, ss38 & 55.

[83] Section 38(1).

[84] Section 3(3).

[85] Policy – Acceptance of Names – Registrar-General of Births, Deaths and Marriages at 3.

[86] The Office of Film and Literature Classification *Notice of Decision under Section 38(1): Christchurch Mosque Attack Livestream* OFLC Ref: 1900148.000 (18 March 2019); The Office of Film and Literature Classification *Notice of Decision under Section 38(1): The Great Replacement* OFLC Ref: 1900149.000 (23 March 2019); Film and Literature Board of Review *A review of the publication titled: The Great Replacement* (12 August 2019).

Similarly, the Royal Commission into the Christchurch Mosque Attacks identified many areas for reform in legislation.[87] The discussion document produced by the Ministry of Justice (on behalf of the Government) summarises the Government's view on the significance of the need for a solution which addresses the risk of societal harm at the risk of limiting freedom of expression.[88]

The Government recognises that there is a high bar when it takes action that has the effect of impeding the freedom of expression, but in relation to the intended hate speech law reform, justifies any consequential limitation on the grounds that there is harm caused by the freedom of expression that can and should be prevented if possible. Importantly, the Government considers that in this context, that exercise of the freedom of expression also conflicts or discourages other freedoms outlined in the New Zealand Bill of Rights Act.[89]

When applying this logic to the exercise of a power to reject a name submitted for registration, it is not clear what significant harms to individuals or society can be prevented through rejection. Certainly, any name that would also meet the criteria of objectionableness under the Classification Act,[90] or meet the incitement criteria under the proposed (or for that matter existing) hate speech law reform,[91] would be likely to meet the undesirability in the public interest test for being offensive under section 18(8)(a) of the Registration Act.[92] By contrast, it is difficult to see how limiting the freedom of expression could be justified where a name is rejected under section 18(8)(c) grounds.[93] Specifically, it is difficult to see the basis on which a claim could be made that significant harm could be caused to the wider society if someone were allowed to bear a name that resembles an official rank or title without adequate justification. It is worth noting that other jurisdictions do not prevent names from being registered on this basis, which calls into question the legitimacy of an argument that registration of such names could create the opportunity for fraud or other deception to occur. If the state's view that a name that resembles a rank or a

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[87] William Young and Jacqui Caine *Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019* (2020) & William Young and Jacqui Caine Recommendations 39-42; *Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019: Hate Speech and Hate Crime Related Legislation* (2020).

[88] Ministry of Justice *Proposals against incitement of hatred and discrimination* (25 June 2021) at 9-12

[89] New Zealand Bill of Rights Act 1992, ss 8-27.

[90] Films, Videos, and Publications Classification Act 1993, s3(1).

[91] Human Rights Act 1993, s131.

[92] Births, Deaths, Marriages and Relationships Registration Act 1995, s18(8).

[93] New Zealand Bill of Rights Act 1992, s5.

title may lead to fraud later in life for a child is correct, then there must be examples from other states that do not impose such a restriction, where children with ranks or titles as names have grown up to commit fraud under those names, or even examples where adults have changed their names to a particular rank or title in order to commit fraud. Yet if such examples are found, none is readily discoverable, or has been relied on by the Registrar-General in any decision making.[94]

It is clear from the considerations and justifications given when the state is considering issuing a decision that makes a publication objectionable, or the process that is currently being considered with the reform of hate speech laws, that the state places a high-bar on the threshold that must be reached in order to justify state intervention that restricts the freedom of expression. It must therefore be considered whether this high-bar is met when the state chooses to intervene in the freedom of expression by deciding to reject the registration of names under the Registration Act.

VII Recent Rejections of Names

The Registrar-General has implemented a system where, not only do they not need to articulate their views for why a name is undesirable, but they also know that, for whatever reason, the chances of a name chooser appealing are reduced. There have been no challenges to a decision of the Registrar-General in the three years up to March 2021.[95] Yet even in the list of declined names there are examples that do not obviously fit within the section 18(4) Registration Act categories and so should presumably have had a relatively good chance of successful appeal. For example:

2018	**2019**	**2020**
Allah	Empress	Krown-Hayllar
Emperor[96]	Ford-Royal	Messiah
Gunner	Gunner	Nikita-Majesty
Heaven-Princezz-Star	Rogue	
Hunter-Rhouge		
II		
III		

[94] Taylor, Letter dated 17 March 2021, above n 31.

[95] Taylor, Letter dated 17 March 2021, above n 31.

[96] Given that the Court has previously accepted such a low public interest in refusal.

Messiah		
Rogue[97]		

There are no obvious reasons for why many of these names may cause offence to a reasonable person in terms of s 18(8)(a). It is difficult to see how II and III fit within any of the categories that would justify rejection, unless the view is the Roman numerals are inherently offensive because as the Registrar-General has said:[98]

> There's no problem if you want to give your child a spelled-out number or even silly name, but remember your child has to live with it!

'Hunter-Rhouge' is certainly an unusual name, but not one that obviously causes offence, or resembles a rank or title.

A case could potentially be made for the rejection of names with clear and well-known religious roots, such as Messiah, on the grounds that such names might cause some offence to a particular religious group (the name 'Messiah' for example, could be offensive to Christians). However, given the preponderance of the name "Jesus" amongst some Christian communities, it seems unlikely that 'Messiah' would be likely to cause offence to a reasonable person while "Jesus" would not.

The Registrar-General uses a process where barriers are placed to a parent's selection of a name, in a way that avoids the Registrar-General giving an appeal right to the name choosers. A Registrar will often make contact with a parent when what they consider to be an inappropriate name is chosen, and instead of making a decision to reject, encourages the individual parent to change their chosen name or provide further explanation. [99] This is despite only section 18(8)(c) allowing adequate justification from the name choosers. If the Registrar really does believe that the chosen name is offensive under 18(8)(a) or (b) then no further justification can mitigate that. Either the name is offensive or it is not. By avoiding making a decision, and placing a barrier to the freedom of expression being exercised by the parents as name choosers, the Registrar-General is avoiding generating an appeal right for the parents, and avoiding making a decision that may be capable of further

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[97] Taylor, Letter dated 15 April 2021, above n 65.

[98] https://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/abb662eb6c988a78cc25866a000f3be4!OpenDocument.

[99] Taylor, Letter dated 15 April 2021, above n 65.

review. This is clearly not the high-bar to the exercise of any limitation on the freedom of expression that Governments contend is required.

This effectively means that no final decisions have been made by the Registrar-General in the past three years (prior to March 2021). However, the Registrar-General has helpfully given his view that were he required to do so he would consider the names ‘Rogue’ and ‘Messiah’ to be undesirable in the public interest on the grounds that they would cause offence to a reasonable person.[100] This does not, however, provide any clarity as to the grounds on which ‘II’ and ‘III’ were rejected. These names cannot be considered unduly long, so by a process of elimination it might be deduced that the names were refused because they are believed to be an official rank or title. Similarly, none of the rejected names would appear to fall foul of the unreasonably lengthy requirements of section 18(b), with the exception of the doubly hyphenated “Heaven-Princezz-Star”. However, given the 99-character limit that seems to be the most allowed by the Registrar-General it is unlikely that the 18 digits in that name would fail that criterion.[101]

The inescapable conclusion therefore is that the majority of the names above are perceived as meeting the requirements of section 18(8)(c) in that, in the Registrar-General’s opinion, they resemble an official rank or title.

It therefore remains unclear exactly how the two acknowledged offensive names of Rogue and Messiah could objectively be considered offensive.

This paper is not focused on objectively offensive names. None of the names listed as being rejected by the Registrar-General is an objectively offensive name, however. There are no people naming their child after a swear word, or giving some obviously offensive name. Any name that would be likely to cause harm to a child could and should be restricted. However, no state should be making bold assertions about the objective undesirability of names in the public interest assertions without any evidential support and without any meaningful criteria that the claim can be assessed against.

VIII Justifiability under section 5 of the Bill of Rights Act

[100] Taylor, Letter dated 15 April 2021, above n 65.

[101] https://www.nzherald.co.nz/nz/dunedin-mans-99-character-name/NDDUYUJ443CVUPUQTH2R6JZ5MM/

The Registrar-General cannot prevent anyone being called by any name. What the Registrar-General can do is prevent that name being registered. There is no harm caused by the act of registration of a name in all but the theoretical examples of people being given names that would be considered objectionable. If there is a harm regarding a name, it is from the act of calling someone by that name, not of registering that name on a birth certificate. Rejection of registration is therefore an ineffective solution to a theoretical problem. Furthermore, the Crown is already of the view that even when a harm is articulated in the case of preventing sex offenders from registering a name change in order to mitigate risk of their re-offending, that any limitation on the convicted sex-offender's freedom of expression in choosing a name is unjustified. It is clear therefore that the current exercise of the Registrar-General's power is even less likely to be justifiable under the Bill of Rights Act.

The leading New Zealand case of *R v Hansen* sets out the test for the Court to apply when considering whether any limitation on a freedom outlined in the Bill of Rights Act is justified.[102] Specifically this states:

> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

If the state believes that intervention is needed and justified with regards to the registration of names, it needs to be able to articulate why that intervention is important, in a way that it does not appear to currently be able to state.[103] The Bill that would become the Act (albeit with a title change) was introduced in 1989,[104] before the requirement for a section 7 report under the New Zealand Bill of Rights Act commenced.[105]

Traditionally there are very few areas where the state intervenes in what could be considered an intimate matter involving rights. There are few restrictions on marriage,[106]

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[102] *R v Hansen* [2007] 3 NZLR 1 per Tipping J at [104].

[103] Taylor, Letter dated 15 April 2021, above n 65.

[104] Births, Deaths, and Marriages Registration Bill 1989.

[105] New Zealand Bill of Rights Act 1990, s7.

[106] Marriage Act 1955, ss15-22.

and similarly few restrictions on the freedom of movement.[107] When those rights are interfered with it is usually to prevent criminal offending (or to provide a remedy in relation to a criminal offence after it has occurred). Yet, no underlying offence has occurred (or will be prevented from occurring) when a chosen name is rejected for registration. Choosing a name, whether it is a parent choosing a name for their child, or an individual of age choosing to change their name, is a pure act of the freedom of expression.

Applying the first limb of the test in *Hansen*, the first matter to consider is whether the ability of the state to reject registration of names is of sufficient importance. This is difficult to know because of the limited discussion as to the rationale behind the provision through its enactment as discussed above. However, taking the requirement that no one be given a name that is undesirable in the public interest, for them to have that name meets some level of importance to say that this limb has been met. Further analysing the various section 18(8) sub-sections does also indicate that there is something relatively important; clearly no one should have an offensive name under section 18(8)(a). For practical reasons there might well be said to be sufficiently important reasons to limit the length of a registered name under section 18(8)(b). As noted earlier in this essay, taken at its strongest the objective behind section 18(8)(c) would be to limit confusion, offence from those who have earned the title that is claimed to be resembled, or to mitigate the potential for a name change to be used to commit fraud or some related misrepresentation.

As outlined above the state must be indicating that the undesirability is caused by the registration of the name, or as that concept is expressed in *R v Hansen*, that there is a rational connection between the registration of the name and the harm that is believed to be caused by that registration.[108]

> The ability to express oneself is a value in its own right as individuals seek fulfilment through expression. Therefore the purpose of the right, amongst other things, is to allow humans to reach their full potential – to be themselves…Choice of a name as a component of freedom of expression is recognised in international law.[109]

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[107] For example Health Act 1956, s70, Parole Act 2002, s14 and Terrorism Suppression (Control Orders) Act 2019, s17.

[108] *R v Hansen* [2007] 3 NZLR 1 at [X].

[109] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) Amendment Bill* (20 November 2015) at [9-10].

However as noted by the Attorney-General when considering restrictions on the ability of child sex offenders to change names:[110]

> I consider the prohibition on 'child sex offenders' changing their registered name will have a minimal impact on the ability for a child sex offender to use other names, as they may lawfully use other names in many situations and for many purposes without the need to change their registered name.

Preventing the registration of a name does nothing to stop the actual potential harms that are caused by the individual bearing the name that has been rejected. The undesirable name can still be for all intents and purposes the legal name of the person so long as they do not use it for fraudulent or improper purposes.[111]

However a later amendment was proposed to be made to the Registration Act to restrict the ability for a child sex offender to register name changes post-conviction.[112] This section 7 report applied the Hansen test above.[113] Ultimately the Attorney-General found the restriction on freedom of expression through permanently banning convicted child sex offenders from registering a name change was inconsistent with section 14 of the Bill Of Rights Act and that the inconsistency identified could not be justified under section 5 of the same act.[114] The Attorney-General did not consider there was any rational connection between the purpose of the legislative objective and the proposed limit on the right to freedom of expression.[115]

The policy behind preventing convicted sex offenders from changing their name must be to mitigate risk that a convicted paedophile could change their name and evade detection in the community and therefore increase the risk of their recidivism.[116] If a name change by a convicted child sex offender could not be justified under section 5 of the Bill Of Rights Act, it is difficult to see how a name change of a person unrelated to any criminal offending

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[110] At [19].

[111] At [17].

[112] Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) Amendment Bill 2015.

[113] Finlayson, above n 109, at [13].

[114] At [29].

[115] At [15].

[116] (2 December 2015) 710 NZPD 8504.

could be restricted on the basis that, for example, the chosen name resembles an official rank or title without adequate justification.[117]

That the Crown has already considered limiting the ability of an individual to change their name, in circumstances where they have been found guilty of a crime, and the clear purpose is to mitigate risk of them committing a similar crime again, and found that limitation to be unjustifiable, calls into question whether the Registrar-General's current powers are justifiable limitations on the freedom of expression.

Sections 18(8)(b) and (c) have a rational connection to mitigate an alleged harm. Putting the lack of substantiation of any harm aside, if the objective is to limit the size of names, then clearly it is rational to reject whenever intended names get too big. Similarly, if it is undesirable for someone to bear a name that resembles an official rank or title then the rejection of names that meet this description necessarily follows.

The situation is not as clear cut for section 18(8)(a) and turns on what exactly is rational when considering offensiveness. It is unknown exactly how a determination of 'offensiveness' is made and difficult to therefore know if there is a rational connection between the limitation and the objective. That the Registrar-General does not have a duty to give reasons appears to be an oversight. In finding a name might be offensive to a reasonable person, the Registrar-General is making a decision akin to the Chief Censor's finding that a publication is objectionable, but unlike section 38 of the Classification Act, the Registration Act has no duty to give reasons.

The state may be saying that the undesirable name will cause negative outcomes for the bearer, or for the society at large. For example, giving someone the name Rogue may cause people to treat the bearer of that name badly, out of fear or some other type of prejudice. This begs the question as to whether the name itself is the undesirable thing, or whether society's reaction to it is the actual undesirability.

Similarly, the state could be saying that the undesirable name will cause the bearer to be bad. In this example, that someone named Rogue will inevitably *become* a rogue. Again, this could be for two reasons: potentially because the name itself causes the child to become rogue-like, or because the name causes society at large to believe the bearer is rogue-like and this becomes almost a self-fulfilling prophecy.

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[117] Births, Deaths, Marriages and Relationships Registration Act, s18(8).

A nuance of this is linked in with whether we as a society believe that a name denotes something about the bearer, or whether it is intended to link or connotate the bearer with some other idea. For example, whether someone named Rogue is so named because they are inherently rogue-like, or whether someone named Rogue is so named because they or their parents wanted to have their name refer to a previous Rogue or whatever they perceived to be the 'rogue-like essence'.

Wittgenstein said:[118]

> If one says 'Moses did not exist', this may mean various things. It may mean: the Israelites did not have a single leader when they withdrew from Egypt — or: their leader was not called Moses — or: there cannot have been anyone who accomplished all that the Bible relates of Moses — . . . But when I make a statement about Moses, — am I always ready to substitute some one of those descriptions for 'Moses'? ...Have I decided how much must be proved false for me to give up my proposition as false? Has the name 'Moses' got a fixed and unequivocal use for me in all possible cases?

All reasons for state intervention must be based on a belief that there is a connection between bearing an 'undesirable name' and negative outcomes for the bearer, in such a way where the fault or harmful act must be directly attributed to the act of choosing that particular name, rather than to the negative acts that are caused by it. Although unarticulated in any decisions, by this token, New Zealand must believe that if someone names a child Rogue or Messiah, that it is that act of naming that causes negative outcomes, and that therefore justifies the public interest in rejecting that name.

It is accepted that there must be some names that are innately so offensive so as to warrant state intervention preventing the imposition of that name on a child. However, in exercising this power, clearly the state must accept that it is travelling fairly close to a victim-blaming line if it does choose to intervene in the acceptance of names. Someone named after a swear word will clearly be faced with sufficient difficulties that it will undoubtedly impact on their upbringing in a negative way. However, in cases where the offensiveness is not as obvious, such as for II, or Rogue, or any instance where the offensiveness would not be as obvious to the majority of the population, such as Messiah, then in allowing the Registrar-General's opinion to justify a state intervention in the registration of a child's name, the

[118] Ludwig Wittgenstein *Philosophical Investigations* (4th Edition, John Wiley and Sons Ltd, Chichester, 2009) at [79].

state must in effect be taking a view on the oldest philosophical question regarding proper names. The state must be arguing that a name connotes and creates negative outcomes for the bearer. They are taking the position that either a rose by any other name would *not* smell as sweet or that a rose smells sweet *because* it is named rose.

But even if a harm is established that justifies state intervention in rejecting the registration of the name it is also important to consider that the state has no ability to prevent someone being called or known by a name that has been rejected for registration. The rejection only works insofar as that the rejected name will not be recorded on a birth certificate. There is nothing to stop, or prevent the parent's still referring to their child by the rejected name, and nothing to prevent them from using that name in the community. This point was outlined in the case of *Ojstersek*.[119] If the state really is concerned that calling a child a particular name is inherently harmful to that child and will cause negative outcomes, it does not follow that the action is restricted to the prevention of the registration of that particular name, and not some other mechanism created to prevent the child being known by that name regardless. The state may be able to prevent a boy from being registered with the name Sue, but can do nothing to prevent that boy being called Sue.

For names considered 'offensive' such as Rogue and Messiah, the state appears to believe that the act of refusing to accept the registration of the names will mitigate the harm to the child. However, if the state really does believe the name is likely to cause harm to the child, then further state intervention to prevent harm to the child should be justified, unless the state believes that the act of registration is far more serious and consequential than the act of calling someone a name. This cannot be the case.

The focus here is on the act of naming of a child but notes that clearly the act of naming of an adult must have a greater strength to any freedom of expression argument. If an adult chooses to change their name to a name for which they are fully aware of potential negative connotations, then surely the state must have a weaker argument for not allowing them to register that name. Nevertheless, because any argument for the Registrar-General's intervention must be stronger when intervening on behalf of a child, we shall focus on that act of naming.[120]

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[119] See for example *Ojstersek v Registrar-General,* above n 34, at [721].

[120] Tesone, Juan Eduardo. In the Traces of Our Name: The Influence of Given Names in Life, Taylor & Francis Group, 2011. At 5.

> In the choice of his name, the child is enunciated by his parents. In order to become the subject of this enunciation, he needs to make the name he was given (the "given name") his own. This is what Françoise Zonabend (1977) calls "the constant dissociation between identity received and identity experienced".

Assuming rationality for section 18(8)(a) then the rejection of the name would be no more than reasonably necessary. If it is offensive to a reasonable person, then rejecting the name seems to be the minimally intrusive way of preventing that harm. However, potentially there could be a distinction between a name being endowed on a child, and a name being chosen by an adult in this situation. A reasonable person may well consider it to be not as offensive for an adult of sound mind to choose a potentially offensive name, as opposed to a situation where parents are imposing an offensive name on a child.

Those considerations might be reversed when considering the assessments under section 18(8)(c). An adult choosing to give themselves a name that resembles a rank or a title may have less ability to adequately justify their intentions; it might be more reasonable to assume that they are intending to commit fraud. By contrast it may be more unlikely that parents endowing a child with a name would be intending for that child to commit fraud, or intend to use that child to commit fraud themselves; it may therefore be that the assessment of the adequate justification should be at a reduced level in that particular case.

Putting concerns around how the state determines 'offensiveness' to one side, if the state can evidence that a name would cause offence to a reasonable person then a rejection of registration under section 18(8)(a) grounds would likely be considered proportional.

If the use of a name actually was causing harm to an individual then presumably further intervention would be able to be justified under the Care of Children Act in order to further mitigate risk to the subject. The question always will become as to how the state has determined the offence.

Similarly, if there really are technological limitations to the acceptance of a lengthy name, or if there is some evidence the state is relying on that shows the longer a registered name the greater the adverse outcomes, then the more likely a name can be legitimately rejected without being an unjustifiable breach on the freedom of expression.

The third basis on which a name can be rejected for registration provided for under section 18(8)(c) does not seem proportionate to its objectives. If it is related to perceived fraud or confusion then the case law does not suggest that that is a serious concern. The lack of

similar legislation in other states further indicates there is limited support for the notion that names that resemble ranks or titles are used to promote fraud, and furthermore there is an inherent irrationality in treating a child being endowed with a name that resembles a rank or title the same as someone who has reached the age of majority from changing their name to that resembling a rank or a title.

If there is a sufficiently important harm identified that might justify a limitation on the freedom of expression it has not yet been articulated or argued by the Registrar-General but even if a harm regarding names was identified it is far more likely to be regarding how someone is referred to in society, not what name is registered on their birth certificate so it is difficult to see any meaningful rationale in rejecting a name for any of the bases under section 18(8) of the Registration Act. It seems clear that were section 18 of the Registration Act introduced today the Attorney-General would view it as clearly demonstrating an unjustifiable limitation on the freedom of expression.

IX Conclusion

The Registrar-General has the power to limit the freedom of expression. It should therefore be incumbent on the exercise of that discretion that any such limitations are rational and justified. Clearly any name that is inherently offensive will potentially cause harm to the bearer of that name. If a harm can be established then it is likely that any refusal on the grounds set out in section 18(8) of the Registration Act will be justified.

However, the reality is that people do not choose to endow their children with inherently offensive names. The published lists of names rejected by the Registrar-General indicate that the state is intervening in the exercise of the freedom of expression far more than what might be a justifiable limitation on that freedom. There is no evidence that suggests that a name causes harm to the bearer of that name but there is evidence that suggests there may be a relationship between an unusual name and negative outcomes for the individual. There is nothing to suggest however that the rejection of the chosen name for registration will mitigate any of the harms that have caused concern and therefore the rejection of a name for registration is an irrational exercise of a power.

Instead of identifying the relationship between unusual names and negative outcomes as meriting state intervention in the registration of a name, the state would be better placed to use the registration of an unusual name as an indicator for where further state intervention *may* be needed to provide the parents and the child with adequate support.

The harms evidenced by the names that are rejected from the published lists appear to be non-existent. If there are harms to an individual or a society that can be shown then the Registrar-General must provide greater justification of that reasoning so that the exercise of the discretion to reject is transparent and capable of adequate scrutiny. The status quo of expecting new parents to defend their rights to the freedom of expression in naming their children is a flawed process that does not provide adequate reasons for state intervention, and does not provide for a fair process that provides adequate scrutiny of the Registrar-General's powers.

I am not pretending that the freedom of expression in choosing of a name to be registered for a child is the greatest human rights breach in New Zealand society. Ultimately the name itself does not cause negative consequences for the bearer at all. It is precisely because of this that the state's role in limiting the freedom of expression must be reconsidered. If an actual harm in a name is thought to exist (and substantiated) then replacing the subjective public interest test with something more objective should be preferred. A discretion to reject only for objectionable names defined along the lines of the Classification Act's objectionable criteria should therefore be considered. The process should ensure that there is adequate transparency in the Registrar-General's exercise of the rejection power, this will encourage a meaningful appeal right for name-choosers, and prevent the unwarranted and unreasonable limitations on freedom of expression from becoming the accepted norm. The best and easiest solution would be to scrap the paternalistic ability of the Registrar-General to reject names as it is an unjustified and unjustifiable limit on the freedom of expression.

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