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SEX OFFENDER REGISTRIES
Our right to know or no right at all?

Can sex offender registries be demonstrably justified in New Zealand?

LLB RESEARCH PAPER

CENSORSHIP AND FREEDOM OF EXPRESSION

(LAWS 520)

Faculty of Law
Victoria University of Wellington

2007

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ABSTRACT.

This paper seeks to prove that the establishment of any form of publicly accessible sex offender registry in New Zealand is not a demonstrably justified limitation on an offenders' right to privacy, in a free and democratic society. It is acknowledged that the right to privacy is not included in the Bill of Rights Act. However, the author suggests the framework of section 5 can still be used to determine whether a reasonable restriction has been placed upon a common law right. This paper outlines legislation and case law regarding sex offender registries in other jurisdictions, and uses it as a springboard for discussion regarding the constitutionality of the Sex Offender Registry Bill 2003. In completing a section 5 analysis of the Bill's disclosure clause, the author states that offenders do have a right to privacy and can expect their residential address to remain private in these circumstances. The only reasonable limitation that can be placed upon this right is a register that is solely accessible by Police for investigatory purposes. The Sex Offender Registry Bill 2003 was therefore unconstitutional and should never have reached the Select Committee stage. Parliament hastily responded to public concern regarding sexual crimes, without proper consideration for the Bill's legal foundations.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 16,091 words.

Subjects

Tort – Privacy; and

Bill of Rights Act 1990 – Freedom of expression; and

Bill of Rights Act 1990 – Section 5.

I INTRODUCTION

For a number of years commentators have debated whether the community notification of sex offenders' residential addresses is justifiable. Clearly, when a man is convicted of the rape and murder of a child and continues to have violent sexual fantasies, arguments that the public have a right to know of his whereabouts hold some weight. But what about other offenders who simply make a one off mistake, are successfully rehabilitated and since their sentence, have lived as productive members of the community? Arguments regarding the benefits of sex offender registries in this case are less persuasive. Unfortunately, we are unable to reliably predict which offenders are likely to re-offend and which will go on to lead rewarding and offending free lives. It thus becomes a question of whether the public has a right to know the personal details of *all* sexual offenders in order to 'protect' themselves and their children, or whether they have no right at all. This essay seeks to consider whether the establishment of a sex offender registry in New Zealand is a demonstrably justifiable limitation on offenders' right to privacy or whether it goes beyond what is reasonable in a free and democratic society. While it is acknowledged that the right to privacy is not included in the Bill of Rights Act 1990 (*BORA*),[1] in the absence of other direction, the framework of inquiry generated by section 5 of BORA provides an adequate foundation for discussions into the limitation of common law rights.

Community notification of sex offenders' whereabouts traditionally requires a convicted offender to register with a central authority upon release from prison. Information is then compiled into a database and periodically updated with the names and addresses of every known sex offender. Such databases are typically publicly accessible at any time, by anyone in the community. Those in favour of community notification argue that "sex offenders are a serious threat to our nation" and it is a parents' right to have access to information that ultimately affects the safety of their children.[2] Those opposed to such a system suggest that publicly naming these offenders is not conducive to their rehabilitation and carries their punishment beyond the prison walls, effectively labeling them as community 'outsiders' for the rest of their lives. Whether such a register is justifiable is something that not only society and legal commentators disagree upon. The courts in both America and the United Kingdom have

[1] Bill of Rights Act 1990. Section 21 incorporates an element of privacy within the concept of the right to free from unreasonable search and seizure. Similarly, section 14 includes an element of privacy in the right to not disclose certain things.

[2] Ryan Hawkins "Human Zoning: The Constitutionality of Sex Offender Residency Restrictions as Applied to Post-Conviction Offenders" (2007) 5(2) Pierce Law Review 331, 331.

struggled to determine the constitutionality of legislation that allows such notification. It is with this in mind that this paper considers the constitutionality of the New Zealand Sex Offender Registry Bill 2003 (*the Bill*).

While the Bill was ultimately rejected by the Justice and Electoral Committee on the basis that it would not achieve its objectives,[3] it seems that an even greater issue was overlooked; the Bill's constitutionality. The Bill was praised in the House for its good intentions and hailed as a big step towards addressing the 'epidemic proportions' of sexual offending in New Zealand.[4] But minimal discussion was had as to the legality of the Bill's proposals. From its conception, through to its drafting, readings within the House and consideration in Select Committee, little debate was directed towards the Bill's constitutional footing. While the Human Rights Commission and the New Zealand Law Society raised serious concerns as to the Bill's consistency with various rights, little other acknowledgment of the legal consequences of the Bill was made.[5] In fact, in a short memorandum of advice given by the Attorney General it was suggested that the Bill was actually consistent with BORA.[6] It is on this basis that this paper suggests the Bill should never have reached the select committee stage within the legislative process. It was never going to be constitutionally viable in concept, or in drafting.

The American Senate was able to push through legislation to create sex offender registries due to the strength of their first amendment right to freedom of expression. Nevertheless, it should have been clear that New Zealand was incapable of a similar action, given the weight of our right to privacy and the position of the right to freedom of expression within our

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[3] Justice and Electoral Committee *Sex Offender Registry Bill: Report* (Wellington, 1998) 1.
[4] (30 July 2003) 610 NZPD 7481.
[5] See Human Rights Commission *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, Wellington 2003); New Zealand Law Society *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, Wellington 2003).
[6] Attorney General *Legal Advice on Sex Offender Registry Bill: Consistency with the New Zealand Bill of Rights Act 1990* (Submission to Justice and Electoral Committee, Wellington 2003) 1.

constitutional framework. It would seem that much like the American government, members of the New Zealand legislature got caught up in the public's fear of sexual offending. In their haste to be seen to be addressing the problem, a proposal was created based on unconstitutional policies.[7] This paper in no way seeks to suggest that the affects of sexual offending are not severe and should be prevented where at all possible. However, this "fear and frustration must not drive communities to accept, as solutions, measures that are questionable in terms of effectiveness, justness and humaneness".[8]

Part two of this paper will outline the legislation that created sex offender registries in America and the United Kingdom. Both registries are fundamentally different and sit within their own legal, political and social contexts. However, they provide a platform for legal comparison with the New Zealand Bill, which was created with international experience in mind.[9] Parts three and four of this paper will then go on to highlight the constitutional struggle that has occurred in America and the legal hurdles that the New Zealand legislation faced. Finally, part five of this paper seeks to prove that the Bill, in its current form, could never have been demonstrably justified under a section 5 analysis of BORA. In illustrating this proposition discussion will be had as to the extent of an offenders right to privacy, the weight of the right to freedom of expression in New Zealand, and the limitations that can be reasonably be placed on these conflicting rights. Within the discussion as to reasonable limitations, the paper will consider the purpose and significance of the rights involved, the objectives of the Bill, the public interest in limiting offenders' privacy rights and the proportionality of such limitations.

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[7] Ryan Hawkins, above n 2, 331.
[8] John Howard Society of Alberta *Offender Registry* (2001) www.johnhoward.ab.ca/PUB/offender.htm (accessed 18 September 2007) 1.
[9] Ministry of Justice *Sex Offender Registry Bill 2003: Departmental Briefing* (Wellington, 2004) 5.

It is acknowledged that there are numerous other issues regarding the legality and practicality of the Bill; however the focus of this paper remains solely on the effect of the disclosure provisions in clause 13.

II JURSIDITIONAL APPROACHES

A American Position

The American legislation establishing sex offender registries is considered a model for other jurisdictions that wish to implement similar systems. While all 50 states now have active sex offender registries, the operation of these registers vary in terms of the registration procedures used, information sharing processes, verification of details, maintenance of the system and community notification requirements.[10] The *Violent Crime Control and Law Enforcement Act of 1994* requires all states to implement a system in which sexually violent offenders and those who commit sexual and kidnapping crimes against children, register their place of address upon release from prison.[11] This information is confidential and is only released to law enforcement agencies for public protection purposes and to government agencies in order to conduct background checks.[12]

Public notification of register details was not made mandatory until after the rape and murder of seven year old Megan Kanka by a neighbour who was twice convicted of sexual assault.[13] The Committee on the Judiciary suggests that as a result of public demand and the media attention surrounding Megan's death, the government was forced to introduce an amendment to the 1994 legislation named "*Megan's Law*".[14] Commentators have referred to this notorious amendment as "an unusually ferocious piece of legislation born of parental emotion".[15] The amendment allowed not only for the publication of names, descriptions, photographs and addresses of

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[10] Home Office Police Research Group *Keeping Track?: Observations on Sex Offender Registers in the U.S* (Crime Detection and Prevention Series Paper 83, 1997) 7.
[11] Violent Crime Control and Law Enforcement Act of 1994 42 USC.
[12] Ibid, s 170101(d).
[13] Office of the Attorney General *Megan's Law* (Prepared for the Department of Justice, America, 2006) 1.
[14] (104th Congress 2d Session) 104-555 Committee on the Judiciary 2.
[15] (4 February 1997) *The Sydney Morning Herald* Sydney.

offenders,[16] but for law enforcement agencies to proactively communicate this information to all at risk groups in the community when "necessary".[17] The extent and nature of this disclosure is determined by the risk classification given to the offender.[18]

Under Megan's law, registers are no longer deemed confidential and the public is free to access the information "for any purpose permitted under the laws of that State".[19] Thus, each state is entitled to determine whether the information contained in the register is entirely publicly accessible or if certain elements remain private.[20] Such an amendment was based on submissions by the Attorney General and the Department of Justice which indicated that the 1994 Act could not achieve its purpose of protection without public access to the register:[21]

> The requirement that registration information generally be created as private data is not necessary or helpful in realising the objectives of the Jacob Wetterling Act, and it imposes a limitation on the states that did not exist prior to the enactment of the Jacob Wetterling Act. We see no reason why States should not generally be free to make their own decisions concerning the extent to which registration data should or should not be treated as private data, as they have been in the past. We accordingly recommend deletion of the provision that information collected under State registration systems is generally to be treated as private data.

It should also be noted that in addition to the above legislation, the *1996 Pam Lychner Sexual Offender Tracking and Identification Act* establishes a National Sex Offender Registry at the Federal Bureau of Investigation (FBI).[22] The Act requires all information contained in the national register to be forwarded to the FBI and maintained within a database that is used to locate offenders who violate the Act.[23]

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[16] Violent Crime Control and Law Enforcement Act of 1994 42 USC s 170101(d).
[17] Ibid, s 2 of amendment H.R. 2137.
[18] "Keeping Track?: Observations on Sex Offender Registers in the U.S", above n 10, 27.
[19] Violent Crime Control and Law Enforcement Act of 1994 42 USC s 2 of amendment H.R. 2137.
[20] Ibid.
[21] United States Department of Justice *Megan's Law* (Submission to Committee on the Judiciary, America, 1996) 6.
[22] "Keeping Track?: Observations on Sex Offender Registers in the U.S", above n 10, 7.
[23] Pam Lychner Sexual Offender Tracking and Identification Act 1996 42 USC s 14072.

B United Kingdom Position

The Sex Offenders Act 1997 requires certain categories of sexual offenders to notify the police of their name, date of birth and residential address upon release from prison.[24] These categories are determined by the type of offence committed, the victim and offenders' age, and the length of the sentence imposed.[25] It is also important to note that an offender who commits murder, manslaughter, kidnapping or abduction, with a sexual element, is not required to register.[26] Such a condition has led to considerable criticism of the system for falsely suggesting that the most active offenders are captured within the register.[27]

The 1997 Act is designed to ensure the Police National Computer (PNC) remains an up-to-date and useful tool for Police to prevent crime by monitoring previous offenders and identifying suspects after an offence has been committed. The Home Office also notes that the Act is designed to deter sexual offenders from re-offending.[28] Unlike America, the legislation states that data contained in the register must be subject to a process of "selective disclosure". This involves releasing the information in a controlled fashion to police, officials and professionals such as doctors and teachers. Information can only be distributed to the public in certain circumstances, for example, to immediate neighbours, direct victims, co-habitués of the offender, or when the offender poses a risk to a particular person or group[29]. Typically, the Police use "general awareness-raising measures within the community, without disclosing individual details", where possible.[30] Regulations introduced in 2001 also provide for the notification of people outside the United Kingdom if the offender chooses to travel overseas[31].

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[24] Sex Offenders Act 1997 (UK).
[25] Home Office Policing and Reducing Crime Unit *Where are they now?: An evaluation of sex offender registration in England and Wales* (Police Research Series Paper 126, 2000) 1.
[26] Ibid. "The Home Office points out that these offences do carry the possibility of life imprisonment and as such render these offenders subject to life licence on release".
[27] Ibid, 2.
[28] Ibid.
[29] Sex Offenders Act 1997 (UK).
[30] Home Office Policing and Reducing Crime Unit, above n 25, 40.
[31] Sex Offenders (Foreign Travel) Regulations 2001 (UK).

Prior to the Act's introduction, the Home Office indicated that public access to the register was not desirable. In a report entitled, *Protecting the Public*, the Home Office states that research conducted on the American system concluded publicly accessible registers actually drive offenders underground and decrease registration rates.[32] The report also notes that given offenders' high compliance rates in registering with Police in the United Kingdom (97%), it is largely unnecessary for the public to have access to the register.[33] While the report does not provide an explanation for this statement, it is likely that as the bulk of offenders are included on the register, the Police believe they are able to adequately monitor most sexual offenders without the need for widespread community notification.

This attitude was mirrored by the legislature, which showed little support for public access to a register as the Bill moved through the House: "I have a feeling that the result would be more crimes, not fewer",[34] "notification must not become an additional punishment, it must be a preventive measure",[35] "[public notification] would be akin to branding them on the forehead",[36] "it would lead to mob rule",[37] and "the evil [vigilantism] could be even greater than that of a possible paedophile that is at large"[38]. Numerous concerns were also raised as to what guidelines would be implemented to aid Police in their discretion as to when to disclose the information.[39]

C New Zealand Position

Unlike America and the United Kingdom, New Zealand does not currently have legislation providing for either a registry of sex offenders or public notification of such offenders whereabouts. The Police Criminal Profiling Guidelines presently govern the distribution of information on

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[32] Home Office *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences* (The Stationary Office, London, 2002) 12.
[33] Ibid.
[34] (27 January 1996) 289 GBPD ser 6, 36.
[35] Ibid.
[36] Ibid, 42.
[37] Ibid.
[38] Ibid, 45.
[39] (27 January 1996) 289 GBPD ser 6, 23-71.

dangerous sexual offenders.[40] These guidelines are designed to balance the community's need for information, with the rights of individuals not to be treated "unjustly, unfairly or oppressively".[41] The guidelines suggest that offenders' profiles may only be distributed when the offender is an active, persistent criminal who is currently engaged in significant offending[42]. It is also noted that the profile must be confined to the information that is "necessary" and may only be distributed to a narrow target audience.[43]

While publication is extremely rare, and the Police maintain that the guidelines are strictly complied with, recent media attention on the case of *Brown v Attorney General (Brown)* highlights the practical difficulties involved in discretion dictating the disclosure of such sensitive information. In the case of *Brown*, the court awarded convicted paedophile Barry Brown, $25,000 after he sued the Attorney General for a breach of his privacy by the New Zealand Police.[44] A flier containing his personal details was distributed within the community, as an officer believed Brown posed a serious threat to neighbourhood children.[45] However, Spear J held that Senior Sargent Cowan's actions were "maverick"[46] and failed to have "any real regard or account of the guidelines".[47]

While New Zealand does not have an official sex offender registry, a private citizen, Deborah Coddington, has compiled a register designed to notify society of the whereabouts of sexual offenders. The book, entitled *The 1996 Paedophile and Sex Offender Index* contains the names of offenders, their crimes, sentences, occupations and city of residence.[48] The book operates under the assumption that upon release from custody, offenders will continue to use the same name, live in the same city and seek

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[40] I N Bird *Criminal Profiling Guidelines,* (Prepared for the New Zealand Police, 27 July 1993).
[41] Ibid.
[42] Ibid, Guideline 1.
[43] Ibid.
[44] *Brown v Attorney General* [2006] DCR 630, para 96.
[45] Ibid.
[46] Ibid.
[47] Ibid, para 100.
[48] Debra Coddington *The 1996 Paedophile and Sex Offender Index* (Alister Taylor Publishers, Auckland, 1996).

work in the same field.[49] It is also limited in that the information it contains was retrieved from court and media reports. Therefore, those offenders granted name suppression do not feature in the book.[50] Coddington published the index with the aim of "prevent[ing] merely one person from being a victim of a sex crime". She states, "an informed public is a safer one". The book has been widely published in New Zealand, and Coddington has since published both Australian and British versions of the Index.[51] While the book is particularly popular, once featuring fifth in the New Zealand best sellers list, it has also received considerable criticism for its abuse of offenders' rights.[52] Nonetheless, it was this unofficial register that paved the way for Deborah Coddington's introduction of the Sex Offender Registry Bill in 2003.

The Bill sits somewhere between the approaches of the American and United Kingdom legislation. Although based on the United Kingdom Sex Offenders Act and arguably closer to it than the American legislation, the Bill goes beyond the scope of the United Kingdom law. The Sex Offenders Act appears to be a rather more measured response to sexual offending and seems to have been carefully considered in light of offenders' rights. This is evidenced by the fact the Act provides clear guidelines as to when 'selective disclosure' to the public can occur. The Bill on the other hand, is rather ambiguous as to its disclosure requirements, and can be read as allowing significantly greater disclosure than that permitted under the Sex Offenders Act.

The Sex Offender Registry Bill sought to establish a register of New Zealand offenders who committed an offence under sections 128 to 144C of the Crimes Act 1961.[53] That registry would contain the name(s) used by the offender, his or her address, date of birth, the offences (or alleged offences)

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[49] Jae Lemin *The Privacy Law Implications of the 1996 Paedophile and Sex Offender Index* (LLB Research Paper, Victoria University of Wellington, 1997) 2.
[50] Ibid.
[51] Radio interview with Deborah Coddington (Kim Hill, Radio New Zealand, 13 May 1996) transcript provided by Audio Monitor Services (Wellington).
[52] "Best Sellers List" (19 July 1996) *National Business Review* Wellington 5.
[53] Sex Offender Registry Bill 2003, no 2.

committed, reference to identifying information held on the offender and other identifying information prescribed by regulations[54]. While the Bill did not advocate complete public access to the register, clause 13 of the Bill provides:

> (1) No person may disclose information provided in accordance with this Act or have access to the registry except in accordance with and for the purposes of this Act.
>
> (2) A member or employee of the Police and any person authorised by the Minister may have access to the registry and may collect, retain, and use information obtained from the registry for any purpose under this Act or for law enforcement purposes.

The purpose of the Act is listed in clause 3 as being, "to assist the police in their investigation of sex offences, to reduce sexual offending, and thereby to contribute to public safety".[55]

Clause 13(1) effectively provides anyone with a "desire to reduce sexual offending" to access the register, such as, interest groups, politicians, local bodies and the media.[56] While the information must be used for "the purposes of the Act", the purposes listed are extremely wide and could extend to the publication of fliers, posters or billboards.[57] Without regulation as to what the information can be obtained for, details contained on the register can effectively be published in their entirety.[58] This problem is exacerbated by the Bill's failure to incorporate an offence for improper disclosure into the offences provision in clause 10.[59] The New Zealand Prisoners Aid and Rehabilitation Society suggest that such a provision is necessary and should be comparable to the offence provision in the Clean Slate Act for releasing information that should remain concealed.[60]

Similarly, clause 13(2) provides wide discretion for any member of the Police to use the information for "law enforcement purposes" or "any

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[54] Ibid.
[55] Ibid, cl 3.
[56] New Zealand Law Society *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, Wellington 2003) 3.
[57] Ibid, 4.
[58] Ibid.
[59] Ibid.
[60] New Zealand Prisoners Aid and Rehabilitation Society *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, 2003) 11.

purpose under the Act".[61] Such a sweeping guideline would in practice allow officers or even unsworn Police employees to disseminate information to the community whenever a sexual offender moves into the area.[62] This proviso therefore has parallels with the American system and would go some way towards giving New Zealand Megan's Law in practice, if not in theory.

On the 30th of July 2003 the Bill was passed to the Justice and Electoral Committee for consideration. A variety of submissions were made, the bulk of which contained submissions condemning the Bill. On the whole, it was largely private submissions that offered their support, with many discussing the "epidemic proportions" of sexual offending[63] and the necessity of protecting the nation's children. Those in opposition to the bill primarily consisted of industry businesses that focused on specific clauses that were impracticable or would render the register ineffective. For example, the New Zealand Police and New Zealand Law Society were supportive of the spirit of the Bill but suggested that it was unlikely to achieve its purpose of assisting in the investigation of sexual offences and the elimination of suspects.[64]

Discussions regarding the legal ramifications of the Bill were primarily contained in submissions made by the Human Rights Commission and the Office of the Attorney General. Rather surprisingly, the Attorney General suggested the Bill was not inconsistent with the minimum guarantees of the rights and freedoms contained in BORA.[65] The submission noted that even if offenders could obtain protection under the right to withhold information in section 14, "the nature and extent of any inconsistency is such that, having regard to the Bill's objectives, it would be

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[61] New Zealand Law Society, above n 56, 4.
[62] Ibid.
[63] Sensible Sentencing Trust Submission *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, Wellington, 2003) 1.
[64] New Zealand Police *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, Wellington, 2003) 4.
[65] Attorney General, above n 6, 1.

'justified' in terms of section 5 of the Bill of Rights Act".[66] The Human Rights Commission, on the other hand, had considerable issues regarding the constitutionality of the Bill. It acknowledged the "understandable political and public sympathy" for such legislation, but suggested the government needed to act cautiously given its domestic and international obligations.[67] Consequently, issues were raised regarding the Bills inconsistency with the right to be presumed innocent, the right to privacy, the right to freedom of expression and the right to natural justice.[68]

Ultimately, the Bill was not passed after recommendations to that effect by the Justice and Electoral Committee on the 25th of August 2006.[69] The Committee gave an extremely brief report as to its findings:[70]

> The previous Justice and Electoral Committee received advice from the Ministry of Justice and the Police. Both advised the committee that the Bill will not achieve its intended purpose in its current form. We concur with the advice received from the Ministry of Justice and the Police. We also consider that this bill will not achieve its intended purpose and recommend that it not proceed.

Thus, New Zealand has been left to deal with the issue of community notification of dangerous offenders by way of the Police Criminal Profiling Guidelines and ultimately, Police discretion. The Committee's report highlighted the fact that the Bill, in its current form, was rejected because it would not be effective. Such a statement lends itself to the idea that, if amended, the Bill may have been passed. However, in reality, no amendments could be made to ensure the Bill would achieve its objectives and considerable changes are needed before it would ever be considered constitutional.

III CONSTITUTIONALITY

Unlike the United Kingdom, since its introduction the American legislation has been subjected to considerable judicial scrutiny regarding its

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[66] Ibid, 3.
[67] Human Rights Commission *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, Wellington, 2003) 1.
[68] Ibid.
[69] Justice and Electoral Committee, above n 3, 2.
[70] Ibid.

constitutionality. This can, in part, be attributed to a lack of legislative scrutiny as to its legality prior to its implementation. As New Zealand does not have any case law regarding the constitutionality of registers, an examination of the American courts' approach to the issue is informative despite its different legal context.

A America

While the American public lobbied strongly for publicly accessible sex offender registries, the various laws under which such access is guaranteed have not been easily accepted among the community. Over the years numerous cases have been brought challenging the constitutionality of such legislation. However, it is not just the public who have struggled with this issue. The courts themselves have continually dissented from each other. Some have suggested the legislation is constitutionally sound, while others have stated that they represent a flagrant breach of various constitutional rights, such as the ex post facto clause, the bill of attainder, the rights to privacy, due process, equal protection and the clauses against double jeopardy and cruel and unusual punishment.

In an attempt to remove the legislation from "constitutional limbo",[71] in 2002 the United States Supreme Court announced it would be reviewing decisions on various state sex offender registration laws. The Court looked at two class action suits involving the Alaskan and Connecticut legislation, which dealt with breaches of the ex post facto and bill of attainder clauses.[72] Ultimately, the Supreme Court ruled that both registries were consistent with the rights contained in the constitution.[73] The judgments permitted disclosure of the information on the internet and allowed registers to include the details of offenders who were convicted

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[71] *Artway v Attorney General*, 876 F. Supp 666, 692 (3rd cir) Becker J.

[72] Online News Hour Update: Supreme Court Watch *Supreme Court Examines Sex Offender Registration Laws* (13 November 2002) www.pbs.org/newshour/updates/scotus_11-13-02.html (last accessed 18 September 2007).

[73] Stateline *High Court Frees States to Broaden Sex Offender Warnings* (10 March 2003) www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15180 (last accessed 18 September 2007).

prior to the legislations formation.[74] Such an outcome has been criticised as allowing Megan's Law to be applied in "dangerous ways".[75] Lawrence Goldman, President of the National Association of Criminal Defence Lawyers stated, "the court is saying you've done your time, you've done the punishment, you've successfully completed parole and probation, but we brand you with a stigma: sex criminal forever".[76]

The following is a brief outline of the courts' approach to the various constitutional issues and how they have been addressed so as to justify the legislation.

I Ex post facto clause

The strongest challenge to Megan's law lies in whether it breaches article 1 of the United States Constitution. The ex post facto clause effectively prevents retrospective increases in an offender's punishment after he/she has been sentenced.[77] In the case of *Smith v Doe,* the Ninth Circuit Court of Appeal struck down the Alaska Sex Offender Registration statute, holding it amounted to a retroactive punishment of offenders.[78] The Court based this decision on the fact that offenders were required to register four times a year for the rest of their lives, regardless of their future law abiding behaviour and low risk to society.[79] It was also noted that widespread disclosure of the information was unacceptable, as it resulted in damage to offenders both personally and professionally.[80] However, this decision was struck down by the Tenth Circuit Court of Appeal. The Court held that registering on a public database was not a punitive requirement, as only people with a genuine need the information, i.e. those in the offenders' community, will bother to access the register.[81] The Supreme Court

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[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Suzanne DiNubile "Looking at the Legal Issues: Supreme Court Reviews Predator Registration" (2002) 8 Klaasaction Review 15.
[78] *Smith v Doe* (2003) 538 U.S 84 (SC); 259 F.3d 979.
[79] Suzanne DiNubile, above n 77, 15.
[80] Ibid.
[81] Ibid.

affirmed this decision 6 to 3, with Kennedy J stating that it was necessary for the legislation to be retroactive in order to be effective.[82]

II Bill of attainder clause and right to due process

Under the Bill of Attainder clause in article 1 of the Constitution the state may not "engage in legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial".[83] In 2001, the Hawaii Supreme Court held that notification legislation violated offenders' due process rights as they are not given "a meaningful opportunity to argue that they do not represent a threat to the community before the information is disseminated on the internet".[84] A similar outcome was reached in the Court of Appeal hearing of *Connecticut Department of Public Safety v Doe*, which resulted in the prohibition of public access to the register.[85] However, this decision was overturned by the Supreme Court, who ruled 9 to 0 that publishing offenders' names, pictures and additional information, without giving them a hearing to determine dangerousness, was constitutional.[86]

III Double jeopardy

The clause against Double Jeopardy prohibits, "a second prosecution for the same offence after conviction... and multiple punishments for the same offence".[87] The issue for the courts has thus been whether registration amounts to a punishment. The case of *Artway v Attorney General* stated that if the legislature had the actual or objective purpose of punishment in mind when forming 'Megan's Law', or the effect of the legislation amounted to a punishment, then the legislation would fail constitutional analysis.[88] However, the court ruled that the legislature did not intend to create an additional punishment as the law was simply designed to "enhance safety

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[82] *Smith v Doe*, above n 78, 4 (SC) Kennedy J.
[83] The Constitution of the United States 1787 42 USC, article 1.
[84] Suzanne DiNubile, above n 77, 15.
[85] *Connecticut Department of Public Safety v Doe* (2003) 538 U.S 1, 2 (SC) Rehnquist J.
[86] Ibid.
[87] The Constitution of the United States 1787 42 USC, 5th amendment.
[88] *Artway v Attorney General*, above n 71, 1270.

and prevent and promptly resolve incidents".[89] Additionally, it was stated that the effect of the registration requirements were only minimal given the information was already within the public domain. Therefore, the legislation did not amount to a punishment or breach the double jeopardy clause.[90]

IV Equal protection

The United States constitutional right to equal protection under the law is equivalent to the New Zealand right to freedom from discrimination. However, the American right provides that people 'similarly situated' should be treated alike, not that 'everyone' should be treated alike.[91] Therefore, due to its construction, provided the legislature has a legitimate interest in classifying people differently, the clause will not be breached. The court in *Artway v Attorney General* held that the registration requirements were constitutional in this respect as there is a legitimate interest in singling out sexual offenders to protect vulnerable individuals from their attacks.[92]

V The right to privacy

In 2001, the District Court of New Jersey addressed the issue of breaches of sex offenders' right to privacy.[93] It was held that an offenders precise home address was a 'non trivial' privacy interest that was entitled to constitutional protection. However, information such as "an offenders' name, conviction, appearance, place of employment or school attended" was not afforded the same protection. This is primarily because the information is merely a compilation of truthful facts that are freely available, albeit less readily, as a matter of public record.[94] Nonetheless, despite the fact that residential addresses attract a degree of privacy, the courts have ultimately ruled that this interest is "substantially outweighed by the state's compelling

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[89] Violent Crime Control and Law Enforcement Act of 1994 42 USC s 2 of amendment H.R. 2137.
[90] *Artway v Attorney General*, above n 71, 708.
[91] *City of Cleburne v Cleburne Living Center* (1985) 473 U.S 432, 439 (SC).
[92] *Artway v Attorney General*, above n 71, 692.
[93] *Paul P. v Verniero* (1999) 170 F.3d 396; 227 F.3d 107 (3rd cir).
[94] *Doe v Portitz* (1995) 142 N.J. 1, 662 A. 2d 367 Wilentz CJ.

interest in disclosure".[95] Hence, the public interest in the information is greater than an offenders' right to privacy.

B New Zealand

Obviously, given the lack of registration and notification legislation, there is no applicable case law to indicate the Bill's consistency with our constitution. Whilst the case of *Brown* dealt with the issue of the publication of a sex offenders details, the case focused solely on breaches of privacy by an individual officer. What is needed is a consideration of how the courts would approach legislation that permitted the disclosure of such information. It is therefore necessary to determine how the New Zealand courts have previously approached the issue of reconciling conflicting rights.

Section 5 of BORA deals specifically with "demonstrably justifiable" limitations on a right contained in the Act.[96] It is acknowledged that the right to privacy, though a fundamental stand alone right under domestic and international legislation, is not specifically contained in BORA. However, the right is tenuously encompassed in section 21 of the Act, being the right to be free from unreasonable search and seizure.[97] Similarly, it is generally accepted that freedom of expression "entails the right to say nothing or the right not to say certain things". [98] Thus, in some respects the notion of privacy is included in the right to non disclosure encapsulated within section 14. In the absence of other direction, there is no reason why discussion regarding the limiting of the common law right to privacy can not be approached using the framework developed in connection with section 5 of BORA. It is from this proposition that the following analysis stems.

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[95] *Paul P. v Verniero*, above n 93, 107.
[96] *Duff v Communicado Ltd* [1996] 2 NZLR 89.
[97] New Zealand Bill of Rights Act 1990, s 21.
[98] *Slaight Communications v Davidson* (1989) 59 DLR (4th) 416, 21; *Wooley v Maynard* (1977) 430 US 705; Attorney General *Legal Advice on Sex Offender Registry Bill: Consistency with the New Zealand Bill of Rights Act 1990* (Submission to Justice and Electoral Committee, Wellington, 2003) 2.

New Zealand case law regarding what approach the courts should adopt when faced with two conflicting rights is rather limited and confused. At times, a definitional approach to balancing rights has been adopted by the judiciary. This involves reading limitations into the definition of the right *before* proceeding to apply it to the factual situation.[99] Such was the case in *Re J*, where an infants right not to be deprived of life under section 8, was in direct competition with his parents right to "manifest" their religion under section 15.[100] The Court of Appeal ultimately used a definitional approach to conclude that, it should define "the scope of the parental right under section 15 of the Bill of Rights Act to manifest their religion in practice, so as to exclude doing or omitting anything likely to place at risk the life, health or welfare of their children".[101]

However, at other times the courts have adopted an ad hoc approach to balancing, requiring a two stage analysis of the right.[102] The first requires the right to be defined as it would be naturally, without limitations.[103] A separate inquiry is then completed into what reasonable limits the right or freedom may be subject to.[104] This approach was adopted in *Living Word Distributors*, which saw the right to freedom of expression under section 14 pitted against the right to be free from discrimination on the basis of sexual orientation under section 19(1).[105] The Court of Appeal overturned the Board's decision, concluding that it was reasonable to limit an individual's section 14 rights, in order to secure other rights and freedoms owed to members of society.[106] This approach is favoured by New Zealand legal commentators Butler and Butler, as section 1 of the Canadian Charter, which section 5 is based upon, is applied in this way.[107]

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[99] Butler and Butler *The New Zealand Bill of Rights* (Lexis Nexis, Wellington, 2005) 122.
[100] *Re J (An Infant): B and B v DGSW* [1996] 2 NZLR 134 (CA).
[101] Ibid, 146.
[102] Butler and Butler, above n 99, 122.
[103] Ibid.
[104] Ibid.
[105] *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA).
[106] Ibid.
[107] Butler and Butler, above n 99, 122.

This paper approaches the issue of conflicting rights in an adhoc way, as it allows for a comprehensive assessment of the justification for limiting a right. As the New Zealand judiciary have had little chance to rule on theories regarding the equal and unequal limiting of rights, it will be necessary to look to international legislation and jurisprudence for guidance.[108]

IV WHEN IS A LIMIT REASONABLE AND JUSTIFIABLE?

Section 5 of BORA prescribes that "the rights and freedoms contained in this Bill of Rights may be subject to *reasonable limits* prescribed by law as can be *demonstrably justified* in a free and democratic society", subject to section 4.[109] In order for a limitation to be prescribed by law it is necessary for it to be "expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law".[110] Although legislation can not be struck down by the New Zealand courts, judicial opinion as to legislative consistency with fundamental rights and freedoms has considerable social value.[111]

It is obvious from the wording of section 5 that the rights outlined in the Act are not absolute, yet it is also clear that the limitations must be necessary and fundamental.[112] The public expects the state to place limits on our rights and freedoms in order to ensure other essential rights and freedoms are not eroded.[113] For example, it is necessary to limit the right to free speech in situations where an absolute right would prevent an individual receiving a fair trial. Whether the limits placed on such rights are reasonable or justified forms a considerable portion of the law on rights.[114] International jurisprudence is a helpful guide in determining what amounts to a permissible limit on an existing right. It is, however, necessary to keep

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[108] Butler and Butler, above n 99, 132.
[109] Bill of Rights Act 1990, s 4.
[110] Phillip Joseph, *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) para 26.4.
[111] *Hansen v R* [2007] NZSC 7, 113 (SC) Anderson J.
[112] Butler and Butler, above n 99, 133.
[113] *Hansen v R*, above n 111, 9 Elias CJ.
[114] Butler and Butler, above n 99, 117.

in mind that a variety of limitation clauses exist, resulting in varying judicial approaches to interpretational constraints, or lack thereof.[115] For this reason, this paper focuses on Canadian and South African limitation clauses which have a degree of similarity with section 5.

A New Zealand

What amounts to a reasonable limit has not been addressed by the New Zealand courts in any great depth, as BORA has primarily acted as a tool in order to aid the interpretation of words rather than a determination of what is reasonable.[116] Case law that does attempt to address the meaning of section 5 provides nothing more than a vague guideline of what is necessary to consider. Judicial commentary suggests it ultimately requires a difficult balance of "public policy analysis and value judgments on the part of the court"[117] and a "utilitarian assessment of public welfare".[118]

The Court of Appeal in *Moonen v Film & Literature Board of Review* (*Moonen No. 1*) set out, not to define the phrases in section 5, but to provide a series of steps that are required by the section.[119] However, the result is a rather poorly constructed test that fails to take account of the actual purpose of section 5 and the relevant international jurisprudence and case law.[120] The court stated:[121]

> In determining whether an abrogation or limitation of a right or freedom can be justified in terms of section 5, it is desirable first to *identify the objective* which the legislature was endeavouring to achieve by the provision in question. The *importance and significance of that objective must then be assessed.* The way in which the objective is statutorily achieved must be in *reasonable proportion* to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a *rational relationship with the objective*, and in achieving the objective there must be as *little interference as possible* with the right or freedom affected.

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[115] Butler and Butler, above n 99, 118.
[116] Butler and Butler, above n 99, 129.
[117] *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA). Such an approach was then adopted in *Hopkinson v Police* [2004] 3 NZLR 704 (HC).
[118] I L M Richardson "Rights Jurisprudence – Justice for All" in Phillip Joseph *Essays on the Constitution* (Brookers, Wellington, 1995) 82.
[119] Andrew Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" (2000) NZLR 43.
[120] Butler and Butler, above n 99, 139.
[121] *Moonen v Film & Literature Board of Review (Moonen No 1)* [2000] 2 NZLR 9, 16-17 (CA).

> Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgement which the court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

The Court of Appeal in *Moonen No. 2* does little to aid our interpretation of section 5, simply stating that the approach adopted in *Moonen No. 1* was merely prescriptive and that there are a range of other approaches available.[122]

New Zealand's most recent authority on the approach to justification under section 5 is that of *Hansen v R.*[123] While the case is largely concerned with the interaction between sections 4, 5 and 6, judicial commentary as to the courts role under section 5 of BORA is still provided. Blanchard J states that if Parliament enacts a limitation upon a certain right, it must be taken to have viewed that limit as reasonable and justified in a free and democratic society.[124] He suggests that, while the courts are not bound by the Attorney General's assessment of a piece of legislation or Parliament's concurrence, judicial scrutiny of any legislation must take into account these views.[125] Ultimately, the court must ask itself "whether the legislature was entitled...to come to the conclusion under challenge. It is only if Parliament was not so entitled that the court should find the limit to be unjustified".[126]

B Canada

The White Paper on the Bill of Rights Act states that section 5 was based on section 1 of the Canadian Charter, which reads:[127]

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits

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[122] *Moonen v Film and Literature Board of Review (Moonen No 2)* [2002] 2 NZLR 754; 6 HRNZ 623, para 15 (CA).
[123] *Hansen v R*, above n 111, 7.
[124] Ibid, 53, Blanchard J.
[125] Ibid.
[126] Ibid, 58, Blanchard J.
[127] Canadian Charter of Rights and Freedoms RS C 1982, s 1.

> prescribed by law as can be demonstrably justified in a free and democratic society.

The comparable nature of our law thus makes it necessary to consider Canadian case law and jurisprudence as to what limitations can be demonstrably justified.[128] The most valuable authority in this regard is that of *R v Oakes*.[129] Dickson CJ outlined the values and principles that should be prioritised in a free and democratic society:[130]

> [T]o name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

He also suggests that at times it will be necessary to limit the rights and freedoms contained in the Charter when "their exercise would be inimical to the realisation of collective goals of fundamental importance".[131] The judgement ultimately outlines two criteria that must be satisfied in order for a limit to be justifiable:[132]

> (1) The purpose in limiting the right must be sufficiently important to justify overriding a constitutionally protected right or freedom; and
> (2) The limit must be reasonable and demonstrably justified.

I Sufficiently important

In determining whether the limit is sufficiently important it is necessary to consider the "cardinal values" it embodies.[133] *R v Oakes* is authority for the proportion that in order for a limitation to be sufficiently important:[134]

> The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society.

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[128] *Hansen v R*, above n 111, 14 Elias CJ.
[129] *R v Oakes* [1986] 1 SCR 103 (SCC).
[130] Ibid, 136.
[131] Ibid.
[132] Ibid, 140.
[133] *Hansen v R*, above n 111, 14 Elias CJ.
[134] *R v Oakes*, above n 129, 138-139.

It should be noted that it is the purpose of the limitation, not the law as a whole, which must to be considered.[135] While the phrase "pressing and substantial" implies a rather high threshold, in reality it is rare for the test to result in a breach of the Charter. Hence, commentators Butler and Butler suggest that whilst the importance of the purpose should be considered, it is merely one factor within a proportionality inquiry.[136]

II Reasonable and demonstrably justified

R v Chaulk summaries the *R v Oakes* justification inquiry into proportionality as:[137]

> The means to achieve the objective must:
> (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
> (b) impair the right or freedom in question as "little as possible"; and
> (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

These considerations have been built upon by subsequent case law that determined that some of these factors were too demanding or stringent.[138] The case of *Edward Books*, for example, held that the focus should not be on impairing the right "as little as possible" but on preventing "excessive impairment" of the right.[139] Thus, the legislature does not have to adopt the least intrusive method of achieving the objective; rather they must have chosen a method from "within a range of reasonable alternatives".[140] Similarly, the case of *Little Sisters Book and Art Emporium* states it is not necessary to provide scientific evidence as to the harm caused, it is sufficient to provide a reasoned apprehension of such harm.[141]

In order to determine what amounts to a proportional response the case of *Irwin Toy* states that consideration must be given as to how wide the limitation must be in order to achieve its objective.[142] It is also noted that the

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[135] Butler and Butler, above n 99, 143.
[136] Ibid.
[137] *R v Chaulk* [1990] 3 SCR 1303 (SCC).
[138] Butler and Butler, above n 99, 143.
[139] *R v Edwards books & Art Limited* [1986] 2 SCR 713 (SCC).
[140] *RJR-MacDonald Inc* [1995] 3 SCR 199, para 160 (SCC) McLachlin J.
[141] *Little Sisters book and Art Emporium* [2000] 2 SCR 1120 (SCC).
[142] *Irwin toy v Attorney-General* (Quebec) [1989] 1 SCR 927, 999 (SCC).

effectiveness of the limitation in achieving that objective must be discussed.[143] Ultimately, the inquiry requires a balancing exercise in respect of the context in which the right arises, and what level of protection should be accorded to that right.[144]

> "Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit entrench upon the integral principles of a free and democratic society".

C South Africa

Similar to that of New Zealand and Canada, section 36(1) of the South African Constitution 1996 contains a limiting provision that states:[145]

> The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

Unlike the Canadian decision of *R v Oakes*, the South African courts have developed an approach based entirely on a proportionality assessment. The inquiry is founded on the notion that "the more serious the impact of the measure or the right, the more persuasive or compelling the justification must be".[146] Such an approach is used as the courts have acknowledged that "differing rights have different implications for...an open and democratic society based upon freedom and dignity" and therefore, there is not an absolute standard that can be used to determine reasonableness.[147] The courts must engage in "a nuanced and context sensitive form of balancing".[148]

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[143] Ibid.
[144] *R v Chaulk,* above n 137, 1341.
[145] South African Constitution 1996, s 36(1) (SA).
[146] *State v Mamamela* (2000) 5 BCLR 491, para 32 (SACC).
[147] *State v Makwanyane* (1995) 6 BCLR 665, 708 (SACC) Chaskasson P.
[148] *Christian Education South Africa v Minister of Education* (2000) 9 BHRC 53, 67 (SACC).

D Conclusions as to when a limit is reasonable and justifiable

Essentially the New Zealand approach to determining when a limit will be reasonable and demonstrably justified in a free and democratic society can be summarised as follows. When rights or freedoms conflict with each other the situation can be addressed using the framework provided by section 5 of BORA. Such an inquiry begins from the position that "neither right has precedence over the other". [149] International case law then suggests it is then necessary to complete a balancing exercise based on the relevant contextual factors. Thus, consideration must be given to: [150]

(1) the purpose and significance of the rights;

(2) the weight of the good that the limit gives effect to;

(3) an assessment of proportionality; and

(4) general concerns such as "preserving room for legislative choice, uncertainty, the limits of law, and the role of the judiciary".

Whilst New Zealand case law regarding the topic is rather limited, McGrath J in *Hansen v R* notes that the approach used in *R v Oakes* "continues to be a workable basis for applying section 5 of BORA". [151] A similar inquiry, that encapsulates the flexible approach in *Oakes* is made in the New Zealand case of *Ministry of Transport v Noort*: [152]

> In the end an abriding inquiry under s5 is a matter of weighing:
> (1) The significance in the particular case of the values underlying the Bill of Rights Act;
> (2) The importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
> (3) The limits sought to be placed on the application of the [Bill of Rights] Act provision in the particular case; and
> (4) The effectiveness of the intrusion in protecting the interest put forward to justify those limits.

V ARE SEX OFFENDER REGISTERIES DEMONSTRABLY JUSTIFIED?

There are a variety of rights that conflict with various aspects of the Bill and thus ultimately the right to free speech. New Zealand legislation raises different issues to that of American law. Most notable is the

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[149] *Campbell v MGN Ltd* [2004] 2 All ER 995.
[150] Butler and Butler, above n 99, 149.
[151] *Hansen v R*, above n 111, 92, McGrath J.
[152] *Ministry of Transport v Noort*, above n 117, 283.

difference in emphasis on the right to freedom of expression, and as a consequence, the weight given to the right to privacy. In America, freedom of expression is of the utmost importance and thus, residential addresses and criminal conviction data is freely available.[153] Public notification schemes simply serve to make such information more accessible. In New Zealand, the right to freedom of expression is subject to greater restrictions and as such, criminal records are relatively more difficult to obtain and carry a higher expectation of privacy.[154] This is where the primary conflict of rights lie and therefore discussion into the degree of privacy rights held by offenders will form the bulk of this paper's inquiry into constitutionality.

Nonetheless, it is worth noting that submissions by the Human Rights Commission allude to additional breaches of rights by the Bill. The right to be presumed innocent under s25(c), for example, is infringed upon as the register includes those individuals who are merely cautioned for an offence. Similarly, issues arise regarding the right to due process under article 14 of the International Convention on Civil and Political Rights (*ICCPR*). Arguments can be made that the right has been violated by including individuals on the register who are in the process of appealing their conviction or whose convictions have been overturned by a higher court. However, issues of consistency with these rights will not be discussed as the conflicts can largely be addressed through amending the Bill.

It is also important to note that other issues raised by various American courts do not present themselves as hurdles to the New Zealand Bill. Unlike the American legislation, the New Zealand Bill is not retrospective, and thus does not breach s26(1) of BORA. Similarly, unlike America, the New Zealand right to non-discrimination does not raise issues of consistency with the legislation. Section 19 of BORA states that citizens have a right to be free from discrimination on the basis of any of the prohibited grounds of discrimination in the Human Rights Act 1998. The

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[153] *Doe v City of New York,* (1994) 15 *F.*3d 264, 268 (2d Cir).
[154] Jae Lemin *The Privacy Law Implications of the 1996 Paedophile and Sex Offender Index* (LLB Research Paper, Victoria University of Wellington, 1997).

listed prohibited grounds, however, do not include any reference to discrimination on the basis of conviction or type of offence.

For the sake of completeness, it should be mentioned that, like America, the protection against double jeopardy in section 26(2) of the Act will not be breached by the legislation. The New Zealand right to double jeopardy provides that "no one who has been finally acquitted or convicted of, or pardoned for an offence shall be tried or *punished for it again*".[155] In the case of *Harder v Director of Land Transport Safety*, Laurenson J held that a sentence handed down to enforce the criminal law, plus an additional activity required to protect the public, did not amount to double jeopardy.[156] However, the latter statement was qualified by the notion that the additional activity must not be designed to punish the offender.[157] As the purpose of the Bill is to "assist the police in their investigation of sex offences, to reduce sexual offending, and thereby to contribute to public safety";[158] the registration requirements of the Bill will not amount to double jeopardy.

A The right to privacy in New Zealand

It is often unequivocally stated that "these types of offenders have infringed on the freedoms and rights of their victims, and in so doing, have forfeited any rights enjoyed by other members of the community".[159] In particular, those in favour of sex offender registries argue that, "the rights of the children – the most vulnerable group in our society – must come before the privacy rights of convicted criminals".[160] It is therefore necessary, first to consider the degree of privacy rights offenders actually have in respect of their personal details, and then to determine whether these rights are outweighed by the public interest in disclosure of such information.

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[155] New Zealand Bill of Rights Act 1990, s 26(2).
[156] *Harder v Director of Land Transport Safety* (1998) 5 HRNZ 343, 347, Laurenson J.
[157] Ibid.
[158] Sex Offender Registry Bill 2003, no 2, cl 3.
[159] Nigel Waters, Office of Federal Privacy Commissioner "Paedophilia: Policy and Prevention" (Australian Institute of Criminology, Sydney, 14-15 April 1997) 3.
[160] (27 January 1996) 289 GBPD ser 6, 23, 41.

I International Obligations

The right to privacy is considered a fundamental right and is offered protection by article 12 of the Universal Declaration of Human Rights 1948 and article 17 of the International Covenant on Civil and Political Rights 1966:[161]

> (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.
> (2) Everyone has the right to the protection of the law against such interference or attacks.

Protection offered by article 17 only prevents intentional, unlawful and false attacks on individuals' honour and reputation.[162] As any information that would be contained in a register is legally collected and correct, sex offender registers would not be deemed an attack on offenders' honour and reputation. Therefore, any discussion into breaches of international obligations of privacy would need to focus on whether the register is in fact "arbitrary", and thus unjustifiable.[163]

II Domestic Obligations

In New Zealand, the right to privacy, though still in its formative stages, is relatively settled and consists of a rather comprehensive set of privacy laws designed to prevent abuses of individuals' right to privacy. Actions can be brought for a breach of:[164]

> "the tort [of privacy], the privacy principles developed by the Broadcasting Standards Authority, the legislative requirements for collection, storage and use of personal information set out in the Privacy Act 1993, possibly the requirements of the Harassment Act 1997, and a number of miscellaneous legal requirements".

While the Privacy Act 1993 is designed to provide guidelines as to disclosure of private information by the state and its agencies, sex offenders will be unable to challenge the legitimacy of a register under this Act. Clause 14 of the Bill explicitly prevents the Privacy Act from applying to

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[161] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 17.
[162] Jae Lemin, above n 154, 4.
[163] Ibid, 5.
[164] Burrows and Cheer *Media Law in New Zealand* (5ed, Oxford University Press, Australia, 2005) 234.

the disclosure provisions.[165] Accordingly, the only possible avenue for offenders to challenge their inclusion on a register lies with tort, and thus the remainder of this paper will focus entirely on tortuous liability.

The New Zealand tort was established in 1986, when the case of *Tucker v News Media Ownership* acknowledged that a legal right to privacy did in fact exist.[166] Unlike the United Kingdom, which recognises this right through an extension of the action for breach of confidence, New Zealand has remained comparatively true to the traditional action espoused in the case of *Coco v AN Clark.*[167] The courts have chosen to develop a separate tort that directly addresses alleged breaches of privacy. As the tort is entirely a creature of judge-made law, it is best analysed by considering its foundation cases. However, for the sake of succinctness the state of the law as it is today will simply be outlined.

There is a collection of early case law that contributed to the formation of the New Zealand tort, but it is the case of *Hosking v Runting* that has established the approach currently used. The majority decision saw the creation of two fundamental elements:[168]

> (1) The existence of facts in respect of which there is a reasonable expectation of privacy; and
> (2) Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Added to this test, is the notion that a legitimate public concern in the disclosure of the private facts can, despite being considered highly offensive, allow the information to be released to the public.[169] Such a concession was made in order to ensure the tort did not breach BORA by imposing unjustifiable restrictions on the right to freedom of expression.[170]

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[165] Sex Offender Registry Bill 2003, no 2, cl 14.
[166] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 732 (HC).
[167] *Coco v A. N. Clark (Engineers) Ltd* [1969] RPC 41.
[168] *Hosking v Runting* [2005] 1 NZLR 1, para 117.
[169] Ibid, para 129.
[170] Ibid, para 130.

III Do offenders have a right to privacy?

First, in determining whether an offender has an enforceable privacy right, it is important to remember that such a right will only be protected by the tort when there is widespread publicity of the information.[171] *Hosking v Runting* does little to clarify the meaning of the word 'widespread', beyond indicating that publication to just one person will not be sufficient.[172] Nonetheless, if police maintain a register and distribute information to even a small select group of people it likely that an arguable case could be made in respect of a breach of privacy.

(a) Is there a reasonable expectation of privacy?

In *Hosking v Runting,* the majority determines if an expectation of privacy exists by way of an inquiry into whether the information is a private fact.[173] Whether the criminal convictions and personal details of a sex offender are capable of attaining the status of private facts is rather contentious, and lies at the heart of the debate surrounding sex offender registries. It is clear that some matters are inherently private, such as domestic, personal and family affairs, and some matters are inherently public, such as marriage, divorce, and ownership of land.[174] However, Gleeson CJ in *Australian Broadcasting Corporation* notes, "there is no bright line which can be drawn between what is private and what is not".[175] In order to determine the privacy value of facts that are not inherently obvious, we must apply "contemporary standards of morals and behaviours".[176]

(i) Residential Address

Legal advice on the Bill given by the Attorney General stated that requiring an offender to register their residential address was consistent with

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[171] Ibid, para 125.
[172] Ibid, para 125.
[173] Ibid, para 256.
[174] E. Paton-Simpson "Invasion of privacy by the publication of private facts" (1998) MLR 318.
[175] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, para 42 (HC) Gleeson CJ.
[176] Ibid.

BORA.[177] This advice was based on the notion that "a statement of an individual's name and address is not sufficiently expressive so as to attract the protection afforded by section 14 of the Bill of Rights Act". The protection referred to is the right to remain silent or not say certain things.[178] Hence, sex offenders cannot refrain from disclosing their residential address on the basis that it breaches their right to non disclosure under section 14. Such an approach is supported by the judgment of *Regina v Holman,* which held that requiring a person to complete a census form was not a breach of their rights.[179]

Similarly, various American courts have declared that no privacy interest lies in a registrant's home address,[180] as the information is readily available in public records, such as telephone books and electoral registers.[181] However, American case law on the area is confused, and at other times the courts have acknowledged that "[in] an organized society, there are few facts that are not at one time or another divulged to another".[182] Thus, a right to privacy does not disappear simply because of a controlled disclosure. In *United States Department of Defence,* the court suggests it is "reluctant to disparage the privacy of the home, which is accorded special consideration in the Constitution, law, and traditions".[183] Hence, a degree of constitutional protection has since been accorded to a "non-trivial privacy interest" within residential addresses.[184]

The New Zealand judiciary, on the other hand, have had little chance to consider the privacy interests attached to residential addresses. In New Zealand's sole case involving the disclosure of a sex offenders' address, *Brown,* the court stated that for *some* purposes an address is capable of

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[177] Attorney General, above n 6, 2.
[178] *Slaight Communications v Davidson* (1989) 59 DLR (4th) 416, 21; *Wooley v Maynard* (1977) 430 US 705.
[179] Ibid.
[180] *Russell v Gregoire* (1997) 124 F.3d 1079, 1094 (9th Cir).
[181] *Doe v Portitz*, above n 94, 56, Wilentz CJ.
[182] Ibid, 57.
[183] *United States Department of Defence v Federal Labour Relations Authority* (1994) 510 U.S 487, 501.
[184] *Paul P. v Verniero*, above n 93, 404.

being considered a private fact. McGechan J notes that this is particularly the case when the address belongs to a convicted sexual offender, who "unquestionably" has a reasonable expectation of privacy.[185] He suggests this expectation arises as an offender is unlikely to anticipate that their address will be publicly distributed when it is provided in the course of a legitimate criminal investigation.[186] This approach is consistent with that of the current Police Criminal Profiling Guidelines which state that their must be "exceptional circumstances" before an offender's address can be published.[187]

(ii) Criminal Convictions

Whether criminal convictions are considered private facts is less clear. The New Zealand courts subscribe to the principle of open justice, in which the courts are accessible to the public, and the media are free to report on cases under section 25(a) of BORA.[188] It thus follows that convictions are a public fact. This, however, is not always the case. Legislation exists in order to allow some convictions to become private again after a period of time.[189] Whilst almost all sexual offenders will not fall within the eligibility criteria of the Criminal Records (Clean Slate) Act 2004, such legislation acknowledges that privacy concerns exist and that public disclosure of convictions may have severe implications on an offender's future.[190]

In America, individuals do not have a reasonable expectation of privacy in respect of matters of public record as they are not considered private facts.[191] However, in New Zealand, privacy interests can exist despite information being publicly available.[192] The approaches differ as information regarding a criminal conviction is freely available in America, and thus public notification schemes simply make the information more

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[185] *Brown v Attorney General,* above n 44, para 75 (DC) McGechan J.
[186] Ibid, para 75.
[187] I N Bird, *Criminal Profiling Guidelines,* (Prepared for the New Zealand Police, 27 July 1993) Guideline 9.
[188] *Lewis v Wilson and Horton Limited* [2000] 3 NZLR 546.
[189] *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156, 169 (SC).
[190] Criminal Records (Clean Slate) Act 2004.
[191] *Doe v. City of New York*, above n 153, 268.
[192] *Tucker v News Media Ownership Ltd*, above n 166, 735.

accessible.[193] Whereas in New Zealand, information regarding criminal records is relatively more difficult to obtain and therefore carries a higher expectation of privacy. For example, in order to acquire an individuals' criminal record from the court, it is necessary to have a "genuine and proper reason" to obtain the information and to have knowledge of the date and place of conviction.[194] Alternatively, you can apply to the Department of Courts for the information with written consent from the criminal record holder.[195]

Ultimately, New Zealand case law indicates that over time convictions may become private again, [196] it is simply a "matter of degree and circumstance as to what should become private information".[197] *Tucker v News Media Ownership* is authority for the proposition that, the greater the length of time that has elapsed since a conviction, the greater the expectation of privacy that exists.[198] This approach is consistent with that of the United Kingdom courts. In the case of *Green Corns v CLA Verley Group,* the court held that there is no recognisable privacy interest in a conviction alone, however, when compiled into a register a degree of privacy exists as the conviction is prevented from fading into non existence.[199] Therefore, it seems criminal convictions can attract a degree of privacy, but the degree of protection is likely to vary between individuals, and in most cases will be minimal.

(iii) Compilation of other information

Aside from an offenders address and convictions, a sex offender registry can contain information such as an offender's name, race, age, birth date, weight, height and hair colour. It has been argued that, despite the information being publicly available, an expectation of privacy is created by its compilation into a single source. It is suggested that the combination of

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[193] Jae Lemin, above n 154, 9.
[194] Ibid.
[195] Ibid.
[196] *Tucker v News Media Ownership Ltd*, above n 166, 735.
[197] *Brown v Attorney General,* above n 44, para 67 (DC) McGechan J.
[198] Jae Lemin, above n 154, 7.
[199] *Green Corns Ltd v CLA Verley Group Ltd* [2005] EWHC 958, para 63.

inoffensive facts enables the reader to build a detailed picture of an individual.[200] However, the American courts have declined to recognise such a right, stating "an offender's name, appearance, place of employment or school attended", are not afforded the same protection as a residential address. This decision was based on the fact the information was merely a compilation of truthful facts that were freely available as a matter of public record.[201]

The New Zealand judiciary has not had a chance to address the issue of whether privacy rights can be attributed to a compilation of otherwise innocuous facts about an individual. The United States Supreme Court has acknowledged that "the compilation of otherwise hard-to-obtain information alters the privacy interests implicated".[202] However, this type of information is relatively easy to obtain as it exists within the public domain. An offender's name, for example, is an inherently public fact. As is his or her birth date, which can be compared to marriage, divorce and death dates that are also inherently public facts. [203] Case law also suggests that information regarding an individuals' race, height and hair colour will not attract a reasonable expectation of privacy as the information can be obtained upon visually citing an individual.[204] "Because a person's physical appearance is necessarily and constantly exposed to public view, no person can have a reasonable expectation of privacy in his appearance".[205] Therefore, any expectation of privacy recognized by the courts in this compilation of information is likely to be minimal.

(b) Is disclosure highly offensive?

What is considered highly offensive has been the subject of debate through out the torts development. *Hosking v Runting* recently determined that it is the publicity given to the facts that must be considered highly

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[200] *Doe v Portitz*, above n 94, 59, Wilentz CJ.
[201] Ibid.
[202] *US Department of Justice v Reporters Committee for Freedom of the Press* (1989) 489 U.S 749, 763.
[203] E. Paton-Simpson, above n 174, 318.
[204] *Bernstein v Skyviews Ltd* [1978] QB 479.
[205] *United States v. Dionisio* (1973) 410 U.S. 1, 14.

offensive, not the facts themselves.[206] What is required is a public disclosure that is truly harmful, distressing or humiliating.[207] It was established in the case of *P v D,* that what will be deemed highly offensive will be determined from the perspective of an objective reasonable person in the shoes of the claimant.[208] Thus, it is necessary to consider whether an individual who has been convicted of a sexual offence would find it highly offensive to have that conviction and their personal details publicly distributed. Logically, offenders who have completed their punishment and are attempting to reintegrate themselves back into the community would be offended by such disclosure.

Nonetheless, *Hosking v Runting* also notes that whether a disclosure is considered offensive is coloured by the degree of an individual's expectation of privacy. [209] Over the years, the opinion of the American courts has varied as to the degree of expectation attached to offenders' privacy rights. Some courts have labelled the rights, "significant" or "important" and others have categorised them as, "relatively modest" or "minimal".[210] *Aronson v Internal Revenue Services* notes that the degree of privacy expectation can ultimately be determined by a consideration as to the effects of such disclosure.[211] In this case, a real threat of harassment and vigilantism exists when details of an offender's criminal convictions, coupled with their residential address, are publicised. It therefore follows that disclosure would be considered highly offensive. Although, the degree of offensiveness would be greater in respect of an offender's address, as it represents the basis of the threat.

Thus, sex offenders do have a right to privacy, and they can expect their residential addresses to remain private in these circumstances. They can also expect their convictions and other personal details to have some degree of protection. Nonetheless, they must also accept that non disclosure

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[206] *Hosking v Runting*, above n 164, para 117.
[207] Ibid, para 126.
[208] *P v D* [2000] 2 NZLR 591, 601.
[209] *Hosking v Runting*, above n 168, para 256.
[210] *Doe v Portitz*, above n 94, 57, Wilentz CJ.
[211] *Aronson v Internal Revenue Service* (1992) 973 *F.*2d 962 (1st Cir).

of this information is subject to demonstrably justified limitations. It is the degree of these limitations that will be addressed in part V(c) of this paper.

B The conflicting right: Freedom of expression

Section 14 of BORA provides that, "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind, in any form".[212] This right is also protected within international legislation such as article 19 of the Universal Declaration of Human Rights, article 19 of the International Covenant on Civil and Political Rights, and article 10 of the European Convention on Fundamental Rights and Freedoms. "It embraces free speech, the sanctity of an individual's opinion, a free press, the transmission and receipt of ideas and information, the freedom of expression in art and other forms, the ability to receive ideas from elsewhere, and even the right to silence".[213] The right acts as dual protection to citizens. [214] It encompasses the right of individuals to not be arbitrarily restricted in their expression.[215] While at the same time it provides individuals with a collective right to receive information subject only to prescribed limitations; and places a duty upon the government, as controllers of information, to disclose it unless otherwise prohibited. [216]

Case law suggests that the right to freedom of expression is "as wide as human thought and imagination".[217] Thus, in its purest form freedom of expression exists without limitations. Nonetheless, the right is not absolute in any jurisdiction in the world. Although, it's legal position and importance varies between countries. Under the first amendment of the United States Constitution, the right is theoretically absolute, and the state is burdened with the duty of proving a limitation is necessary before the right can be

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[212] Bill of Rights Act 1990, s 14.
[213] Rishworth P., Huscroft G., Mahoney, R., & Optican, S. *The New Zealand Bill of Rights (*Oxford University Press, Melbourne, 2003).
[214] Human rights Commission *Human Rights in New Zealand Today: The right to freedom of opinion and expression – New Zealand Action Plan for Human Rights* (Wellington, 2004) chapter 8.
[215] Ibid.
[216] Ibid.
[217] *Moonen No 1*, above n 121, 9 (CA) Tipping J.

restricted.[218] Whereas, in New Zealand the right is inherently restricted by demonstrably justifiable limitations prescribed in section 5 of BORA. It is for this reason, it is often suggested that the right to freedom of expression plays a defining role in determining the scope of other rights.[219] For example, in this case it is necessary consider whether: (1) offenders' right to privacy can be construed so as to provide convincing reasons for a limitation to be placed on the right to freedom of expression, and (2) whether the public interest in freedom of expression can be constructed so as to provide a justifiable restriction on the right to privacy.

C What limits can reasonably be placed on offenders rights?

After outlining the various rights at play, and indicating how they conflict, it becomes necessary to determine what limits can justifiably be placed on each right under section 5 of BORA. In completing this task *Hansen v R* suggests, it is important to go beyond merely interpreting the rights involved.[220] This paper undertakes to consider the purpose and significance of the rights at stake, the objectives of the limitation, the importance of the public interest in the limitation and whether any restriction would be a proportional response, including whether the Bill achieves it's objectives and whether any restriction is excessive.

I Limitation sought to be placed on the rights

Often arguments are made, that limiting offenders rights, even to a great extent, is justifiable given the considerable threat they pose to the community. Such an approach is completely incompatible with that of human rights legislation that aims to protect human dignity. It is also inconsistent with offenders' goals of successful long term rehabilitation and reintegration into the community. In determining what is a reasonable restriction, it is first essential to assess "whether *the* limitation is demonstrably justified, not whether *some* limitation is justified".[221] Hence,

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[218] The Constitution of the United States 1787 42 USC, 1st amendment.
[219] *Human Rights in New Zealand Today: The right to freedom of opinion and expression – New Zealand Action Plan for Human Rights*, above n 211, chapter 8.
[220] *Hansen v R*, above n 111, 23, Elias CJ.
[221] Ibid, 115, Anderson J.

consideration must be given to the specific limits the Bill seeks to place upon offenders' right to privacy.[222]

The explanatory note of the Bill acknowledges that a conflict arises between the right to privacy and the right to freedom of expression. Yet it states that, "the protection of the privacy of sex offenders must give way to the protection of the public from such offending. That is, in this area the community's interests must come first".[223] Under clause 13, the Bill proposes to prioritise the right to freedom of expression by permitting the disclosure of information in various circumstances. Offenders' privacy rights are limited by allowing anyone with a "desire to reduce sexual offending" or "contribute to public safety" to access the register.[224] This proposed limitation is extensive given that no guidance is provided as to what use may be made of the information, beyond suggesting it must be used "for the purposes of the Act".[225] Similarly, the information has the capacity to be published widely by Police officers or unsworn staff members, who are not restricted as to what use they make of the information, beyond it being "for law enforcement purposes" or to "aid in police investigations". [226] While it is acknowledged that if the Bill proceeded the courts are likely to narrowly interpret clause 13, in its current form, offenders' privacy rights are substantially limited, and open to abuse.

In the Bill's explanatory note the drafters attempt to justify this restriction on the basis that:[227]

> "the Bill maintains a balance between these competing concerns in various ways: for example, it applies only to the extent necessary, it does not apply to offences and offenders in the distant past, it strictly limits access to the registry which should be seen as a crime fighting and law enforcement tool, and it provides a means by which offenders can have erroneous information corrected and be struck from the record in the event that they are pardoned".

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[222] *Ministry of Transport v Noort*, above n 117, 283.
[223] Sex Offender Registry Bill 2003, no 2, explanatory note.
[224] New Zealand Law Society, above n 56, 3.
[225] Sex Offender Registry Bill 2003, no 2, cl 3.
[226] New Zealand Law Society, above n 56, 4.
[227] Sex Offender Registry Bill 2003, no 2, explanatory note.

Whether this balance is appropriately struck can only be considered in light of an inquiry into whether the limitation is a proportional response to the potential harm or threat to society.

II Objective of the Bill

Moonen No. 1 state there must be a rational connection between the restriction placed on the right and the harm sought to be prevented or remedied.[228] In this case, clause 3 of the Bill outlines the purpose of the legislation as, "to assist the Police in their investigation of sex offenders, to reduce sexual offending, and thereby to contribute to public safety".[229] Each of these goals is honourable and of "pressing and substantial importance"[230] in a modern society, that relies on the government to fulfil these objectives as part of the social contract. As such, if these objectives are effective, they may arguably be sufficiently important to justify the restriction of constitutional rights.

(a) Assisting Police in their investigations

Currently, the Police do not always have access to a reliable, up-to-date database of offenders' residential addresses.[231] This has been sited as a reason for lengthy investigation times.[232] The Bill is designed to provide Police with a complete register of names and addresses of sexual offenders, in order to decrease the time it takes to identify and make contact with offenders for investigatory interviews.[233] It also aims to speed up the process of eliminating suspects during inquiries.[234] Additionally, the Bill also provides for disclosure of this information to the public when it is necessary, to assist in their investigations.[235] However, no guidance is provided as to precisely when disclosure is reasonable and who the information can be disclosed to.

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[228] *Moonen No 1,* above n 121, para 15.
[229] Sex Offender Registry Bill 2003, no 2, cl 3.
[230] *R v Oakes*, above n 129, 138-139.
[231] *Sex Offender Registry Bill 2003*, above n 67, 4.
[232] Ibid.
[233] Sex Offender Registry Bill 2003, no 2, explanatory note.
[234] Ibid.
[235] Ibid, cl 13.

(b) Reduce sexual offending

The Bill's explanatory note suggests it is designed to deter offenders from future offending.[236] Offender rehabilitation agency, STOP, notes that when an offender knows that people around him/her are aware of their previous offending, they are less likely to offend.[237] "Registration places a defendant on notice that when subsequent sexual crimes are committed in the area where he lives, he may be subject to investigation. This may well have a prophylactic effect, deterring him for future sexual crimes".[238] Clause 13 of the Bill provides for disclosure of information to the community in the hopes of preventing offenders from re-offending.[239] The United Kingdom Sex Offenders Act has a similar purpose, although the objective is achieved through provisions permitting the monitoring of previous offenders by Police.[240] Such provisions are not included within the New Zealand Bill.

(c) Contribute to public safety

The driving force behind sex offender legislation is increasing public safety. The concept of a register works on the premise that, "if endangered citizens know that a released...offender is among them...they can take steps to prevent the victimisation of themselves and other more vulnerable people".[241] While the Bill is not designed to make the public aware of every offender living within their community, it nonetheless allows information to be distributed by the Police or anyone with the Minister's permission that has desire to increase public safety.[242] While the current Police Criminal Profiling Guidelines only provide for disclosure in "exceptional circumstances",[243] it seems the Bill is designed to widen this approach, and allow for disclosure in a variety of situations. Although, no indication is

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[236] Ibid, explanatory note.
[237] *Sex Offender Registry Bill 2003*, above n 67, 4.
[238] Home Office Police Research Group, above n 10, 22.
[239] Sex Offender Registry Bill 2003, no 2, cl 13.
[240] Sex Offenders Act 1997 (UK).
[241] John Howard Society of Alberta, above n 8, 3.
[242] Sex Offender Registry Bill 2003, no 2, cl 13.
[243] I N Bird, above n 40, Guideline 9.

given as to what these circumstances are beyond the fact they must be in line with the purposes of the Act.

III Degree of limitation justified by a legitimate public interest

Despite the public outcry that offenders' rights must give way to societal interests, this in fact can only occur within the constraints of a *legitimate* public concern defence. It is universally accepted that a certain degree of an individual's right to privacy must be forfeited in the interests of the enforcement of the law and public safety. [244] However, it is also generally accepted that there are times where disclosure of personal information will not be justified by such a purpose.[245] New Zealand case law highlights the difficultly in establishing a legitimate public concern defence for a register that promotes nationwide disclosure of information. This is largely because a primary factor in obtaining the defence lies in whether the people receiving the information have a right to be informed.[246] Arguably, residents in Bluff do not need to know the details of a sex offender living in Northland, despite the fact the information may be of general interest to them.

However, the American courts have ruled that full public access to a register does not amount to a wider distribution of the information than is necessary. It is suggested that the public will only access information about offenders within their own community and communities they intend to travel to.[247] Therefore, in reality, the information is only disclosed to those who the offender poses a risk to. On this basis, *Paul v Verniero* held that, any disclosure will be legitimate as "the privacy interest is substantially outweighed by the state's compelling interest in disclosure".[248] However, this approach would not be condoned by either the New Zealand or the United Kingdom courts who have stated that widespread disclosure will

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[244] Nigel Waters, above n 159, 3.
[245] Ibid
[246] *Hosking v Runting*, above n 168, para 259.
[247] *Paul P. v Verniero*, above n 93, 414.
[248] Ibid, 107.

rarely be justified.[249] For example, *Brown* makes it clear that, "any legitimate public interest in a convicted and recently paroled paedophile living in the community can be met without releasing extensive information to a wide audience".[250]

Nonetheless, the United Kingdom case of *Hellewell* states that the disclosure of offenders' information in a controlled manner is capable of attracting the public concern defence.[251] Laws J notes that if the information is distributed only to those who have a "reasonable need to make use of it" for the prevention of crime, then any breach of the offender's right to privacy is minimised.[252] Provided the Bill tightly regulates disclosure to those who legitimately require the information, the breach of privacy is justified. Therefore, in order to obtain a public concern defence any register must be accessible solely by the Police, and the information must not be distributed on a widespread or indiscriminate scale. Disclosure must be subject to strict guidelines as to how and when this information can legitimately be released, keeping in mind both the rights of offenders and needs of the public. However, the Bill does not propose a limitation that fulfils this requirement and as such, in its current form, would not attract a defence of legitimate public concern to breaches of offenders' privacy rights.

IV Proportionality

The final consideration in determining the legitimacy of a rights based restriction is an inquiry as to whether the restriction is a proportional response to the harm that is sought to be prevented. This consideration embodies the notion that you should not use a sledge hammer to crack a nut.[253] In completing this inquiry it is important to consider the effectiveness of the Bill at achieving its objectives, whether the limitation is excessively

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[249] *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, 475.
[250] *Brown v Attorney General*, above n 44, para 92.
[251] *Hellewell v Chief Constable of Derbyshire*, above n 249, 475.
[252] Ibid.
[253] *Moonen No 1*, above n 121, 16-17 (CA).

restrictive, and ultimately whether there are other viable alternatives that would infringe upon offenders rights to a lesser degree.

(a) Effectiveness of the Bill

Commentators Butler and Butler suggest that the effectiveness of the legislation is a primary concern within any discussion into proportionality.[254] This is particularly the case, given that the Justice and Electoral Committee ultimately declined the Bill on the basis of reports from the New Zealand Police and Ministry of Justice, which indicated the register, was unlikely to achieve its objectives.[255]

(i) Assist police in their investigations

Submissions made by the New Zealand Police on the Bill outlined the current internal intelligence systems maintained by the Police. Presently, the Wanganui database routinely collects the type of information a register would contain, and in fact, contains a more detailed criminal history of offenders than the Bill proposes. The database includes released offenders' residential addresses, provided by the Probation Service under section 54 of the Parole Act. [256] A similar database, connected with an information sharing scheme, is also currently being established in Dunedin. Information for this database is being contributed by the Police, Department of Corrections, Child Youth and Family Services, Housing New Zealand and Work and Income.[257] Thus, any register established under the Bill will merely be replicating information already available to the Police under current practices and guidelines.[258] While it is acknowledged that the current databases do not always contain up-to-date residential address details, the costs of establishing and maintaining a register solely to obtain these details is not a proportional response.[259]

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[254] Butler and Butler, above n 98, 145.
[255] Justice and Electoral Committee, above n 3, 1.
[256] New Zealand Prisoners Aid and Rehabilitation Society, above n 60, 6.
[257] Howard League Society for Penal Reform *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, 2003) 3.
[258] Ibid.
[259] *Sex Offender Registry Bill 2003*, above n 67, 4.

This lack of effectiveness is exacerbated by the fact that international research suggests offender compliance rates, in terms of registering correct and up-to-date residential address details, are particularly low. For example, a study completed by Presser and Gunnison in 1999 found that 75% of offenders in California failed to register their address upon being released from prison or upon moving from their registered address.[260] Similarly, some American states have reported that up to 80-90% of the addresses on their register are inaccurate or missing information.[261] Ironically, research also suggests that those offenders, who do choose to register, are generally more stable and pose less of a threat to the community, than those who do not register.[262] Thus, it seems many offenders will be reluctant to comply with the registration requirements and those who do, will largely not pose a risk to the community.

In a similar vein, international experience suggests that Police are unlikely to consider the registers accuracy and completeness a high priority.[263] Therefore, the register will rarely be an accurate picture of offenders' whereabouts. As a result of this, United Kingdom research states that "register intelligence" is only used in 23% of investigations,[264] and is primarily confined to risk assessment inquiries.[265] It is on this basis that many submissions stated that establishing a register will not actually aid Police in their duties and will in fact waste a considerable amount of time, effort and resources that could have been put into front line policing.[266]

(ii) Reduce sexual offending

While it can logically be argued that a register may help police identify and eliminate suspects quicker, there is no empirical evidence to

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[260] Presser, L. & Gunnison, E. "Strange Bedfellows: Is sex offender notification a form of community justice?" (1999) 45(3) Crime and Delinquency 299-315.
[261] Hinds, L. & Daly, K. "The war on sex offenders: Community notification in perspective" (2001) 34(3) The Australian and New Zealand Journal of Criminology 256.
[262] John Howard Society of Alberta, above n 8, 6.
[263] Home Office Policing and Reducing Crime Unit, above n 25, 7.
[264] Ibid.
[265] Ibid, 41.
[266] Howard League Society for Penal Reform, above n 254, 3; New Zealand Prisoners Aid and Rehabilitation Society, above n 60, 6.

suggest a register will reduce sexual offending. This is primarily because registers do nothing to contribute to the management of offenders in the community or aid in their rehabilitation.[267] Those in favour of sex offender registries have always argued that public notification actually deters sex offenders from re-offending, and therefore prevents tragedies from occurring. Proponents of these registries, however, offer comparatively strong criticism of the effectiveness of registers based on their unintended effects on an offenders' rehabilitation. It thus follows, that it is necessary to consider whether rehabilitating offenders or notifying the community of their whereabouts is a more important objective.

For years, a debate has raged regarding labelling theory and the merits of publicly 'naming and shaming' offenders. Some research suggests that the shame involved in community notification is sufficient to deter an offender from future offending. It is this premise that is used to justify the publication of recidivist drink driving convictions in local newspapers. However, there is also a considerable amount of literature outlining the harmful effects of such shaming. This is particularly pertinent given the considerable stigma attached to sexual offending.

Re-integrating an offender into the community is one of the most important steps in treating and rehabilitating sexual offenders.[268] This process involves offenders obtaining accommodation, employment, support services, rebuilding connections with family and friends, and establishing a place for themselves within the community. Public notification schemes hinder this process by socially isolating offenders and creating very real safety concerns.[269] Ultimately, such disclosure can result in offenders: [270]

> breaking off contact with probation officers, moving from addresses that were monitored by police, altering their appearance, failing to attend

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[267] *Sex Offender Registry Bill,* above n 67, 4.

[268] BBC News *Sarah's Law: Can it work?* (21 December 2001) http://news.bbc.co.uk/2/hi/talking_point/1704533.stm (last accessed 18 September 2007).

[269] New Zealand Prisoners Aid and Rehabilitation Society, above n 60, 8.

[270] The Telegraph *Pressure to halt name and shame campaign* (19 August 2001) www.telegraph.co.uk/news/main.jhtml?xml=/news/2000/07/31/npaed31.xml (last accessed 18 September 2007).

> treatment programmes and adopting habits that signal a return to offending, directly as a result of the 'outing' of offenders.

Psychologists suggest that the secrecy and isolation created by notification actually allows paedophilia and other sexual deviancies to thrive as offenders are no longer forced to answer to the expectations of their families, friends or support groups.[271] A study completed in the United States, for example, notes that offenders who were subject to community notification schemes were re-convicted twice as quickly as those that were not.[272] In this respect, it is also important to remember that when an offender is forced out of one community, they move into another that is then unaware of their offending and ill equipped to provide treatment, placing the public at a greater risk.

As the Bill does not provide provisions for Police monitoring of previous offenders,[273] any objective in reducing offending relies solely on the deterrent effect of those surrounding the offender knowing of their previous convictions.[274] However, the Canterbury Council for Civil Liberties states that community notification does not in fact reduce offending. They suggest that a stable job and marital arrangements are the most important deterrent for sexual offenders.[275] Thus, by publicising these details it is actually increases the likelihood that offenders will re-offend, due to the subsequent effect on their relationships and employment positions, coupled with the other negative effects on their rehabilitation.[276] Similarly, research into labelling theory also states that community notification can propel individuals' further towards offending. The John Howard Society notes that "a percentage of offenders will re-offend because of the stress and pressure imposed by a hostile, rejectionist community that has branded the offender as a pariah".[277]

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[271] John Howard Society of Alberta, above n 8, 9.
[272] Ibid.
[273] New Zealand Prisoners Aid and Rehabilitation Society, above n 60, 6.
[274] *Sex Offender Registry Bill 2003*, above n 67, 4.
[275] Canterbury Council for Civil Liberties *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, Christchurch, 2003) 1.
[276] Ibid.
[277] John Howard Society of Alberta, above n 8, 9.

Finally, it is also important to consider the consequential vigilantism that is sure to follow from community notification schemes. Whilst the Bill is ambiguous as to the degree of public access permitted to the register, there is nonetheless a significant risk that anyone who accesses it will make improper use of the information. Such abuse can result in threats, harassment and violence against offenders, but also against those mistaken for offenders.[278] For example, in the United Kingdom, a female *paediatrician* suffered vigilante attacks after she was mistaken for a *paedophile*.[279] Similarly, there is always the risk of Police abusing the register through the continued harassment of local sexual offenders whenever an offence occurs within their community.[280] While it is acknowledged that the Police must be able to warn the public of serious immediate threats to their safety, such warnings must be directed specifically to those in need. Research completed in America notes that targeted warnings are considerably more effective for citizens than a list of 1000 people who live in their vicinity, and may or may not pose a risk to them.[281]

(iii) Contribute to Public Safety

Whether the establishment of a register will actually offer the public increased protection is a divisive subject, and one that lacks conclusive research, as no register in the world has been operating long enough to make definite conclusions.[282] Community notification legislation been labelled by some as a "misguided response to violent crime", given its unintended consequences. Fundamentally, publicly accessible registers actually decrease public safety and merely serve to create a false sense of security.[283] The Howard League Society for Penal Reform states that while the Bill is a

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[278] Ibid, 8.
[279] BBC World News *Paediatrician attacks ignorant vandals* (30 August 2000) http://news.bbc.co.uk/2/hi/uk_news/wales/901723.stm (last accessed 18 September 2007).
[280] Barnardos *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, 2003) 1.
[281] The Globe & Mail *Should public get open access to private details of sex offenders* (18 April 2006) www.ipce.info/library_3/files/laws/06apr18_blackwell.htm (last accessed 18 September 2007).
[282] Ministry of Justice, above n 9, 8.
[283] John Howard Society of Alberta, above n 8, 1.

well intentioned response to the publics fear, it ultimately is nothing more than "a blunt instrument in terms of its promotion of public safety".[284] The League notes that the Bill fails to take account of:[285]

> the actual level of risk posed by convicted sexual offenders; our current inability to accurately predict serious re-offending; actual conviction rates; the nature of any subsequent offending, and the actions which might more effectively be pursued if we are to reduce offending.

Similarly, it would seem little credence has been given to the fact that the bulk of offenders are already known to their victims, sexual offending recidivism rates are low, and any register established will be incomplete. Hence, there is no rational connection between the objectives of the Bill and the limit it seeks to place on offenders' rights.

A primary reason why registers are largely redundant is that the bulk of sexual offences actually occur within the family. Hence, most offenders are already known to potential victims[286]. While the media has created a notion of 'stranger danger', in fact only 5-20% of offences are committed by a person who is a stranger to the victim.[287] In the majority of cases, victims receive no additional protection by having the offenders details published in a register. Commentators also allude to the fact that a register may have the unintended consequence of forcing victims not to report such offending given their family member will be "marked for life" by the register.[288] It is for these reasons that Greg O'Connor, President of the New Zealand Police Association, suggests that "more rigorous DNA sampling would be a more productive way to eliminate and identify a suspect".[289]

Interestingly, due to the sensationalisation of sexual crimes by the media, polls have indicated that the public perceive the recidivism rate for sexual offending to lie at 70-80%.[290] In reality this figure is approximately

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[284] Howard League Society for Penal Reform, above n 257, 1.
[285] Ibid.
[286] *Sarah's Law: Can it work?*, above n 268.
[287] Schwartz & Cellini *The Sex Offender: Corrections, Treatment and Legal Practice* (Civic Research Institute, New Jersey, 1996) 11.
[288] John Howard Society of Alberta, above n 8, 10.
[289] New Zealand Police, above n 64, 1.
[290] Karen Kersting "New hope for sex offender treatment" (2003) 34(7) Monitor on Psychology.

10-20%, depending on whether the offender has received treatment.[291] Research conducted by the Ministry of Justice concluded that:[292]

> Only a very small proportion of all released prisoners are reconvicted of very serious offences, and the type and seriousness of the offence that a person was imprisoned for is not a reliable predictor of the likelihood that they will commit a serious offence in the future.

In an analysis of the Kia Marama Sex Offender Treatment Programme established in New Zealand in 1989, researchers concluded that sexual offenders who did not receive treatment re-offended at a rate of 23%, and those that did receive treatment were only reconvicted in 10% of cases.[293] Also, for those offenders that were reconvicted the most common conviction was for traffic offending.[294] Ultimately, the reconviction rate for sex offenders committing another sexual offence is actually remarkably low.[295] For example, studies completed in the United Kingdom suggested that only 7% of people convicted for sexual offences had a previously been convicted of sexual offending.[296]

In a similar vein, it is important to note that any register will obviously be incomplete and thus ineffective, given the bulk of offenders will not be included within its confines. Obviously, sexual offenders who are not caught, or those individuals that are first time offenders will be absent from the register.[297] Similarly, offenders who have received name suppression, so as to not identify their victims, will also not be included[298]. Studies carried out in Massachusetts found that, out of the 136 serious sexual offences that occurred in 1998, only 27% of the offenders would have been included on the register.[299] This problem is compounded by the fact that there is an extremely high dark figure of crime for sexual offences

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[291] Brendan Anstiss *The effectiveness of correctional treatment* (Prepared for the Department of Corrections, Wellington, 27 August 2007).
[292] Philip Spier *Reconviction and re-imprisonment rates for released prisoners* (Prepared for Research and Evaluation Unit of Ministry of Justice, Wellington, 2002), summary.
[293] Brendan Anstiss, above n 291, chapter 2.
[294] Howard League Society for Penal Reform, above n 257, 2.
[295] Ibid.
[296] Soothill et al *Murder and Serious Sexual Assault: What criminal histories can reveal about future serious offending* (Police Research Series Paper 144, 2002).
[297] Canterbury Council of Civil Liberties, above n 272, 1.
[298] Howard League Society for Penal Reform, above n 257, 4.
[299] New Zealand Prisoners Aid and Rehabilitation Society, above n 60, 7.

due to the intimate and often embarrassing nature of the crime.[300] As a result many offences are not reported or recorded. Additionally, there is an extremely low conviction rates for sexual offences. For example, in Sydney there were 183 child sexual assault cases in 2002, and only 32 resulted in a conviction.[301] However, most importantly the New Zealand Bill is non retroactive and thus any offenders sentenced prior to the Bill's introduction will not be included. Practically, both for Police investigations and public safety, this is a serious limitation to any register given the numerous offenders that will be absent from the list. Furthermore, a considerable period of time will need to pass before a comprehensive register can be collaborated.[302]

(b) Alternatives

The inquiry into whether there are viable alternatives to limiting a right has "been described as both crucial and difficult".[303] Case law suggests it is necessary for the restriction to be "as little inference as possible"[304] and "the least ambitious means to protect vulnerable groups".[305] Therefore, it is important to determine whether there are alternative measures available to achieve the Bill's objectives. *R v Oakes* states that, "when assessing the alternative means which are available to Parliament, it is important to consider whether less intrusive means would achieve the same objective or would achieve the same objective as effectively".[306] McLachlin J in *RJR-MacDonald Inc* also notes that, the only time a restriction will fail is when "the government fails to explain why a significantly less intrusive and equally effective measure was not chosen".[307]

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[300] Ministry of Justice, above n 9, 4.
[301] Ibid.
[302] New Zealand Law Society, above n 56, 1.
[303] *R v Whyte* [1988] 2 SCR 3, para 41, Dickson CJ.
[304] *Moonen No 1*, above n 121, 16-17 (CA).
[305] *Irwin Toy v Attorney General*, above n 142, 999 (SCC).
[306] *R v Oakes*, above n 129, 1341 (SCC),
[307] *RJR-MacDonald Inc*, above n 140, para 160, McLachlin J.

(i) Is the Bill proposing an excessive restriction on the right to privacy?

In order to determine whether a restriction is excess, one must first consider how wide the restriction would need to be to achieve its objectives. As discussed earlier in the paper, the establishment of a publicly accessible register will never reduce sexual offending or contribute to public safety given its negative effects on offenders' rehabilitation. Therefore, even if offenders' privacy rights are greatly restricted, and complete public access to the register is permitted, these objectives would not be achieved. It thus follows, that the Bill is imposing an extremely excessive restriction on offenders' rights in order to achieve a purpose that is unattainable.

In respect of the Bill's other purpose of aiding the police in their investigations, the Howard League for Penal Reform suggests the Bill "overstates and over-responds to the problem".[308] It is acknowledged in Police submissions that increased DNA sampling powers would better achieve the objective. Nonetheless, there is a valid argument that an up-to-date register of offenders' residential addresses would contribute to decreasing Police investigation times to some degree. However, in order to achieve this purpose the New Zealand Law Society submits that:[309]

> the simplest and most direct means of achieving this, and at the same time providing proper safeguards against misuse of the information on the register, may be simply to direct the Police to maintain a register, rather than a Minister of the Crown, and to provide that no person shall have access to the register other than Police officers for the purposes of investigating sex offences.

Such an approach is appropriate. Particularly, given the Bill's other objectives can not be achieved by public access to the register, and may in fact be furthered by a confidential register. As Parliament provides no explanation as to why a register, such as the one proposed by the New Zealand Law Society, could not be implemented, the case of *RJR-MacDonald Inc* states the restriction on privacy must fail.[310]

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[308] Howard League Society for Penal Reform, above n 257, 1.
[309] New Zealand Law Society, above n 56, 1.
[310] *RJR-MacDonald Inc*, above n 140, para 160, McLachlin J.

(ii) Are there less restrictive alternatives than a register?

This paper acknowledges the extreme importance of reducing sexual offending and ensuring public safety. Therefore, rather than pursuing a register that would be largely ineffective at achieving this goal, and may in fact decrease such safety, it is suggested that community based alternatives designed to reduce sexual offending should be pursued.[311] Instead of focusing on reactive policing and how best to aid police investigations, emphasis must be placed upon rehabilitating and reintegrating offenders back into the community successfully.[312] The John Howard Society outlines the following available alternatives to establishing sex offender registers:[313]

1. Specialised, professionally operated and adequately funded treatment services in correctional facilities. Such services should not only treat the offender while in prison but also assist in the development of a plan for relapse prevention and provide the link for release into community based services to facilitate the maintenance for the plan.
2. A system that makes gradual release part of every sentence.
3. The focussing of community supervision and treatment resources on those with the greatest need and who pose the greatest risk.
4. An end to those policies and practices that undermine the gradual release process such as the practice of detention under federal legislation and reducing the granting of provincial parole and temporary absences.
5. Available community based treatment and residential services that are specialised, professionally operated and adequately funded. Such services should be accessible to all offenders both before and after their sentences.

While New Zealand has already begun to implement such policies, we are far from providing a comprehensive package for controlling, managing and rehabilitating offenders.[314] The New Zealand Prisoners Aid and Rehabilitation Society suggest New Zealand lacks an inter-agency rehabilitation focus, and needs to recognise that "managing sex offenders involves more than criminal matters". They suggest that agencies such as social services, housing, education, and youth offending organisations must all be involved in collaborative treatment programmes.[315] Ultimately, the government simply needs to focus, not on notifying the public where these

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[311] John Howard Society of Alberta, above n 8, 13.
[312] Howard League Society for Penal Reform, above n 257, 4.
[313] John Howard Society of Alberta, above n 8, 13.
[314] *Sex Offender Registry Bill 2003*, above n 67, 5.
[315] New Zealand Prisoners Aid and Rehabilitation Society, above n 60, 8.

offenders reside, but on re-building offenders lives, so they are capable of living a fulfilling, offending free existence.

V What limitation on privacy can be demonstrably justified?

South African case *State v Mamamela* is authority for the proposition that "the more serious the impact of the measure or the right, the more persuasive or compelling the justification must be".[316] The rationalisation for sex offender registries must therefore be particularly convincing given its substantial effects on offenders rights. However, the justification offered in the explanatory note of the Bill is far from compelling. The Bill's restrictions fail to achieve two of its objectives, and only somewhat contribute to the third. It is clear that restricting offenders' privacy rights to the degree suggested in the Bill is by no means a proportional response to somewhat decreasing police investigation times.

As outlined in part two of this paper, the courts have given little guidance as to when something is demonstrably justified. However, the phrase seems to embody the notion that, in a free and democratic society it is necessary to ensure legislation protects human dignity and promotes equality.[317] In this case, any form of public access to a register containing the residential address details of a sexual offender, puts that offender's safety at risk. Whilst it is acknowledged that recidivist offenders pose a threat to society, our ability to predict which offenders will re-offend is limited. Therefore, in a free and democratic society, considering the factors discussed through out this paper, an offender's right to privacy can only be justifiably limited by a register established, maintained and accessed solely by the Police, for the purposes of police investigations.

In order for the Bill to be considered constitutional many clauses will need to be amended, as they are either ambiguous or silent in certain respects.[318] Fundamentally, it unclear who is permitted to access the register

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[316] *State v Mamamela*, above n 146, para 32.
[317] *R v Oakes*, above n 129, 136 (SCC).
[318] Ministry of Justice, above n 9, 5.

and what use can be made of the information. Clause 13 must be re-drafted in order to ensure only sworn Police officers can obtain access to the register. Similarly, specific guidelines as to the information's use must be incorporated into the provision. It is suggested that the Police be permitted to use the register in order to aid them in locating and interviewing previous offenders. Necessarily, such a purpose would include disclosing details contained on the register to members of the public that are deemed in need of the information. Consideration will need to be given as to whether the current Police Criminal Profiling Guidelines provide a suitable foundation for determining when such disclosure is permitted. The New Zealand Law Society also suggests, that provisions as to the consequences of unlawful disclosure should also be implemented, so as to prevent abuse of police access to the register and inappropriate disclosure.[319]

Ultimately, the Bill as it stands is an ineffective, disproportional response to a moral panic. Murray Edridge of Barnardos notes, that establishing a register of this nature is nothing more than "an ambulance at the bottom of a cliff",[320] when what is needed is a focus on reducing and preventing offending in the first place. While it is understandable that the government wishes to decrease this abhorrent form of offending, its response must be considered, effective and most importantly, just.

VII CONCLUSION

It remains important for the government and the courts to remember that "no matter how repulsed society is by sexual crimes, we cannot place offenders in a unique, separate class bereft of constitutional rights".[321] While it is tempting to suggest that the community's rights must outweigh offenders, it necessary for legislators to refrain from projecting their animus

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[319] New Zealand Law Society, above n 56, 4.
[320] Barnardos *Sex Offender Registry Bill 2003* (Submission to Justice and Electoral Committee, 2003) 1.
[321] Amy L. Van Duyn "The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes" (1999) 47 Drake Law Review 635, 659.

against the offending into laws that violate offender's fundamental rights. Whilst Deborah Coddington's goal of preventing merely one person from being the subject of sexual abuse is admirable, it is unrealistic in a legislative sense. The restrictions in the Bill would substantially affect offenders' lives, while also decreasing public safety.

The Justice and Electoral Committee were correct in their decision to strike down the Bill. However, this decision was justified under the wrong premise. The effectiveness of such a register is fundamental. However, the constitutionality of legislation is more important. Discussion as to the effectiveness of such legislation is essential and may change the results of a proportionality inquiry. Yet, ultimately effectiveness is only one factor to consider within the framework of a section 5 analysis. It seems that in its haste to respond to growing public concern over sexual offending, the government made the same mistake as American legislators and failed to give proper consideration to the Bill's legal grounding. While they successfully appeared to address the publics fear, their approach was futile. The Bill should not have reached the Select Committee process given that, from its conception, it was never going to be demonstrably justified in a free and democratic society.

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